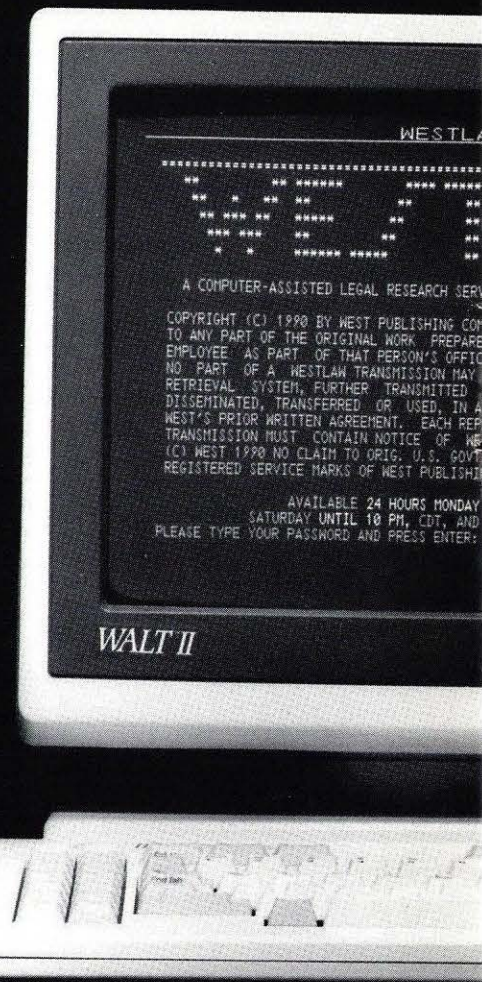
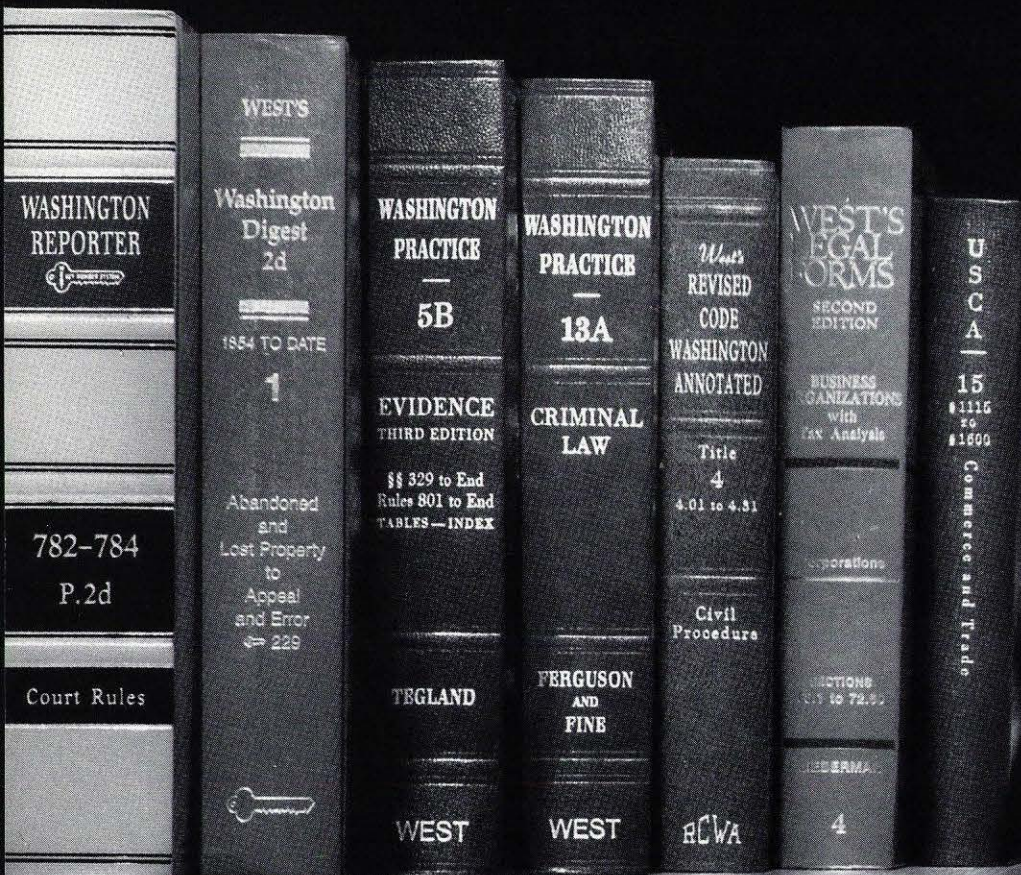


Washington State **Bar**  
**News** Vol. 45, No. 2, February 1991



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**What the General Counsel Thinks**  
**Downsizing, and Other Terrors of the '90s**  
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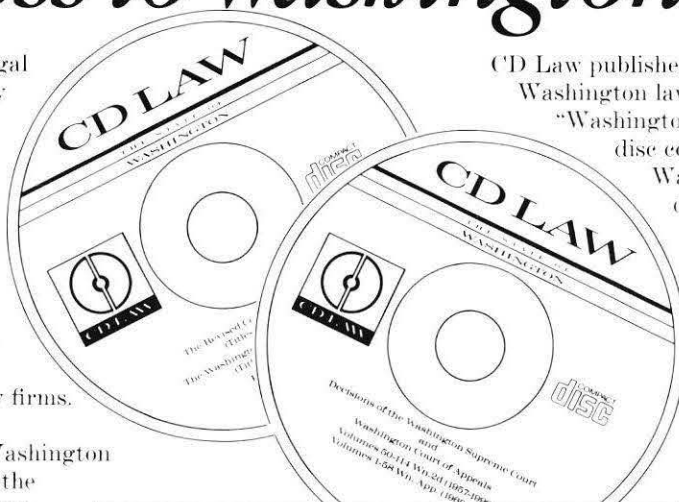
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Vol. 45, No. 2, February 1991

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Bar staff member Jeff Barreca took this photo of a typical, wind-swept February for our cover.

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

## Pro Bono and Prosecution

Editor:

The issue on pro bono services and the Bar's interest in promoting same are commendable. Is it possible, however, to ask that people employed in prosecution, some of whom serve ex officio as coroners or deputy coroners, be recognized as contributing pro bono services through their regular employment when they accept, without complaint, ongoing requirements to spend 60 or more hours a week dealing with their public responsibilities without regard to compensation for this recurring, routine overload?

The issue arose, in the most unpleasant form imaginable, when a former president of the Bar spoke to the meeting of prosecutors and reproached them for failure to support the Bar's endeavor. The response from one elected prosecutor/coroner, supervising four deputies and earning \$44,000 a year, made a couple of good points in a form that was embarrassing to his peers but which could be relevant to the question. First, his deputies work for salaries that are grossly inadequate. (It took him 14 months to recruit a chief criminal deputy given the duties and compensation for the position!) Second, they do not have the luxury of counting on departure from the office at five, particularly when they are trying cases back-to-back, and the coroner's call can come at any hour of the day or night. Third, they can't block time during the week for pro bono with any certainty given the emergent nature of calls that may come in. Fourth, they lack any civil experience whatsoever in many cases.

My perspective on the issue, as a former associate in a large Seattle firm, who was encouraged to do pro bono and who did it in his own practice and while serving as part-time prosecutor, is that members of the private bar fail to understand the problem in most prosecutors' offices and fail to acknowledge in any way that many lawyers engaged in public service expend prodigious effort and log incredible hours for the same reasons their private counterparts engage in pro bono work—why should the latter contribution be recognized and not the former?

Recently I sought and obtained permission to do some pro bono work and was educated on some practical problems which had been discussed, on a theoretical basis, when prosecutors had considered the problems engendered by recent legislation authorizing prosecutors and deputies to undertake this work. First, I could not control the time required to do it or the times when I needed to work the problem. Second, my trial skills were sadly rusted but I was lucky enough to go up against an adversary who was "professional" in what is now an archaic use of the term. Third, after a disillusioning experience with administrative "justice," I was unable to take the appeal further and my client could not afford to go to Superior Court. I did not begrudge the effort but I seriously question the value of it.

There is at least one prosecutor's office where staff have the ability to engage in pro bono work through a bar program and do so. In most offices it is simply not practical and, in many of those offices, some very hard-working members of our profession are indeed giving of themselves for the public benefit without material remuneration. Their endeavors deserve recognition.

MICHAEL C. REDMAN  
Lacey

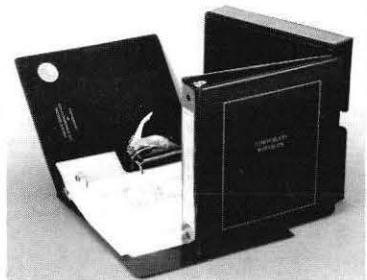
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## The New Guy

by Dennis P. Harwick

Greetings from what used to be known as the "Corner Office" column. The change of title to this column isn't due to any relocation. The executive director of the WSBA still occupies the corner office on the fifth floor of the Westin Building with a view of McDonald's, Budget/Sears Rent-a-Car, and National Car Rental. As long as we were changing executive directors, I decided to change the title of the column as well.

Upon my arrival in early December, I was greeted with the cover of the December issue of *Bar News* using the nautical metaphor, "The Fifth Watch Begins: A New Captain Takes the Duty Post." I was struck by the choice of artwork showing two sailors on deck as a wave breaks over the bow. I'm not sure if I'm supposed to be the one turning around and crying, "Throw me a rope!" or the one staring dumbstruck at what lies ahead. In the frenzy of the first couple of weeks on the job, I could have been either.

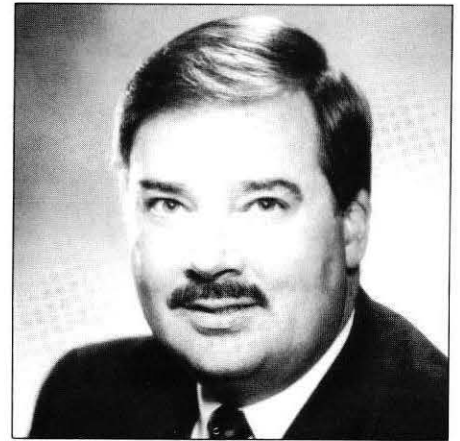
I am barely smart enough to avoid trying to say anything profound after having been here only three weeks. (Publication deadlines require that this be written the day after Christmas to appear in the February issue.) There are enough members of the Washington State Bar who went to law school with me to rebut the notion that profundity is my long suit, so why try? Rather, I intend to use this forum as an opportunity to share information with members of the WSBA about upcoming events in the organized bar and my observations about bar association administration.

In Idaho, where I served as executive director for five and a half years after a dozen years in corporate practice, my columns in the monthly bar magazine were best known for my semiannual publication of "bar exam gems"—actual quotes from bar exam papers. They were the bar examiner's equivalent to David Letterman's "Stupid Pet Tricks"—only they were direct quotes of things examinees would say in the heat of examination. Recently, an examinee laid bare the truth about civil practice by noting that in a civil matter, the prevailing party has to provide "clear and conniving evidence." Another potential estate planner divided an estate "one half to John, one half to Mary, and one half to Sue."

I hope to begin publishing bar exam gems in the *Bar News* if Frank Slak and his crew of Washington bar examiners will provide me with them. There has been discussion about the liability of publishing such things, but my experience tells me that: 1) most examinees don't know they wrote something stupid (or inadvertently brilliant—like the one who observed that remedies run in packs), 2) don't remember they wrote something stupid, or 3) won't admit that they wrote something stupid.

Changing gears: As many of you know, petitions were filed recently to hold a referendum on the Board of Governors' vote to hold the 1995 WSBA convention in Hawaii. A Referendum Committee, as provided by WSBA Bylaws, met recently and outlined the following process:

1. The question on the ballot will read, "Shall the decision of the Board of Governors of the Washington State Bar Association selecting



Dennis P. Harwick

Maui, Hawaii as the 1995 convention site be reversed?"

2. The proponents and opponents will have staggered deadlines to prepare explanatory and responsive statements to be included with the ballot.

3. The ballots will be mailed out on Friday, March 1, 1991.

4. The deadline for returning ballots to the WSBA office will be Friday, March 29, 1991.

That's the serious content of this first column.

I am delighted with the opportunity to serve as only the fifth executive director of the Washington State Bar Association, apprehensive about following in the footsteps of that confirmed workaholic John Michalik, and honored that you saw fit to import December's snows to make me feel at home!



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# Making Computerized Billing Friendly

by James Stewart

Computer billing for legal services needs a friendly touch. We all review and approve our statements (or we

should!), so why not add a handwritten note? The few extra seconds spent on this finishing touch certainly

helps take the edge off of otherwise sterile bills. Here are some examples for you to use on your next billing:

1. "Congratulations on your new baby!"
2. "Your work should be concluded this week."
3. "Please call. I have some questions for you."
4. "Congratulations on your election."
5. "I'm happy your case was resolved so favorably!"

Each of us can think of a kind word to send to our clients. Those kind words can make a difference in the speed with which your bill is paid and they can enhance your clients' attitudes towards you. For long-term clients, an additional, personal note is a very kind gesture. I know of one lawyer who writes "Thanks!" followed by his initials on each and every bill he sends out.

Speaking of billing, make it your objective to have statements prepared and ready for mailing the last day of the month. The "first in, first out" (F.I.F.O.) rule of accounting pays. Some people pay the first arrivals and, as they run low on funds, defer those later-received bills to the next month.

*This column is a clearing house for better ways to run the law office. Contributions are solicited from all members of the Bar and should be sent to: Gregory S. Morrison, Tips Editor, The Flour Mill Penthouse, W. 621 Mallon, Spokane, WA 99201.*



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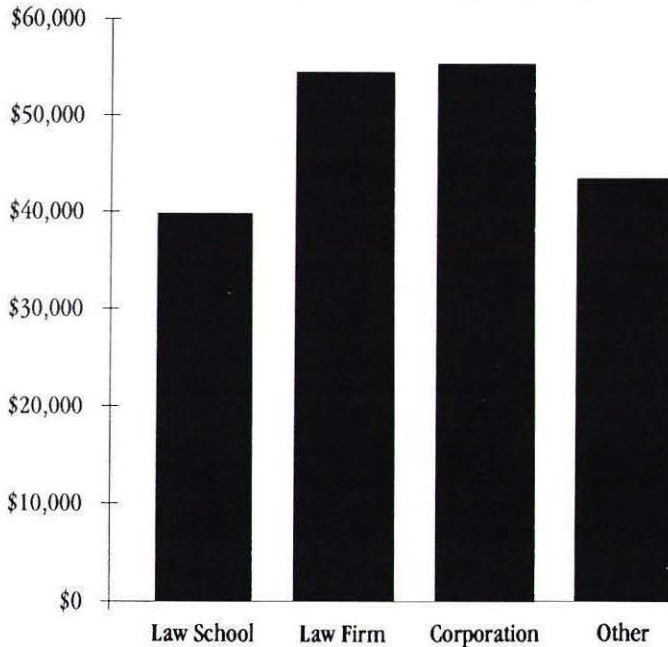
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# What The General Counsel Thinks

Typical Starting Salaries for Incoming Lawyers by Source



## Legal Work Is Still Moving In-house: General Counsel Are Engaging in Tougher Fee Negotiations

by  
David  
Rubenstein

counsel," says Chicago Board of Trade general counsel Scott E. Early. "I think a lot of companies look at the trend and say this means you should hire people for \$100,000 rather than paying out a quarter of a million in legal fees. It ain't that simple."

The top outside lawyers in certain areas, such as banking regulation, "are so valuable because they do it for fifty different clients, not just one," says Early. "So they see the whole marketplace. They are not going to divulge confidential information to you, but the knowledge that is in their heads is going to be applied to your project. When I hire one of them I may have to pay him four hundred bucks an hour, but I am getting a guy who sees the whole picture of what I am just seeing a portion of."

"Even if I would pay this guy a million dollars to come in-house," says Early, "I wouldn't be getting the same thing, because I would be decreasing his experience."

### Tighter Control

Results indicate that many law firms are on an increasingly shorter tether. Law firms retained by corporate clients are twice as likely as they were last year to be subject to a written policy regarding rates, as well as more written policies on budgets and expenses.

Survey results also show there is a good chance that the law firm will be dealing with a general counsel who has had some experience in negotiating discounted fees, or, as one general counsel said, "talking them down." Sixty-three percent of the general counsel say they would like to do more

### 'We Ask that They Fly Coach'

**N**inety-four percent of general counsel responding to the 1990 *Illinois Legal Times/Coopers & Lybrand* survey say they expect the trend to move companies' legal business in-house will continue. This figure should concern marginal law firms or practice groups, since it represents an increase from the 1989 survey results. Last year, 74 percent of corporate counsel agreed there was a growing trend to move legal business in-house.

Companies responding to this year's survey spent almost twice as much on their legal departments (salaries and overhead) than they did on outside counsel. The figures were \$43.7 million for the legal departments, compared to \$1.9 million for outside counsel. This represents a dramatic reversal from last year when companies, on the average, spent only 80 percent as much on their legal departments as they did on outside lawyers.

Moreover, many corporate legal departments are increasing self-sufficiency in the same areas where many law firms are anticipating growth: bankruptcy, environmental law, and labor/ERISA.

Still, the average number of new

lawyers expected to be added to the legal staff in the next two years was one (1). This was down from 1.15 in last year's survey.

### Why are companies moving business in-house?

Many general counsel simply say it's cheaper. Some also say the increased availability of quality lawyers who want to work in corporations has made it easier to build up an in-house department.

"When I graduated from law school in the fifties, there was a concept that if you couldn't make it in a law firm, you went into a corporation," says one general counsel. "That is no longer the case and hasn't been for a long time. We can recruit the very best right out of law school."

However, some general counsel warn that the in-house trend may have been oversold recently, with some perennial advantage of outside counsel being neglected.

"You can still turn outside counsel off and on like a faucet," says Abbott Laboratories vice president and general counsel Lael F. Johnson.

"There isn't enough emphasis placed on being smart in the use of outside

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of this negotiating. Of the various alternatives to this straight hourly bill, negotiating discounted fees is the most popular.

Interviews suggest this expedient is likely to come into play when the general counsel is proposing a large volume of sustained work, or when the general counsel thinks he smells blood.

"I can see it happening quite easily if the law firm is in trouble," said the head of one corporate legal staff, "or if the practice area is underutilized."

J. Richard Hull, senior vice president-general counsel at Household International Inc., a \$26-billion diversified financial services company, sums it up:

"We negotiate the best hourly rate," he says. "We ask that they keep it as low as possible. We have monthly billing. We follow the lawyers quite closely. We ask that they fly coach."

### Areas Gaining Strength In-house

Breach of contract, real estate and construction, labor relations, and environmental topped the list of areas where in-house law departments are becoming much more self-sufficient. Next are mergers and acquisitions/corporate restructuring and occupational safety, followed by bankruptcy. But the survey results show that legal departments, for respondents as a whole, are becoming more self-sufficient in all areas of the law.

### Opportunity for Small- and Medium-sized Firms

General counsel say that about 60 percent of their legal budgets will go to small- or medium-sized law firms or solo practitioners. This is the second consecutive year that general counsel said large law firms will receive less than half their legal business.

A notable exception is the highly regulated banking industry, where general counsel respondents say that almost 60 percent of their budget for outside counsel will go to firms of more than 150 lawyers.

These findings are not surprising, says Hull of Household International Inc. "It's a terribly complicated area, and it's highly regulated. And with all of the problems, it is becoming more regulated. To try to stay up on that - a small firm just can't do it."

If there are boutiques in this area, Hull says he doesn't know about them. Neither does Scott Early at the Chicago Board of Trade. Early acknowledges this could be a niche waiting to be filled.

The question, says Early, for a potential boutique group is really the same as it is for a general counsel who is thinking of bringing a particular area of legal work in-house: is the surge of work in that area a temporary phenomenon, or is it long term?

"If I were general counsel for someone who is heavily into the real estate market right now, I would be taking the view that this is long-term. It is going to be a while before we get back to the boom days. If I were a general manufacturing company, I would tend to view the bankruptcy situation as a one-to two-year phenomenon. That would be my guess."

Sixty-three percent of corporate counsel respondents say they are increasing the number of outside firms they retain.

This is about the same percentage as in the 1989 survey. It indicated the continuation of a trend toward loosening long-standing bonds between law firms and their corporate clients.

But survey results show the firms perceive this trend as significantly more developed than their corporate clients do. While 63 percent of the general counsel say they are increasing the number of outside firms they retain, 80 percent of the law firms responding to the *Illinois Legal Times/Coopers & Lybrand* November 1990 survey, said their clients are expanding the number of law firms that handle their work.

Whether or not a company is expanding the number of its outside law firms is more a function of the kind of business the firm is in than the size of the company, according to a breakdown of survey responses. When companies are broken down according to category of business, there is considerable variation. All of the responding general counsel in healthcare say they are expanding the number of law firms handling their business. Between 70 and 80 percent of general counsel in the realty, banking, and information/communications sector say they are expanding. But in the energy sector, respondents were evenly split on the

question. In the utilities sector, the majority of companies say they are in fact decreasing the number of outside firms they retain.

In Illinois, the trend to spread business among more firms is notably higher than in the 13 states surveyed as a whole. Seventy-two percent of Illinois general counsel say they are expanding the number of outside firms they use, while 62 percent of them would say they are expanding.

### **In-house: Better Lawyers and a Closer Watch**

The trend to use smaller firms, and the trend to use a greater number of firms, are closely related, says James E. Knox, senior vice president, general counsel and secretary at the ITEL Corporation, a holding company with \$2.1 million billing in revenue for 1989.

"They are due in great part to increasing competence of inside lawyers, who have the ability and time to pick these lawyers," Knox says. "In the past, when the relationship was often set by the chief executive, he didn't have time to shop for lawyers from one problem to another."

Survey results indicate that today's general counsel is likely to do more than just shop. It's clear the general counsel does not want outside lawyers to take the ball and run, not very far at least. At a minimum, most general counsel want to maintain close logistic and administrative ties with the firms they retain. When asked how often they combined administrative functions with outside counsel for purposes of efficiency and cost cutting, 41 percent of respondents said "sometimes," and 18 percent said "often" or "very often." Forty-eight percent said they would like to see this happening more often than it does now.

When it comes to sharing electronic mail, databases or other computer capabilities with outside counsel, the general counsel is less enthusiastic. Fewer than half have ever done it.

"We don't have a prime law firm. We use tons of law firms." To tie each one of them into us electronically right now wouldn't make any sense," says one general counsel. "Years ahead as the technology progresses, we may want to."

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### Workmen's Compensation

*Dennis v. Dept. of Labor and Ind.*, 109 Wn. 2d 467 (1987)

### Real Estate

*American Federal Savings v. McCaffery*, 107 Wn. 2d 181 (1986)

### Child Custody

*In Re Dombrowski*, 41 Wn. App. 753 (1985)

### Personal Injury

*Jensen v. Beaird*, 40 Wn. App. 1 (1985)

### Property Division

*In Re Marriage of Lindsey*, 101 Wn. 2d 299 (1984)

### Product Liability

*Gammon v. Clark Equipment Co.*, 38 Wn. App. 274 (1984)

### Trial Practice Rules

*Campbell v. A.H. Robins*, 32 Wn. App. 98 (1982)

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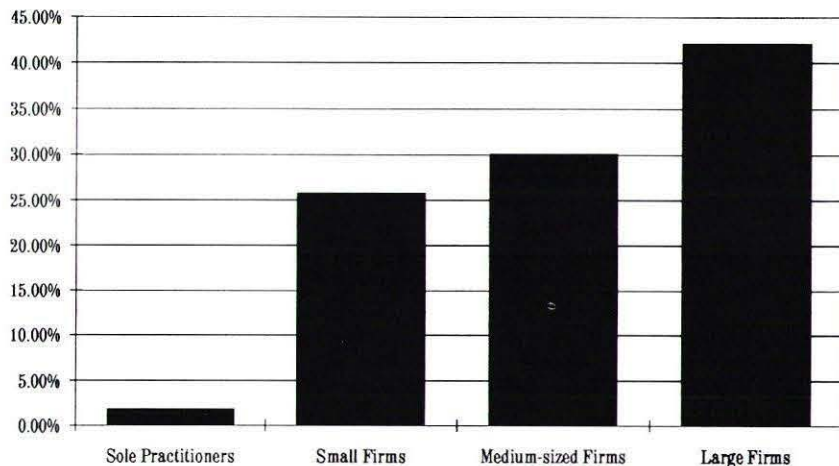
*In Re Heath Estate*, 30 Wn. App. 98 (1981)

### Eminent Domain

*In Re Puget Sound Power & Light*, 28 Wn. App. 615 (1981)

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Outside Allocation by Size of Firm



Forty-four percent of respondents said they sometimes served as first chair of litigation their company is involved in, and almost half of those 44 percent said they did so often or very often.

Of all respondents, 21 percent said they would like to serve as first chair more often than they do now.

On the other hand, some general counsel clearly consider this kind of hands-on involvement an abdication of the managerial responsibility.

"I would consider it malpractice," says Early.

## The General Counsel Likes a "Fixed Fee," Is Cool Toward the "Value Bill"

The general counsel was asked about four alternatives to the straight hourly-fee-based bill: (1) setting a fixed total fee for handling a particular matter, (2) charging a fee based on outcome (i.e., a value bill), (3) discounting individual billing rates, and (4) setting a budget for a particular matter with a bonus for completing the matter below budget.

Most respondents have experienced some or all of these billing methods. More than half of those surveyed want to see them used often - with one exception: the general counsel is cool toward the fee based upon outcome or value bill.

"I don't like it, and I don't want to do it," says Johnson at Abbott Labs, commenting on survey results in this area. "The problem is, first, determining

what is a good outcome. In litigation, for instance, usually it isn't just we won or lost. It's 'We won A and B and we lost C and D.' Plus there is the difficulty of determining what should be paid at win or loss. I tried it a couple of times and never got anyplace. No one is willing to work for zero in the event of a loss of course, and in the event of a win it was going to be outrageous."

Although about a third of respondents say they sometimes arrange to be billed according to this method, only 31.5 percent of those surveyed say they would like to see more of it, while 13.6 percent say they would like to see less of it.

In contrast, the majority of general counsel respondents like the fixed fee.

About 46 percent say they agree on fixed fees for at least certain matters, and almost 60 percent of all respondents say they would like to see more of these agreements. Not only does the fixed fee allow for predictability in budgets, notes Johnson, it gets the job done cheaper because it gives the outside lawyers "an incentive to watch their time."

With the fixed fee, how does the general counsel protect the company against a firm cutting corners when the job starts taking too long? Johnson says you count on the marketplace and law firm's concern for its reputation.

By far the most popular of the alternatives is the discounted individual value rate.

Three-fourths of respondents say they sometimes arrange discounts. Almost

15 percent say they have done it often or very often. Sixty-three percent say they would like to see more of it.

The general counsel also likes having outside counsel work on a fixed budget, with bonuses for coming in below budget, but the survey indicates these arrangements are rare in practice. Thirteen percent of general counsel says it happens sometimes, while only .6 percent say it happens often, and no one says it happens very often. At present, this alternative billing method is clearly the least-utilized of those asked about. However, almost 55 percent of the general counsel say they would like to see more of it.

On a related issue, almost 71 percent of the legal departments surveyed say they sometimes negotiate the professional level (i.e. how partners, associates, or paralegals will divide up the work) to be used in a particular matter. Thirty-five percent of respondents say they engage in such negotiations often or very often. Just over 57 percent of respondents say they would like to see this happen more often.

### **Average Starting Salary Less than \$40,000**

For all legal departments responding, the average salary paid to a lawyer entering directly from law school is \$49,787. The average salary paid to a lawyer hired from a law firm is \$54,489, while lawyers hired from another company's legal department are paid an average of \$55,324.

Relatively low salaries do not prevent them from getting top lawyers, say many general counsel, because there are more lawyers than ever who are willing to trade money for what they see as better hours and working conditions.

"If you ask partners in more private firms today if they are in a collegial business, they say no," says Early. "They look at the partnership structure that, for economic reasons, has become so cutthroat, and they say, 'Well, if you told me when I got the golden ring of partnership that I was set for life, that would be one thing. But it is clear that is not the case. I am watching people in the prime of their life being cut to pieces by their partners, with their equity shares being pulled back, and even getting kicked out of the firm.'

"That makes it very attractive for people like me, who can sit back and pick off those people at leisure and bring them in—even to noncompetitive salaries."

By industry, the lowest average salary paid to lawyers fresh out of law school is in the insurance industry, at \$28,000 per year. Highest salaries paid occur in manufacturing, at \$43,684, and utilities

at \$40,750, followed closely by health-care and information/communications, at \$40,000.

### **"Our key law firms regularly seek feedback about how well they are meeting our needs."**

Only about 31.3 percent of general counsel said that law firms regularly

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seek feedback about how well they are doing their job. For Illinois companies, the figure was slightly higher than for the respondents as a whole: 36.8 percent.

**"How do you expect your department's budget to be allocated among the following areas?"**

The general counsel expects that

breach of contract and labor relations/ERISA will take almost a quarter of their budget. For companies responding, intellectual property was next at 9.6 percent, followed by environmental at 8.2 percent.

**"Outside Legal Counsel Budget as a Percentage of Total Sales, by Industry."**

By this measure, the informa-

tion/communications industry is the most intensive employer of law firms. Its outside counsel legal budget totals .21 percent of total sales. Insurance is second at .18 percent, and healthcare third.

**Legal Department Budget as a Percentage of Total Sales, by Industry**

By this measure, information/communications and insurance are the most intensive users of in-house lawyers, with .7 percent of the amount of total sales going to the in-house legal budget. Utilities replace healthcare as number three.

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**"In the next two to three years, how likely would you be to use alternative dispute resolution approaches to resolve legal disputes in the following areas?"**

Breach of contract is the only area where the general counsel is more likely than not to use ADR in the next two to three years, and that likelihood is slightly higher than in last year's survey. The second most likely area is labor relations/ERISA, but that is down from last year's results, as are most other areas specified.

**What About Washington State?**

*Editor's note: This article reflects the situation in the Midwest and does not single out Washington. The Bar News did some additional research which we thought would be of special interest to our readers.*

The 13 corporations surveyed in Washington failed to respond. Some general conclusions can be drawn, however, from the answers provided by parallel businesses which responded in the Midwest. The Washington sample fell into roughly six categories—healthcare, information/communications, manufacturing, raw materials, real estate and transportation. The real estate aspect of a business may represent a new phase—the sale and development of land originally held for other purposes. Neither transportation, raw materials or real estate comprised a major category in

### Areas of Written Guidelines for the Employment of Outside Counsel

	Yes	No	No Response		Yes	No	No Response
<b>Budgets</b>	53.60%	42.80%	3.60%	<b>Progress Reviews</b>	46.40%	48.80%	4.80%
<b>Rates</b>	53.60%	41.70%	4.80%	<b>Decision Analysis</b>	53.60%	41.70%	4.80%
<b>Expenses</b>	44.00%	51.20%	4.80%	<b>Other</b>	17.80%	8.30%	73.80%
<b>Reporting</b>	35.70%	59.50%	4.80%				

the survey, but healthcare, information/communications and manufacturing yielded data specific to each.

### The Legal Budget

In-house legal department salaries and overhead were averaged for all three: \$3,700,000, but their budgets for outside legal counsel ranged from \$1,095,000 (information/communications) through \$2,510,400 (healthcare) to \$2,834,779 (manufacturing).

Healthcare's expectation for the highest outside legal budget allocation was in the area of intellectual property (46.2%).

Manufacturing expected to spend its money on a broad range of legal services, with intellectual property (14.2%), environmental (12.9%), product liability (12.6%), and breach of contract (10.8%) topping the list.

For information/communications, the areas of labor relations/ERISA (20.5%), intellectual property (20.0%), and commodities/securities (13.7%) were expected to carry the greatest expenditures.

### How Big?

For the purposes of the survey, "small" firms were defined as having 50 or fewer attorneys. "Medium-sized" meant between 50 and 150, and "large" meant more than 150.

The size breakout of anticipated hiring of outside counsel was as follows:

Information/communications businesses expected to spread their legal tasks fairly evenly among large (38.6%), medium-sized (35.0%) and small (22.8%) of firms. Only a few sole practitioners (3.6%) will be hired.

In manufacturing, nearly half (43.4%) of the legal business is expected to go to large firms, with medium-sized and small firms dividing the other two quarters (28.5% and 26.2% respectively) between them. Sole practitioners came in at 1.9%.

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**CAUSES OF LITIGATION**  
**Percentage Likelihood of Anticipated Legal**  
**Involvement in Various Areas**

CAUSE OF LITIGATION	Very High	High	Medium	Low	Very Low	None
Bankruptcy	29.8	21.4	14.3	16.7	11.9	5.9
Breach of Contract	35.7	29.8	26.2	7.1	1.2	0
Commodities/Securities	3.6	4.8	11.89	34.5	29.8	15.5
Environmental	45.2	23.8	13.1	8.3	7.1	2.4
Intellectual Property	26.2	20.2	15.5	22.6	9.5	5.9
International Law	11.9	13.1	20.2	15.5	21.4	17.8
Labor Relation/ERISA	35.7	27.4	19.0	14.3	3.6	0
M.A/Corporate Restructuring	10.7	11.9	32.1	19.0	17.8	8.3
Occupational Safety	11.9	17.8	32.1	22.6	14.3	1.2
Personal Injury	45.2	19.0	19.0	8.3	8.3	0
Product Liability	44.0	15.5	9.5	11.9	13.1	5.9
Real Estate & Construction	20.2	20.2	22.6	23.8	11.9	1.2
Other	8.3	4.8	0	0	0	86.9

**Industries Responding to the Survey**

Banking	2.4%
Energy	3.6%
Health Care	4.8%
Information/Communications	2.4%
Insurance	4.8%
Manufacturing	50.0%
Retail	11.9%
Utility	8.3%
Other	11.9%

**States Responding**

Colorado	0
Illinois	26.2%
Indiana	9.5%
Iowa	2.4%
Kansas	3.6%
Kentucky	0
Michigan	9.5%
Minnesota	10.7%
Missouri	9.5%
Nebraska	0
Ohio	19.0%
Washington	0
Wisconsin	5.9%
Other	3.6%

It is interesting that between a third and a half (41%) of the healthcare industry expected to hire small firms,

with a fat third (35%) of its business going to mid-sized firms and the rest (24%) going to the big ones.

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## ADR

Alternative dispute resolution (ADR) anticipation was measured on a four-choice scale, ranging from "very likely" and "likely" through "not likely" to "not applicable." The averaged responses for all types of business indicated "not applicable" a significant number of times.

Healthcare expectations in the area of ADR varied widely. Greatest were in breach of contract (100% "very likely"!); property disputes (20% "very likely"; 40% "likely"); and international law (80% "likely"). In all other areas, the use of ADR was less than likely.

In manufacturing, ADR was seen as possible, but doubtful, in almost all areas, with "not likely" carrying 50% to 70% in everything but breach of contract (6.5% "very likely"; 65.6% "likely").

The ADR option fared worst with information/communications—not one "very likely." Nevertheless, breach of contract offered a 57.1% "likely." Environmental, intellectual property,

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**Anticipated Budget Allocation by  
Percentage**

Bankruptcy	2.2
Breach of Contract	12.0
Commodities/Securities	4.6
Environmental	9.8
Intellectual Property	10.0
International Law	3.9
Labor Relation/ERISA	11.8
M&A/Corporate Restructuring	8.5
Occupational Safety	1.7
Personal Injury	8.3
Product Liability	8.4
Real Estate & Construction	7.6
Other	11.0
Total	99.8

**USE OF ADR**

**Percentage Likelihood of Use in Various Legal Areas**

	Very Likely	Likely	Not Likely	Not Applicable
Bankruptcy	0	13.1	64.3	22.6
Breach of Contract	10.7	64.3	20.2	4.8
Commodities/Securities	1.2	11.9	60.7	26.2
Environmental	3.6	25.	64.3	7.1
Intellectual Property	2.4	29.8	57.1	10.7
International Law	2.4	25.	42.8	29.8
Labor Relations/ERISA	8.3	27.4	58.3	5.9
M&A/Corporate Restructuring	0	14.3	64.3	21.4
Occupational Safety	0	13.1	75.	11.9
Personal Injury	2.4	28.6	60.7	8.3
Product Liability	3.6	26.2	57.1	13.1
Real Estate & Construction	5.9	35.7	50.	8.3
Other	2.4	7.1	17.8	72.6

international law, labor relations/ERISA and M&A/corporate restructuring tallies all showed a 28.6% "likely," which seems highly coincidental. There was also some discomfiting symmetry in the other percentages in this group of answers, but the rejection of ADR in the main was clear.

**Staffing the In-house  
Legal Department**

While the general survey showed in-house legal department averages of 14 attorneys, four paralegals and nine administrative people, there was wide variation according to business type.

Information/communications averaged three attorneys, three paralegals and three administrative personnel, and the expectation of hiring one more attorney in the next two years. Manufacturing averaged 12 attorneys, four paralegals and 10 administrative staff, and also expected to hire one more attorney. Healthcare, however, showed 16 attorneys, three paralegals and three administrative people, and expected to hire two more attorneys. This gives food for thought when correlated to cause of litigation (supra) and a 100%

"no change" in the extent of reliance on outside sources. □

Complete tables from the survey may be requested from Managing Editor, Bar

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# Downsizing, and Other

*Mergers, downsizings, diversification and restructurings continue apace in the legal field. Whether in the "megafirm," "mid-size" or "boutique" category, such organizational changes often mean displaced personnel. When overlooked, the human issues may also mean the defection or disenchantment of key performers.*

by William H. Levings

**A**s law firms undergo change while striving to remain competitive, the need to qualify and quantify the payoffs (and pitfalls) of personnel issues is becoming more apparent. Being mindful of the need is one matter. Managing it is yet another.

Lawyers and related personnel are no longer immune to job loss, yet the termination process is often unplanned, thereby aggravating the trauma and negative consequences.

During times of change, some human resource issues are going to be obvious. Other concerns may be obscured. Recognizing a need to focus attention—and resources—on displaced workers, the outplacement industry was born.

Nine out of ten Fortune 500 firms now use outplacement services routinely, with this year's expenditures likely to top \$400 million. According to Jeanne O'Donnell, executive director of the Association of Outplacement Consulting Firms (AOCF), professional service firms are using outplacement assistance with increasing frequency. (In recent months, Right Associates has provided assistance to more than 75 law firms nationwide.)

There is growing recognition that most terminations are "no fault." Instead, they tend to be a by-product of business conditions or changes in people and organizations. Enlightened firms are using outplacement services to help strategize separation arrangements.

What is outplacement? What does it cost? And who benefits? Such are among the questions posed by

organizations faced with a need to terminate one or more associates.

Outplacement may involve a single individual or a group of employees. Although used initially for involuntary terminations and group layoffs, outplacement service now may encompass career development/career decision assistance and pre-retirement issues. Its goal is to assist with emotional, financial and professional needs of laid-off workers.

Outplacement firms differ from employment agencies and executive recruiters in that they do not typically function as a service through which job openings are offered. Outplacement programs are designed to assist employers with termination issues, and to help separated employees develop skills and strategies to find new employment. Training, counseling, coaching and guidance are common outplacement services.

In its early days, outplacement assistance was provided only to top executives. As more progressive organizations realize its contributions in terms of public and employee relations and bottom-line benefits (such as reduced reemployment or litigation costs), the service is being offered across hierarchical ranks. According to O'Donnell, companies that provide outplacement services "have developed reputations for being more humane,"—resulting in distinct recruiting and retention advantages.

"In many respects the termination function is as important as the hiring function, and should be managed with the same care," O'Donnell emphasizes. No two situations are identical, she acknowledges, and it's difficult to predict what problems might arise from a termination, but the 55 member firms of her outplacement association typically provide six basic programs:

*Termination consultation* may include assistance in identifying whom to let go, crafting termination announcements, and overseeing logistical concerns.

*Post-termination meetings*, a sometimes emotionally charged event, are held to help individuals cope with the trauma of the event and to focus attention on the future.

*Assessment and consultation* continues the adjustment process, grounds the displaced worker in a clear assessment of strengths, interests and goals, and begins efforts to turn the career crisis into an opportunity. The consultant may meet with the client's family, assist in financial planning or act as an intermediary with the former employer.

*Job search training* imparts skills for conducting a successful job campaign. It may include resume development, strategies for conducting a productive reemployment campaign and technical help to hone skills in interviewing and negotiation.

*Administrative support*, including office space, word processing, reference materials and related services, are provided, enabling the client to concentrate on the job campaign.

*Continuing consultation* sustains the displaced worker throughout the campaign by providing strategic advice, job market information, emotional support or other assistance.

In the legal arena where "you're fired" has not been part of the lexicon, the process of separation has been criticized for its lack of structure or inadequate planning. Terminations are particularly distasteful because of perceived stigmas,

# Terrors of the '90s

## Separation Checklist

The following checklist outlines the points to consider and cover during a separation meeting.

1. Determine and discuss reasons for separation.
2. Review personnel selected for separation to ascertain minimum legal risk, relative to:
  - a. age, length of service, minority status, performance, future skill applications;
  - b. EEOC considerations;
  - c. unionization and health issues.
3. Determine separation benefits, including:
  - a. pay in lieu of notice;
  - b. payment for accrued vacation, paid leave and other benefits;
  - c. severance pay (is policy consistently applied?)
  - d. medical coverage continuation;
  - e. savings/stock/investment options;
  - f. miscellaneous (e.g., tuition reimbursement);
  - g. expense reports;
  - h. payroll deductions (credit union, garnishments, etc.);
  - i. unemployment compensation eligibility;
  - j. outplacement assistance, date, location.
4. Discuss arrangements for return of company property, security clearance.
5. Prepare letter of separation (outlining above elements).
6. Communication to remaining employees.
7. Make provisions for on-call medical personnel for emergency situations.
8. Arrange departure time, movement of personal property.
9. Transportation home for affected employees?
10. Preparation and dissemination of media statement.

*SOURCE: Right Associates*

a highly competitive, saturated market and the close-knit nature of the legal community.

Planning can help minimize bruised egos while controlling the ripple effects on work force morale and productivity. But, consultants note, efforts to ameliorate the trauma must begin long before terminations take place.

As one attorney who survived a firm's downsizing observes, "the intangible, emotional side can be pretty devastating." In reflecting on that firm's particular situation, the attorney said a tremendous amount of downtime has been required to reassure clients and rebuild confidence in the firm. Much of the negative fallout was avoidable, he suggests, had the firm planned better and handled the situation more candidly.

One of the most talked-about downsizings in the area occurred in 1989 at Seattle-based Karr Tuttle Campbell, which still found itself in the headlines more than a year after dismissing eight partners, six associates and 15 staff members as part of a restructuring.

Bruce Larson, vice president of Karr

Tuttle, said the firm anticipated negative publicity, but underestimated the effect on morale. In retrospect, he says, "we could have spent more time with the people (who were not terminated)."

Consultants assisted with the restructuring plan, and outplacement was offered, although not everyone utilized the service. Staff tended to use outplacement assistance more than lawyers, Larson said. Though somewhat disappointed that the service was not used more widely by attorneys, Larson suspects most lawyers opted to tap existing networks. Virtually all the laid-off attorneys have found good positions.

Sometimes as unsettling as downsizing is a merger or acquisition. One firm experienced in both types of change is Seattle-based Foster Pepper & Shefelman. The firm expanded its regional presence largely through acquisition and broadened its array of services by merging two independent concerns.

Despite the potential for problems associated with a need to consolidate or

integrate some functions and to blend cultures, "no one was asked to leave" said Kristi Golden, the firm's training and recruitment specialist.

Areas of confusion emerged during the first year, Golden admits, citing financial, personnel guidelines and other issues. Some misunderstanding may have been averted, she suggests, if an outside adviser had been involved.

An independent consultant can really "point out blind spots," Golden said, citing Foster Pepper's recently drafted mission statement and action plan as an example. Early drafts were attorney-centered, she recalls.

Although employed at Foster Pepper for only about a year, Golden has ten years' experience as a human resources specialist. She believes law firms will engage outside consultants for more employment matters. Along with outplacement, she expects "outsiders" will assist with career counseling, training and retention programs, and other "skills building" to improve effectiveness in human relations.

Opportunity abounds, according to

industry observers who predict continued, if not more intensified, change in the legal profession. Consolidations will spawn megafirms, some say, and corporations will shift more work from outside firms to in-house counsel. Changing needs and geographic factors will also influence the composition of law firms. Associates' performance is being scrutinized earlier in their careers, with marginal performers encouraged to look elsewhere.

Whether for economic reasons, mismatches in personality or skills or for other causes, cutbacks in personnel are traumatic. Consideration, sensitivity, respect and objectivity are keys to easing the process.

During times of change, attention should be focused on three key areas: pre-termination planning, outplacement assistance to individuals, and the effect on remaining employees. Understanding and managing these elements will help the change proceed more quickly, smoothly and productively.

Pre-planning assists managers with various aspects of the separation

process, from analyzing where changes are needed to arranging details of the termination and coaching the notifying manager on dealing with the factual and emotional issues.

When conducting separation meetings, those in charge are encouraged to deal in facts, not perceptions or personalities. Consultants also stress the need to have written policies and procedures to assure consistency in dealing with all associates.

During the session, define the separation clearly, but briefly, emphasizing the finality of the decision. Then move on to positive elements, such as the separation benefits and reemployment or transition assistance that will be provided. Offer support, express confidence in the person and discuss details of the work transition.

Central to the process is the assistance to displaced individuals. Three basic forms of assistance are considered essential to a smooth transition. These "platforms for downsizing in a humane and effective way" include severance or termination pay,

benefits continuation and outplacement assistance.

Effective outplacement counseling helps cushion the blow to those who are terminated. "It gave me a person to talk to right away—and that was very important," said one attorney in corporate practice who suddenly found himself laid off.

"Outplacement counselors don't hand you jobs," the displaced lawyer emphasized. He credits the process with helping him identify options, assess his strengths, weaknesses and interests, and setting him on course to accomplish goals. His initial plan was to seek another corporate law position. Instead, after evaluating options, he pursued a different track. "Ultimately, it was my decision to make the change," the lawyer emphasized.

Understanding control is an important element in the outplacement process. As one adviser says, control is in the jobless person's hands. "It is that individual's responsibility to forge ahead, albeit with the counselor's support."

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Not to be overlooked during the transition are the remaining employees. A recent survey of American Management Association members indicates employee morale suffers significantly when firms downsize. When Right Associates compared responses to its 1989 and 1990 surveys, the number of managers who reported declining morale increased from 74 percent to 81 percent.

Along with exhibiting low morale, those who survive the restructuring fear future cutbacks and are mistrustful of management. When ignored, productivity can suffer. Communicating the what and why of decisions will influence the energy and commitment of workers before, during and after the transition.

### The Financial Considerations

Fees and charges for outplacement services vary with the range of programs or scope of service. Typical costs range from 10 percent to 20 percent of the terminated individual's gross salary and bonus. Services for groups can cost \$5,000 to \$10,000. Three-day workshops are typically priced between \$3,500 to \$4,500. Sometimes, employers may receive discounts for group sessions and for workers in entry-level positions.

Like many services, the value may be difficult to measure. At its best, professional outplacement provides job seekers with the skills, self-knowledge and counsel to find new positions.

According to an industry survey, 75 percent of displaced executives found outplacement helpful. Another study documented significant reductions in the time it takes a displaced executive to find a new position when outplacement services are used.

A recent survey of human resources executives identified five advantages of third-party outplacement: specialized services, labor market experience, current marketplace contact, a professional and objective staff, and outside facilities where employees can be helped during the transition period.

Users of outplacement services say a properly run program can reduce long-

term layoff costs by cutting unemployment costs, minimizing the risk of wrongful discharge lawsuits and improving the morale and productivity of those who survive the cutback.

Moreover, say users of the service, outplacement is an invaluable humanitarian gesture that eases the trauma of layoffs, promotes good will and encourages the new job hunter.

Law firms continue to face changes in

the marketplace, constant pressure to contain costs and new forms of competition. Such challenges influence how they think and operate. And how firms respond to workplace change is of broad interest.

People, policies and programs are keys to success. A well-managed outplacement program speaks loudly by minimizing trauma, enabling associates to focus efforts on finding a new

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## Selecting an Outplacement Consulting Firm

Following are some considerations for selecting outplacement services.

1. *Research the Firm.* Visit its facilities, review its programs and experience, meet the management and consulting staff and discuss credentials of particular interest and relevance to your needs.

2. *Assess the Firm's Capability.* Does it have the facilities, experience, reputation and capacity to serve you conveniently and competently? Are the consultants full-time or part-time? Is the staff able to customize programs?

3. *Assess the Firm's Commitment.* Based on your assessment of the quality and accessibility of its programs, facilities and resources, can it produce the desired results?

4. *Assess Compatibility.* Do you want this company to be an

ongoing resource to your firm?

5. *Begin the Partnership.* Even if there is no outplacement assignment, the firm you select can offer valuable insights into a variety of business and organizational issues. The need for outplacement often arises suddenly so a known and trusted resource can respond to emerging concerns.

*SOURCES:*

*The Association of Outplacement Consulting Firms and Right Associates*

position and ensuring appropriate transfer or completion of assignments. It can have a stabilizing effect on the morale and commitment of remaining associates. The benefits are shared by the separated attorney, the firm, its clients and the legal community. □

*Bill Levings is managing principal of the Bellevue office of Right Associates, which serves the Northwest. With headquarters in Philadelphia, the international network of more than 65 offices specializes in outplacement counseling and career management*

*services. A member of AOCF, its clients include professional service firms, Fortune 500 companies and other public and private sector organizations.*



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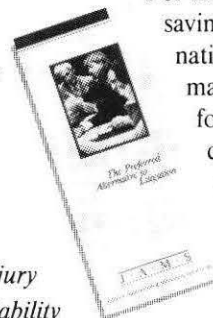


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by **Lindsay Thompson**, Bar News Editor

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**'Tis January: Therefore, 'Tis Olympia.** The governors convened in the state capitol for their annual meeting with the Supreme Court January 10, to consider, among other things, the WSBA agenda in the about-to-convene Legislature.

**Behind the Doors:** A novelty: the board's published agenda listed items to be treated by the governors in executive session Friday morning. There was a review of the executive director's authority; a review of the disciplinary proceedings docket; final disposition of a reinstatement petition; and the selection of the association's president for 1991-1992. The first was easy: the board passed an annual resolution giving Dennis Harwick power to run the Bar office, set salaries, hire and fire, and the like. The middle two items were confidential. The fourth item was hard: several hours of meetings Friday, and again on Saturday, and the board could not agree who will be its next president. They will try again in February.

**The Gates Commission:** a board committee, chaired by governor Tom Chambers, produced a four-page set of recommendations in response to the commission's

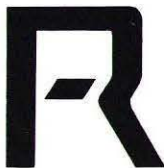
proposals. Noting that in December the board could not get a complete draft of the commission's report to consider, the report said its contents were "merely our initial recommendations." Those include opposing the commission's position of mandatory pro tem judges, supporting expansion of the state jury pool to include driver's license and identocard holders, supporting making no change in jury size or voir dire, supporting an increase in the number of court commissioner counties can have, supporting greater uniformity in local court rules, and increasing mandatory arbitration limits. The board also went for the idea of expanding district court jurisdiction so that it is exercised concurrently with superior court in some areas. Some members thought this a useless gesture, since everyone seemed to agree it would not really affect superior court caseloads significantly, but there was just something about the idea that made the board vote for it.

The Chambers report also observed that the commission booted its original charge—o find improved (and increased) court funding—and instead evolved into yet another court congestion committee. "We believe the commission has failed to address the real cause of court congestion," the report said, and that is drugs, stiffer criminal laws, and local anomalies like asbestos litigation in Kitsap County.

The rights of civil litigants should not be contracted to address problems on the criminal side of the ledger, the report said. After adjustments in wording, some more-subdued than others, the board approved the report for sending to the commission.

**Legislation:** Dick Manning, who chairs the Legislative Committee, presented some bills for the board's endorsement. There were two real property bills. One sought to undo the earnest money forfeiture decision in *Lind Building Corp.*, 55 Wn. App. 70, Rev. Den., 113 wn.2d

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1021(1989). The other would, in effect, make an escrow closer a collection agent for real estate brokers' commissions. Both were opposed by the legislative committee, which recommended working with interested parties on corrective drafting. Fine, the board said; have at 'em.

A bill to raise prosecutors' salaries through fourth-class counties to be not less than a superior court judge's nor less than a district court judge's, was a good thing, the board decided, and they voted to support it.

Some proposals from the alternative dispute resolution front were considered as well. The board voted to support amendment of RCW 5.60 to extend evidentiary confidentiality privileges to mediators, and to support sections of an omnibus bill, which sections would allow state agencies to include mediation provisions in their contracts.

**Money:** Executive director Dennis Harwick and treasurer Ron Gould gave reports. Of 120 applicants, five persons will be interviewed for the position of director of administration/controller. Gould said preliminary audit figures show that the association ended last fiscal year with a \$297,522 surplus. The money went to a reserve fund, which now stands at \$449,870 toward a \$610,000 (ten percent of operation budget) goal.

"Two years ago," Gould told the board, "We had a negative fund balance of \$450,000." Quite a turnaround, he thought, and the board agreed. The board then reaffirmed its commitment that future annual convention costs be budgeted not to exceed expenses. Governor Alva Long, who likes to rag the board in the public prints for fiscal-year responsibility, was absent during these discussions, talking to one of the board observers on the fringes of the room, then out in the hall.

**Ah, Those Pesky Worthwhile Projects:** The

board considered two proposals urging endorsement of worthwhile social issues. Seattle lawyer Mark McPherson proposed creating a WSBA committee to study how the association can advance literacy, taking the work of ABA's literacy project (chaired by former WSBA president Mike Hemovitch) as a point of departure. And Seattle lawyer Robert Mussehl urged the creation of a task force on the hungry and homelessness.

McPherson went over his proposal, complete with a \$200 budget request, though a bit nonplussed by having just been handed an opinion by WSBA general counsel Bob Welden that such a committee would be outside the purposes of the association. "It's like being asked a question about the case you didn't read for class," McPherson said. But after some discussion of the bylaws, some board members came up with a way to fit it in.

But governor Don Curran spoke for several other governors when he wondered, "Are we opening the floodgates? Where do we draw the line as to deserving causes?" Governor Tom Chambers moved to approve the work of the ABA literacy project and encourage Washington lawyers to get involved in other literacy projects. However, several board observers then jumped in, urging the board of governors to do more than pat McPherson on the head before sending him back to Seattle. Governor Jeff Tolman thought GR 12 in the bylaws would not stretch far enough to include supporting a literacy committee. Governor John Slater agreed. But governor Lem Howell thought it a good idea, and governor Monte Hester did, too. The Chambers motion passed 9-0; Alva Long abstained. And governor Ron Gould moved to create an ad hoc committee on literacy with a budget not to exceed \$500. After a bit more debate, the motion passed, 6-4, governors Slater, Schultz, Tubbs and Curran opposed. Saturday morning the homeless/hungry task force came up for a vote. Those on the short end of the

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literacy vote rolled out Procrustes' bed for the do-gooders to either endorse the new proposal as part of the opening of the social program floodgates, or to try to make a logically consistent distinction between supporting the one and defeating the other.

Easy come..., as said Ron Gould. "Lines can be drawn. Distinctions between the ability to read and its impact on understanding the law and the problems of hunger and homelessness can be drawn. I am not sure the task force approach will work here." Governor Don Curran, always a sport, urged governors to "act with discernment, if not consistency. Voting down this motion will point up the error of yesterday's vote."

Governor Steve Tubbs called in the bombers. "It is extraordinary that we can draw a distinction between people ensnared in the justice system because of illiteracy and those ensnared in the justice system because of hunger or homelessness. Shall I vote for consistency or hippocracy? To distinguish between these proposals is a distinction without a difference."

Philosopher/governor Jeff Tolman, continuing his amazing mid-debate conversation from the day before, told the governors they had forgotten the rejoinder of parents with small children: "Because I said so." And some things, he maintained, you support just because you want to. Governor Lem Howell reminded the board that the task force would just study the issue—no spending involved. But to no avail: hunger and homelessness lost, 2-7-1, Long and Howell voting aye, Chambers abstaining, and the rest voting no. But by acclamation the board encouraged Mussehl and his band to keep up the good work.

**Long-Range Planning From Beyond the Grave:** The Board juggled the membership of the long-range planning task force some more. The president said two ex-presidents had gotten in touch, thinking it would be

very useful for ex-presidents to be involved in the task force ex officio. Governor Lem Howell thought it useful enough to move to allow any former WSBA president in the last ten years to take part, with no vote and at no cost to the association. Governor Alva Long thought the idea would be even more useful by amending it to make every active and inactive member of the association an ex officio member.

A considerable pause ensued. Then the flexible Howell agreed with Alva that ex-presidents ought to get no special consideration, and he proposed opening the task force's meetings to any WSBA member who wanted to attend. Some desultory discussion followed, and the ex-president idea drifted away as the Board approved the final composition of the task force and sent it on its way.

**Wrap-up in Olympia:** In other action, the board voted to send ABA delegates uninstructed to the mid-year meeting in Seattle next month; approved a plan for lawyers to volunteer to help out in the disciplinary process as a money-saver for the association; named Northwest Tribal Court Judge Douglas Luna to honorary WSBA membership while reserving for study whether to extend it to administrative law judges; heard a report from Yakima lawyer Adam Moore on the work of the Criminal Law Section; received a first draft of the Domestic Relations Task Force report, and approved a "briefing schedule" for proponents and opponents in the coming referendum on whether to have the 1995 WSBA convention in Hawaii.

Future meetings; February 15-16, Tacoma; March 22-23, Bellevue; April 19-20, Winthrop; May 17-18, Spokane; June 21-22, Kelso; July 19-20, Blaine; August 23-24, Leavenworth; September 11-14, San Diego (Bar Convention).

*Note: See "Digest," page 32 of this issue, for the text of new amendments to the RLD and RPC.*

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See page 42 for details.



*Notices of Interest to Association Members*

**Public Notices**

**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 January 1991 is 6.82%. The maximum allowable interest permissible for **February 1991** is therefore **12.00%**. Compilations of the average coupon equivalent yields from auctions of 26-week treasury bills appear in the *Bar News* on page 39 in October 1987 for 1982-1984; on page 37 in June 1989 for 1984-1985; and on page 51 in June 1990 for 1985-1990.

**The Seattle Office (Division I)** of the Washington State Court of Appeals is looking for a new court commissioner.

Commissioner Larry A. Jordan left the position January 7 to accept an appointment to the King County Superior Court bench. Governor Booth Gardner appointed him to fill a vacancy created when he appointed superior court judge Susan Agid to a seat on the Court of Appeals. Jordan was a commissioner on the appellate court for 15 years.

The commissioner position pays a salary of \$55,840-\$72,165 per year.

WSBA membership and five years' experience as a lawyer, or in some other judicially related field, is required for the job.

Those interested should submit a resume to Anne Noris, Clerk, Court of Appeals Division I, One Union Square, 600 University Street, Seattle, WA 98101-4170 by March 15, 1991.

**Trust Account Overdraft Notice Rule Adopted Effective 3/1/91**

The Washington Supreme Court has adopted amendments to the Rules for Lawyer Discipline and Rules of Professional Conduct (115 Wn.2d 1156) which require that as of March 1, 1991, all lawyer trust accounts must be maintained in a financial institution which has agreed in writing to report to the Disciplinary Board any properly payable instrument which is presented against a lawyer trust account containing insufficient funds, whether or not the instrument is honored. In addition, the new rule requires that if a lawyer receives notification that any instrument presented against his or her trust account

was presented against insufficient funds, whether or not the instrument was honored, the lawyer shall promptly notify the Office of Disciplinary Counsel of the Washington State Bar Association with a full explanation of the cause of the overdraft. See RLD 13.4(d).

The purpose of these rule amendments is to provide a procedure for the reporting of trust account overdrafts. The requirement that lawyers who have notice of an overdraft promptly provide an explanation to the Bar is intended to expedite the handling of these matters and prevent any unnecessary investigation of bank errors and the like.

*If you have any questions regarding compliance with these rule amendments, you should contact the WSBA Office of Disciplinary Counsel at (206) 448-0307.*

*(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.)*

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**HORSE LAW**

Washington State Horse Council, for referrals, is compiling a list of lawyers interested in horse and ranch law issues: tax, buy-sell, leases, liability.

**Contact:**

James D. McBride  
1001 4th Avenue Plaza  
Suite 3900  
Seattle, WA 98154-1084  
(206) 622-3720



**February**

**6** Legal Foundation of Washington Annual Charles A. Goldmark Awards Luncheon, Seattle. *For information:* (206) 624-2536.

**7** Employment Law Series: The 1990 Americans With Disabilities Act. *Sponsored by:* SKCBA/YLD. *For information:* Monique Gill, (206) 624-9365.

**7** Foreclosure and Repossession in Washington, Seattle. Also presented February 8 in Spokane. *Sponsored by:* National Business Institute. *For information:* (715) 835-7909.

**14** "Life and Death—Who Decides? Spokane. *Sponsored by:* Gonzaga University. *For information:* Dale Goodwin, (509) 328-4220, ext. 6398.

**14** Employment Law Series: Drafting, Enforcing or Avoiding Covenants Not to Compete. *Sponsored by:* SKCBA/YLD. *For information:* Monique Gill, (206) 624-9365.

**15-16** WSBA Board of Governors' meeting, Tacoma. *For information:* (206) 448-0441.

**17-23** Skimender '91, Whistler, B.C. *Sponsored by:* WSTLA. *For information:* (206) 464-1011.

**21** Employment Law Series: Dealing with State and Federal Agencies in the Employment Setting. *Sponsored by:* SKCBA/YLD. *For information:* Monique Gill, (206) 624-9365.

**22** Elder Law. *Sponsored by:* SKCBA. *For information,* Monique Gill, (206) 624-9365.

**22** The Immigration Act of 1990 & IRCA Update. *Sponsored by:* SKCBA. *For information:* Monique Gill, (206) 624-9365.

**22-23** Water Quality, Water Quantity: The Reluctant Marriage. *Sponsored by:* Lewis and Clark College and Water Watch of Oregon. *For information:* Mary Anne Traut, (503) 768-6642 or

Maurine Breckenridge, (503) 768-6629.

**23** Board of Directors meeting, Evergreen Legal Services. *For information:* Bev Miller, (206) 464-5933 or (800) 542-0794.

**26** Brown Bag Lecture Series: Socialized Medicine v. Profit-Motivated Competition: Which Way Are We Headed? *Sponsored by:* SKCBA. *For information:* Monique Gill, (206) 624-9365.

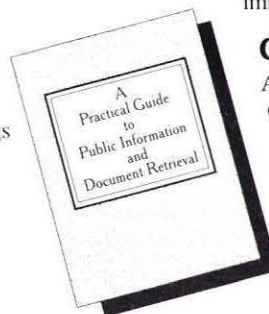
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**March**

**2** New Visions of Professionalism in Law and Legal Education. *Sponsored by: Gonzaga Law Review.* For information: Michelle Dimond, (509) 328-4220, ext. 3715.

**8** Real Estate Foreclosures & Forefeitures. *Sponsored by: SKCBA.* For information: Monique Gill, (206) 624-9365.

**22-23** WSBA Board of Governors' meeting, Bellevue. For information: (206) 448-0441.

**April**

**19-20** WSBA Board of Governors' meeting, Winthrop. For information: (206) 448-0441.

**20** Board of Directors meeting, Evergreen Legal Services. For information: Bev Miller, (206) 464-5933 or (800) 542-0794.

**May**

**17-18** WSBA Board of Governors' meeting, Spokane. For information: (206) 448-0441.

**June**

**21-22** WSBA Board of Governors' meeting, Kelso. For information: (206) 448-0441.

**July**

**19-20** WSBA Board of Governors' meeting, Blaine. For information: (206) 448-0441.

**27** Board of Directors meeting, Evergreen Legal Services. For information: Bev Miller, (206) 464-5933 or (800) 542-0794.

**August**

**23-24** WSBA Board of Governors' meeting, Leavenworth. For information: (206) 448-0441.

**September**

**11-14** WSBA Board of Governors' meeting and State Bar Convention, San Diego. For information: (206) 448-0441.

**October**

**19** Board of Directors meeting, Evergreen Legal Services. For information: Bev Miller, (206) 464-5933 or (800) 542-0794.

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

University of Washington School of Law Continuing Education			
SPRING 1991 SCHEDULE			
Date	Course #	Location	Title
3/2	9101	School of Law	DEALING WITH EXPERTS AND EXPERT TESTIMONY 9:00-5:00 — 7.00 CLE Credits — \$135
3/9	9102	School of Law	INTRODUCTION TO COMPUTER-ASSISTED LEGAL RESEARCH 8:30-5:00 — 7.50 CLE Credits — \$135
4/4-5	9103	Sheraton Hotel	MID-YEAR ENVIRONMENTAL LAW AND MANAGEMENT CONFERENCE 9:00-5:00 — 14.00 CLE Credits — \$300
4/13	9104	School of Law	ADVISING CLIENTS ON STEPS NECESSARY TO COMPLY WITH THE AMERICANS WITH DISABILITIES ACT 9:00-5:00 — 7.00 CLE Credits — \$135
4/13	9105	School of Law	LAND REFORM IN THIRD WORLD AND CENTRALLY PLANNED ECONOMIES 9:00-12:00 — 3.00 CLE Credits — \$75
4/20	9106	School of Law	LAW OF THE ELDERLY 9:00-5:00 — 7.00 CLE Credits — \$135
4/27	9107	School of Law	DEFENDING DWIs—WINNING STRATEGIES FOR THE NINETIES 9:00-5:00 — 7.00 CLE Credits — \$135
5/3	9108	Seattle Center, Nisqually Room	FINANCIAL PLANNING FOR LAWYERS, ACCOUNTANTS AND THEIR CLIENTS 9:00-5:00 — 7.00 CLE Credits — \$135
5/11	9109	School of Law	FIFTH ANNUAL FAMILY LAW INSTITUTE 9:00-5:00 — 7.00 CLE Credits — \$135
5/18	9110	School of Law	SECURITIES REGULATION FOR THE GENERAL PRACTITIONER 9:00-4:30 — 6.50 CLE Credits — \$100
6/1	9111	School of Law	COMMERCIAL GENERAL LIABILITY INSURANCE—SELECTED ISSUES IN PRIMARY AND EXCESS COVERAGE 9:00-5:00 — 7.00 CLE Credits — \$135
6/8	9112	School of Law	MARITIME COMMERCE IN THE PUGET SOUND REGION 9:00-4:30 — 6.50 CLE Credits — \$135
6/22	9113	School of Law	BUYING OR SELLING A HOUSE 9:00-5:00 — 7.00 CLE Credits — \$135

For information, or registration by phone, call 543-0059.

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### Third-Year Report: 1989-1990

During the third year of operation, LAP provided evaluation, referral or counseling services to approximately 1.2 percent of the WSBA's actively practicing lawyers during the third year of operation. As mentioned in earlier reports, no other bar association's assistance program has come close to achieving this result during any year of its operation. Although demand has leveled off to about 200 new clients a year, one third of the actively practicing bar were suffering from serious psychopathology (e.g. major depression) or alcohol/drug addiction at the time of the LAP's first empirical study in 1987. No indication exists to suggest that these data are inaccurate or overstated.

The percentage of the LAP's self-referred clients continued to increase this year (from 65 percent to 70 percent). Self-referred clients increased by 5 percent each year of operation. They are wonderfully motivated to make changes that advance swift recoveries. They also are better suited than our third party referred clients at maintaining recoveries because their problems tend to be less severe or chronic. Factors believed to be responsible for LAP attracting a higher percentage of self-referred cases than any other comparable LAP include: 1) Supreme Court rules that shield client and referrer confidences so that no future prejudice will result from seeking LAP services; 2) approximately 145 ready and willing peer counselors, many of whom have suffered from the same types of distress symptoms, who work statewide in assisting with the evaluation and counseling of impaired lawyers; 3) the availability of Washington state lawyer normative data (produced during the 1987 LAP prevalence study) so that accurate comparisons can be made during initial evaluations between potential clients and other Washington

lawyers; 4) the widespread perception that LAP serves as a repository for the names of professionals, institutions or self-help programs that work effectively with impaired lawyers and that the evaluation, referral and treatment services that LAP peer counselors and professional staff provide are practical and effectual; and 5) a monthly column in the *Bar News* that appears to be avidly read by WSBA lawyers, including many potential clients who seek services after identifying with the experience of the writers (usually former LAP clients). The LAP believes that these factors will continue to increase the percentage of clients who self-refer for services.

Professional staff provided educational and prevention talks for 26 separate presentations, twice last year's number. Some occurred at national ABA events; the WSBA LAP continues to be perceived as one of the most innovative and effective programs serving distressed lawyers. Most of the talks occurred within the state for law schools, local bar associations and judicial conferences. These talks are quite important. For instance, the data about the prevalence of lawyer distress indicate that significantly fewer lawyers are smoking cigarettes than other normal population members. This suggests that other high risk health behaviors can be reduced through concerted educational and prevention efforts. LAP professional staff will continue to devote a large block of time to fulfilling this goal.

Staff have been able to devote more time to such talks as a result of hiring a clinician who works half time. Professional staffing now consists of one program coordinator and the equivalent of two full-time clinicians. As well as serving 200 new clients a year, LAP is able to provide aftercare to

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**LAP STATISTICAL SUMMARY FOR PERIOD  
BEGINNING AUGUST 1, 1989  
ENDING JULY 31, 1990:  
THIRD YEAR OF LAP OPERATIONS**

**NEW CASES:**

		Self-referred	Third-party	Total
Opened, Not In Treatment	year 2	0	37	37 (18%)
	year 3	0	37	37 (19%)
Opened & In Treatment*	year 2	133	33	165 (82%)
	year 3	135	33	156 (81%)
<b>Total</b>	<b>year 2</b>	<b>133 (65%)</b>	<b>65 (35%)</b>	<b>203(100%)</b>
	<b>year 3</b>	<b>135 (70%)</b>	<b>58 (30%)</b>	<b>193(100%)</b>

**CASE DIAGNOSES:**

	Year 2	Year 3
Mental problems (depression, old-age impairment, etc.)	114 (56%)	114 (59%)
Relationship problems	18 (9%)	16 (8%)
Alcohol	50 (25%)	48 (25%)
Drugs	21 (10%)	15 (8%)
<b>Total</b>	<b>203 (100%)</b>	<b>193 (100%)</b>

\*Treatment or being treated includes either: evaluation, ongoing peer counseling/staff treatment, and followup; or evaluation, referral and followup.

\*\*Professional staff currently run five weekly support/psychotherapy groups with a maximum number of eight participants for each group.

**TYPES OF CONSULTATION OR TREATMENT:**

	Year 2	Year 3
Client Treatment*	841 (62%)	1,049 (48%)
Client Attendance at Group Treatment	NA	457 (21%)
Peer Counselor Consultation	240 (18%)	311 (14%)
Third Party Consultation	100 (7%)	125 (6%)
Professional Consultation	185 (13%)	240 (11%)
<b>Total contacts with clients or those involved with cases</b>	<b>1,366 (100%)</b>	<b>2,181 (100%)</b>

**DISPOSITION OF CASES:**

Cases served and closed during first year of operations	57 (10%)
Cases served and closed during second year of operations	122 (33%)
Cases served and closed during third year of operations	99 (18%)
Cases to whom services are still provided	262 (40%)
<b>Total cases served since LAP's inception</b>	<b>540 (100%)</b>

**LeDOUX & LeDOUX  
ATTORNEYS AT LAW**

**MARITIME PERSONAL INJURIES**

**ADMIRALTY NOTE:** Many workers injured aboard floating seafood processors are still being incorrectly informed that they are only entitled to worker's compensation. These workers are seamen who can sue their employers for damages under the Jones Act and general maritime law. It is generally immaterial that they may have been paid worker's compensation benefits.

**KURT M. LeDOUX** is available for referral, consultation and association in cases involving injured fishermen, floating seafood processor workers, longshoremen, and other seamen and maritime workers in Washington and Alaska.

**(206) 624-6771**

**ANCHORAGE OFFICE:** 810 W. 2nd Ave., Ste. "B", Anchorage, Alaska 99501 ..... (907) 272-6868

**KODIAK OFFICE:** 219 Upper Mill Bay Road, Kodiak, Alaska 99615 ..... (907) 486-4082

a significant number of old clients with so few professionals because of the thousands of hours donated each year by our peer counselors.

Finally, this column's readers may want to receive a brochure produced about major depression or copies of two articles about lawyers that were published in peer reviewed journals this year. The articles are entitled: "The Prevalence of Depression, Alcohol Abuse, and Cocaine Abuse Among United States Lawyers;" "Who Smokes? Why?: Psychiatric Aspects of Continued Cigarette Usage Among Lawyers in Washington State."

If you would like to receive any of these publications or if your distress is causing negative consequences in your relationships, legal practice, or well-being, please call the LAP collect at (206) 448-0605.



## WESTLAW Training Sessions Help Legal Researchers Overcome Computer Fears

*Editor's Note:* The *Washington State Bar News* has been awarded a WESTLAW® Bar Journal Grant, which includes a WALT™ II terminal, WEST-JET™ printer, WESTLAW access for six months and WESTLAW training. West Publishing Company provides this copy to us as part of the grant program.

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

Sitting down in front of a computer for the first time can be an intimidating, or even frightening, experience. But first-time computer users quickly learn the advantages of living in today's high-tech world: Computers allow researchers to access in minutes information that used to take days or weeks to locate.

Legal research is no exception. Computer-assisted legal research (CALR) gives attorneys easy access to what they need to build a strong case. Experience quickly turns computer phobia into computer appreciation.

West Services, Inc.'s (WSI) training programs help newcomers to WESTLAW overcome computer anxieties and give them the working knowledge they need to work on the computer. Individual and group training sessions are available both in-house and at WESTLAW training centers. Users can also utilize PC-WESTrain™—a training diskette for IBM PCs and compatibles, WESTRAIN™—an online user-interactive training course, and PRACTICE, which helps users further develop their skills.

Kathleen Bonstrom, Coordinator of WESTLAW education, says WSI's approach to individual and group sessions is to provide training that meets the needs of each researcher it serves.

"Our account representatives are legally trained, highly educated and have received intensive instruction on how to teach WESTLAW to people with a variety of skill levels," Bonstrom said.

### Initial Training Is An Introduction To Computer Advantages

An individual's introduction to WESTLAW usually begins with an initial training session, followed about one month later by advanced training. Any of WSI's training programs can be completed more than once to give researchers even more guided, hands-on training time.

Initial training sessions for one person are geared to that individual's skill level. Group sessions cover a basic package of material, including WESTLAW sign-on procedures, how to access a database, query formulation, how to browse through search results and star paging and printing. These sessions also cover WESTLAW citator services, such as Insta-Cite, Shepard's, Shepard's PreView™ and using WESTLAW as a citator. Trainees receive copies of the Introductory Guide to Legal Research, a WESTLAW Query Planner, the WESTLAW Database List and a User Guide.

The initial training session usually lasts about one and a half to two hours. Training sessions held at firms are normally set up using a single terminal for groups of one to four people. At the WESTLAW training center, each individual has access to a terminal.

### Advanced Sessions, Seminars Address Specific Questions

About a month after the initial session, attorneys attend an advanced one. "Waiting a month after the initial training session gives researchers time to practice their new skills on WESTLAW and get them ready to learn even more about how CALR can help them and their firm," Chris Bawn,

WSI's regional coordinator in Washington says.

New material covered in advanced training sessions includes field-serving on WESTLAW, WESTLAW short-cuts, state statutes, WESTCheck™ and the Personal Directory of Queries. Material from the initial training session may also be reviewed, and the session concludes with a discussion of any further questions the trainees have.

Periodically, WSI also offers one-hour, special-topic seminars that at WESTLAW training centers and law firms. WSI's most popular seminars are tax, bankruptcy, securities, environmental law and litigation. Virtually any topic can be developed; contact Chris Bawn at the Seattle Training Center, (206) 628-6435.

WSI also provides personal assistance to the researcher in the form of retraining. "We gear these one-to-one sessions to each person's skill level; we work to help them overcome specific problem areas, and [we help them] with special topical research questions," Bawn said.

### Products And Service Researchers Count On

Tom McLeod, manager of WESTLAW sales and government relations, says WSI's main goal at any of its training sessions is to help the researchers understand what WESTLAW is capable of doing. They emphasize the benefits of West's editorial enhancements and the error-checking procedures that insure quality control.

"Attorneys can trust the accuracy of West's products," McLeod said. "We'll help you succeed by training you to become a proficient researcher and supporting you with outstanding customer service."



LAWYER DISCIPLINE

Sanctions in the Sunshine

Attorney discipline hearings should be open to the public, and time standards established and monitored to assure prompt but thorough prosecution of cases.

These are among recommendations of the National Organization of Bar Counsel, comprised of prosecutors and judges from state lawyer discipline systems around the nation. The proposals were submitted by NOBC to the American Bar Association Commission on Evaluation of Disciplinary Enforcement, which currently is reviewing the state of lawyer discipline in the country.

"Public protection is an important goal of professional regulation," said David E. Johnson, Jr., president of NOBC and director of the Office of Attorney Ethics of the Supreme Court of New Jersey. He noted that "While individual lawyers are separately accountable for their actions toward clients and others, the profession is

collectively answerable to the public for the competence and integrity of the bar."

"We believe these recommendations will foster improvement in lawyer discipline, and meet the needs of consumers of legal services," said Johnson.

More than 50 specific recommendations were made in nine broad areas, including:

\*Public Outreach: Disciplinary agencies should use such vehicles as Yellow Pages and toll-free telephone numbers to counteract their "invisibility."

\*Management: Deadlines should be imposed to complete investigations and prosecute charges, complimented by computer tracking and aging of all cases to insure compliance.

\*Confidentiality: At a minimum, court rules should permit disclosure of pending formal charges against a lawyer; formal hearings should be open to the public.

\*Relations with complainants: Disciplinary agencies should be easily accessible; complainants should have absolute immunity from civil suit.

\*Prosecutorial discretion: Bar counsel should be independent from improper judicial influence or interference of bar

association leaders; written policy guidelines should specify the types of complaints that can be dismissed without investigation.

\*Alternatives to discipline: Disciplinary agencies should foster alternative means to resolve consumer complaints, such as arbitration and mediation to handle some of the more minor lawyer-client problems; fee arbitration should be mandatory for lawyers.

\*Disciplinary procedures: Lawyers should receive clear notice of pending complaints and should be separately disciplined for failure to respond.

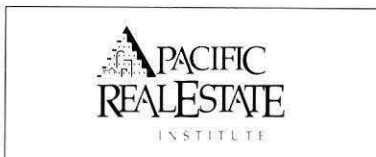
\*Professionalism: Bar counsel should be full-time professionals, and personnel policies should encourage careers in discipline.

\*Duties of lawyers: Written fee agreements should be required for all new clients and for all domestic relations matters; a national uniform law identification number should be developed and assigned to each law school graduate, for use in any jurisdiction where the lawyer practices, to facilitate accurate discipline records and notice of discipline to all appropriate jurisdictions.

The report recognizes that "The ethics effort, like other policy administration, involves the balancing of numerous conflicting interests. Vigorous and swift prosecution must comport with due process."

In conclusion, the report states that "As important and visible as lawyer discipline is, it is only part of the profession's ethics effort. Organized bar programs such as continuing legal education, advisory ethics opinions, mentor programs, peer review and lawyer assistance programs all make immeasurable contributions to improvement of the legal profession."

NOBC was formed in 1965, and has more than 400 individual members representing more than 60 state and federal disciplinary jurisdictions in the U.S. and Canada. Those members voted in February 1990 to undertake their own review of discipline issues and develop an organizational consensus of the ideal disciplinary enforcement system to submit to the ABA commission. The report is the product of that review.



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## ABA CODE OF JUDICIAL CONDUCT

### Who Will Judge the Judges?

The American Bar Association's new Model Code of Judicial Conduct, adopted in August 1990, fails to adequately address selected areas of judicial conduct, according to an editorial published in the October/November issue of the American Judicature Society's journal, *Judicature*. Though an overall improvement on the 1972 version, the 1990 code is far too vague on the issues of judicial campaign financing, and the return of judges to private practice, says the editorial.

The new code instructs judges to accept only "reasonable" campaign contributions from individual sources, but it leaves judges to wrestle with exactly what constitutes a reasonable contribution. AJS suggests in the editorial that a numerical limit of five percent would be far more helpful than ambiguous guidelines.

The code should also include a restriction on judges' return to private practice, says the Society. As increasing numbers of judges leave the bench, they may appear before their former colleagues, creating an appearance of impropriety. AJS suggests implementing a one-year "cooling-off" period during which former judges would be barred from practice before their former colleagues.

In the editorial, AJS notes that the code itself has no binding force unless it is adopted by individual states. The Society urges the states to consider including these measures as they adopt the 1990 Model Code.



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## NOTES FROM THE ACADEMY

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

**Civil procedure.** (Case 1.) Subcontractor sued general contractor for funds withheld (retainage) by latter. General contractor counterclaimed for breach of contract on *different* construction project and claimed retainage as setoff against general contractor's potential liability for problems on second project. Trial court dismissed counterclaim as improper. In case of first impression, supreme court reversed, holding that under CR 13(b), contingent, unliquidated counterclaim may be pleaded as setoff unless plaintiff can show prejudice or court finds counterclaim would make proceedings unwieldy. *Warren, Little & Lund, Inc. v. Max J. Kuney Co.*, 115 Wn.2d 211, 796 P.2d 1263 (9/13/90). (Case 2.) Plaintiff sued defendant in Pierce County, and four hours later defendant sued plaintiff in King County, raising essentially same issues. Pierce County ordered King County case transferred to Pierce County and consolidated with case there. On appeal, in case of first impression, supreme court held that superior court in one county has no authority to order superior court in another county to transfer one of its cases. Court said proper procedure is to move for change of venue in sending county, not receiving county. *American Mobile*

*Homes of Washington, Inc. v. Seattle-First Nat'l Bank*, 115 Wn.2d 307, 796 P.2d 1276 (9/27/90). (Case 3.) At hearing on motion for summary judgment, plaintiff's attorney failed to appear, and judge pro tem granted summary judgment. Trial court denied plaintiff's motion to vacate. *Held on appeal*: (a) constitutional restriction, allowing judge pro tem in superior court only upon consent, applies to motions for summary judgment; (b) attorney's failure to appear did not constitute consent; and (c) plaintiffs did not waive objection by failing to file timely appeal from summary judgment, which was simply void for lack of jurisdiction. *Mitchell v. Kitsap County*, 59 Wn.App. 177, 797 P.2d 516 (Div. 2, 9/13/90).

—K. B. Tegland

**Contracts.** Plaintiff plant nursery contracted to raise apple trees owned by defendant orchard. Contract contained clause, not specifically negotiated, by which plaintiff nursery disclaimed liability for incidental or consequential damages. Plaintiff treated roots of young trees with chemical that killed many of them. When plaintiff sued for unpaid contract price, defendant orchard

counterclaimed for breach of contract and negligence. Trial court found disclaimer clause to be unconscionable and awarded defendant \$2.3 million in direct and consequential damages. Supreme court, in 5-4 decision reversed decision on disclaimer clause. Court refused to apply commercial transactions rule of *Berg v. Stromme*, 79 Wn.2d 184, 484 P.2d 380 (1971), that disclaimers must be expressly negotiated. Under standard of *Schroeder v. Fageol Motors, Inc.*, 86 Wn.2d 256, 544 P.2d 20 (1975), this clause was conscionable because it was clear, not hidden in fine print, and parties had reasonable opportunity to understand it. However, contract was interpreted to permit recovery of direct damages for plaintiff's breach, to which extent supreme court affirmed decision below. *American Nursery Products, Inc. v. Indian Wells Orchards*, 115 Wn.2d 217, 797 P.2d 477 (9/20/90).

—S. W. DeLong

**Real property.** In behalf of condominium apartment owners, condominium homeowners' association sues builder-vendor on account of construction defects. Main contention was that in several respects buildings failed to meet fire resistivity standards of city's Uniform Building Code. *Held, inter alia*: (a) Plaintiff stated cause of action on theory of breach of implied warranty of habitability. Defects that created fire hazard were "serious and substantial," affected safety, and thus restricted "habitability." (b) Even though defendant made no intentional misrepresentations about construction defects, plaintiff's action for fraudulent concealment lay. Supreme court states rule that builder-vendor has duty to disclose where there is a concealed defect in a residential unit, known to him and unknown to purchaser and not reasonably discoverable, which defect is "dangerous to the property, health or life of the purchaser." *Atherton Condominium Apartment - Owners' Ass'n Bd. of Directors v. Blume Development Co.*, 115 Wn.2d 506, 799 P.2d 250 (11/1/90).

—W. B. Stoebuck



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**James M. Vaché**, dean of Gonzaga University's School of Law since summer 1986, has announced he will resign his position August 1, 1991, and return to full-time teaching.

Said Rev. **Patrick J. Ford**, S.J., academic vice president: "Dean Vaché has done an extraordinary job, both qualitatively and quantitatively, in directing the law school over the past five years. But he's an intellectual, a scholar and a teacher first, and he wants to get back to that which he likes best."

During Vaché's tenure as dean, the law school has grown from 300 students to its current optimum size of 450. The Gonzaga Law Clinic, a free service to Spokane's less-fortunate, has grown to provide legal service to about 1,000 persons each year. Alumni development goals continue to be surpassed each year. The Dean's Advisory Council was formed to help direct the law school, and law students have enjoyed expanded national competition opportunities, all under Vaché's leadership.

For his accomplishments in the field of law and his service to Gonzaga University, Vaché was awarded the distinguished alumni award last year from his undergraduate alma mater, Washington State University.

Vaché, who has been on the Gonzaga faculty since 1975, is expected to resume teaching in fall 1991.

## PIERCE COUNTY REPORT

by **GEORGE S. KELLEY**

The firm of Burgess, Kennedy & Fitzer, P.S. has changed its name to Burgess, Fitzer, Leighton & Phillips, P.S. They have also added **Timothy P. Malarchick** and **John L. Kugler** as associates. Former firm member **John F. Kennedy** is setting up his own practice and reportedly has rented the office heretofore occupied by **Charles Johnson**, who took a job in Olympia. You don't suppose that come next election John might file for some obscure judicial post? Does lightning ever strike twice?

**Donna L. Price** has joined the office of Gordon, Misner and Robinson in Gig Harbor. They stole her from the Kitsap County Prosecutor's office.

Small, Snell, Logue & Weiss, P.S. have added **David Snell** to their roster as an associate. Talbot, Orlandini & Waldron now employs **Christopher T. Mahre** as an associate.

Finally, the Pierce County Young Lawyers, who hosted a classy Christmas party at the Pacific Rim, elected **James R. Orlando** president; **Stephanie A. Arend**, president-elect; **Julie R. Weigand-Johnson**, secretary; **Andrea Cocklin**, treasurer; and **Mark J. Dynan**, **Daniel R. Absher** and **David B. Petrich** trustees.

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To register or request information, please contact the *Gonzaga Law Review* at (509) 328-4220, Ext. 3715. The registration fee of \$75 includes materials, catered lunch and opportunity to earn CLE credits.

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**Leona B. Menchey Livingston:** If anyone has any information about the execution of a prenuptial/antenuptial agreement entered into between Leona B. Livingston, formally known as Leona B. Menchey, and Lloyd D. Livingston, please contact: Joseph J. McGoran, Attorney at Law, 202 South 348th, 202 Professional Center, Federal Way, WA 98003. (206) 838-3710.

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