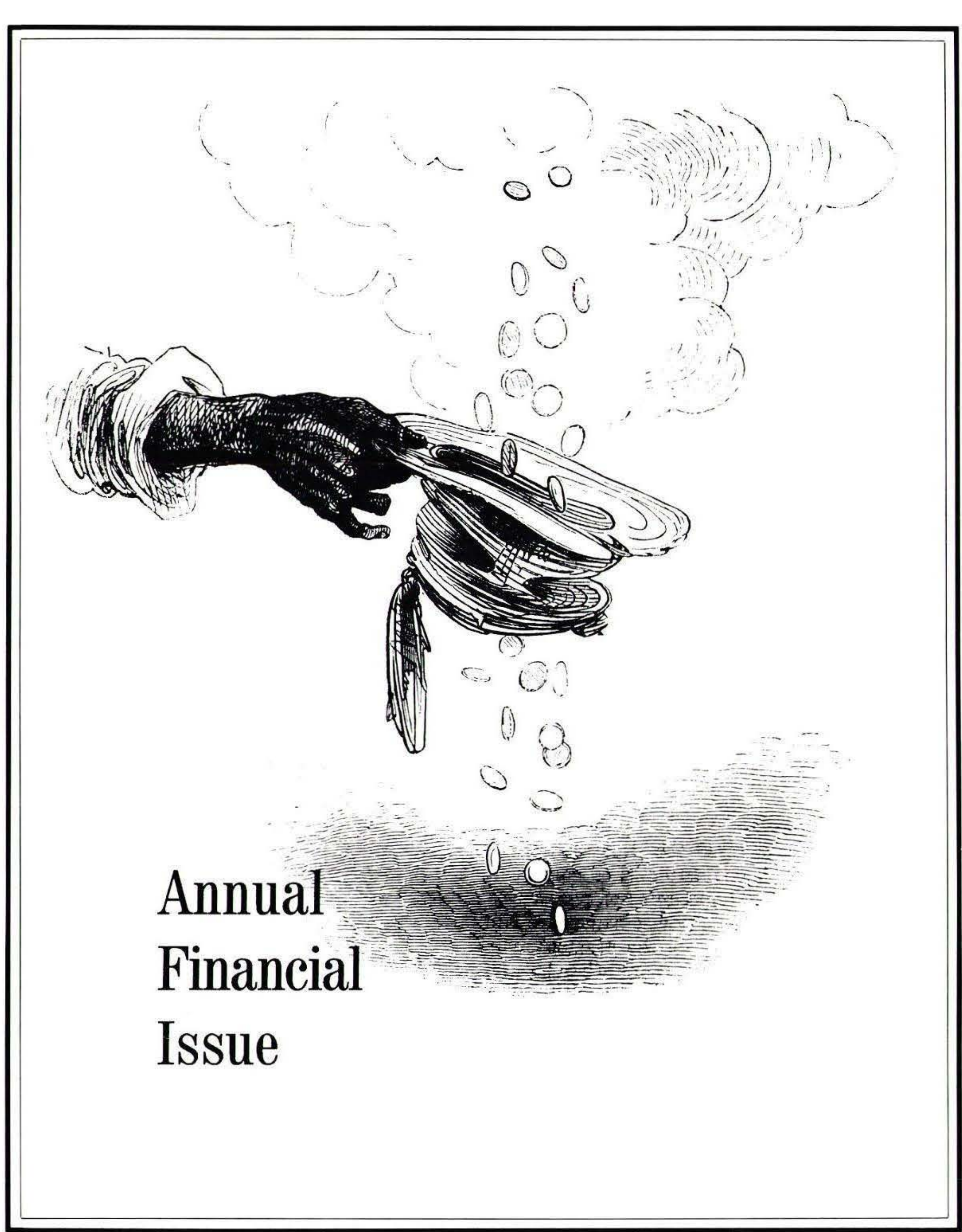
Washington State Bar News

Vol. 45, No. 6, June 1991



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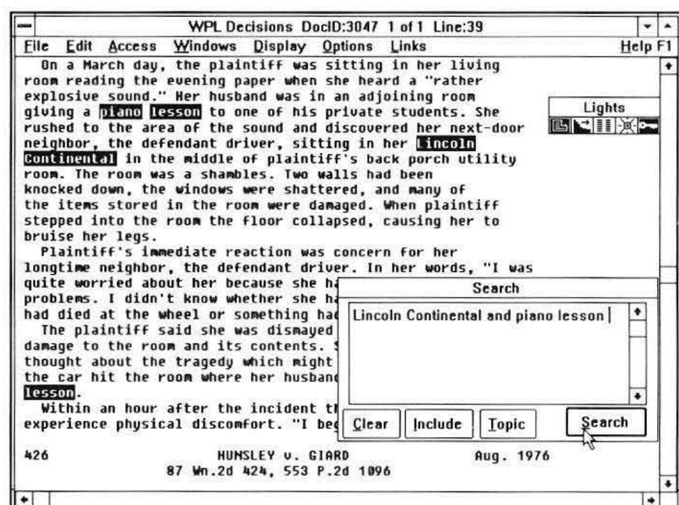

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Letters to the Editor of reasonable length are invited. Such letters should be typed and signed. The Editor reserves the right to select communications or excerpts therefrom for publication, and to edit any letter as may be appropriate.

Sorry, I Wasn't Listening

Editor:

Lawyers rarely have anything important to say. Consequently, finding enough worthwhile comments to fill your monthly Letters column must be a difficult task. Nonetheless, I am dismayed by your decision to print 23 column inches of Thomas Olmstead's bible-thumping drivel ("Letters," March 1991). Even "Dear Abby" has higher publication standards.

Relax, Mr. Olmstead. No camel capable of harboring an even remotely original thought would have the slightest interest in climbing into your tent; much less your bed.

DAVID STROUT
Seattle

Some Are Missing the Point

Editor:

I am writing in response to the various letters you have printed regarding AIDS. One might think, after reading the last letter written by Thomas S. Olmstead, that the best way to prevent AIDS is to become a Christian living in Bellevue. If only it were that simple. Rather than pointing a finger at the homosexual community and theorizing as to its "cause," we should be working together for a cure.

The long and the short of it is that AIDS kills. And if a cure is not found, then each of us will eventually be "punished" by AIDS through the death of a friend or loved one.

Give generously to AIDS research.

VIRGINIA BURDETTE
Seattle

Honesty Is Still the Best Policy

Editor:

I was pleasantly surprised to see that the *Washington State Bar News* printed Mr. Kydd's letter (Letters, *Bar News*, November 1990), which had a positive tone when discussing homosexuality. I was also glad to see that the *Washington State Bar News* printed Mr. Olmstead's provocative response to Mr. Kydd's letter. The letters demonstrate that there is a serious debate concerning homosexuality. More and more we see church elders and biblical scholars do not agree. Thus, how can we take a moral stand and come to a decision? I would like to suggest that we cannot. We cannot find this answer with either those who choose a literal or liberal reading of the Bible. The answer lies within each man's conscience and how he would be true to himself and to his God.

Like other issues which are not clearly drawn, I come to know my own conscience through discussion and meditation. I place myself in the other person's shoes and attempt to determine what brought me to this place. It is only through serious examination of a subject that I begin to understand it. Imagine a court deciding a case without hearing the facts. How can I do less? It is in the act of discussion, disagreement, and exchange that I grow to know my own mind. That is why I was pleased to print both opinions and honor the intelligence of its membership to learn from this discussion.

My personal opinion is that another person's sexual orientation (and by this I am speaking of an interest in consensual sexual relations between adults) should be accepted as they state it and not be a source of argument. It is a personal decision that should be made by that person involved with as much support and information as he or she needs to determine it. Some people appear to know their sexual orientation quite naturally, while others need more information, thought and self-reflection. Discussion in places such as the *Washington State Bar News* gives people a chance to get information and consider this issue.

I did not always believe this. I used to think that sexual orientation just "was" and should not be discussed. My current feelings on this subject have been greatly influenced by Rob Eichberg, Ph.D. Mr. Eichberg has a vision in which people, be they homosexual or heterosexual, deal with each other honestly. Honesty means that people stop protecting themselves and the people they love with lies and avoidance because the truth is too painful. Instead, they tell each other the truth.

For me, honesty has meant that I work to communicate with people, especially those I love, and bring them fully into my life. As a result of this I try now to recognize people because of their talent, their abilities to meet commitments, their visions, their openness, and their honesty. I have found that as I work to open myself to other people, the question of sexual

orientation has become a lot less important. I don't have the energy or desire to judge you on your sexuality. I'm too busy trying to open up and get to know you as you are. I'm a little drunk from all the good things that are happening because of this new attitude. Honesty is acting as a powerful liberating force for me.

Think about it. Who would you rather spend your work time with? Someone you know. Someone who shares the accomplishments of their [*sic.*] life with you, who accepts and is excited about your accomplishments and does not sit in judgment over you. Or would you rather work with someone who insists that only one way of doing a job and living is correct and will only respect that information which fits their [*sic.*] personal views? Or would you prefer to work with those people who share only that information needed to get some work out the door, persons who have cut their life into tiny boxes. There is a certain amount of security in the latter two choices. They can work. I just prefer the first.

If you're interested in knowing more about Rob Eichberg and the tools he teaches to help people open up and live more honestly, contact his Seattle office at (206) 783-5339, or you may want to buy his book, *Coming Out—An Act of Love*. In Seattle, Mr. Eichberg offers a self-development workshop called "The Experience" a couple of times a year. This self-development workshop is offered in a number of cities nationally. It is a weekend of meditation, personal discovery and sharing, a weekend I would not trade for anything else. Thank you for your kind attention and keep up the good work.

EDWARD B. RATCLIFFE
Washington, D.C.

In re: The QDRO Basics

Editor

Governmental and church plans are subject to the QDRO rules under Internal Revenue Code §414(p)(11). This section was added in the Revenue Reconciliation Act of 1989, §7841(a).

KAREN HAYNES-PALMQUIST
Seattle

News Item

A proposal by employees of the WSBA to unionize has been declined by the Bar Association administration. The organizing effort began when six employees announced a meeting to discuss the matter March 19. Sufficient interest was subsequently developed to invite the United Food and Commercial Workers to organize the staff.

In a prepared statement, the WSBA administration "has declined to voluntarily recognize a union, preferring to work directly with its staff. 'I don't want to set up a scenario of winners and losers,' executive director Dennis Harwick said. 'I prefer to work with the staff rather than a union to achieve my goal of a highly professional, efficient, service-oriented organization.'"

According to WSBA press releases and an April 16 *Seattle Times* report by Tim Healy, both the Association and the Union seem to agree that the WSBA is covered by neither the National Labor Relations Act or the state Public Employees Relations Commission. However, Joe Peterson, president of Local 1001 in Seattle, told the *Times*, "There's nothing to preclude them from becoming unionized, either."

According to the American Bar Association, the California State Bar is the only state bar association with union staff.

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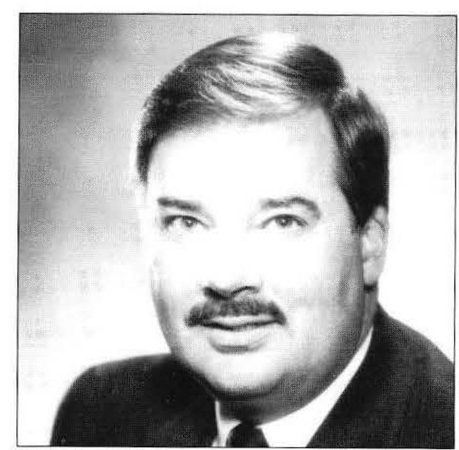
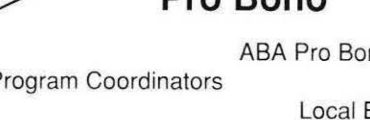
Access to Justice — A Common Thread or a Common Problem?



Dennis P. Harwick

In the "a picture is worth a thousand words" category, I have chosen to use a visual aid that was distributed at a recent meeting of the WSBA's Long-Range Planning Task Force. The topic—the Bar's role in providing access to justice. In what is both a testimonial to effort and an indictment to organization, here is the schematic for the legal professions efforts to provide access to justice to our civil legal system.

Current Landscape
Access to Justice Activities
Civil



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Lowell K. Halverson

Strait is the gate, and narrow is the way...

Today, in the mail, I received the WSBA Committee Preference Form, inviting me to reply to serve on a committee in the next year. Years ago, when the bar was about one-fourth its present size, I applied to serve on one of those committees and actually got appointed! I got onto the Office Practice Committee, ably chaired by Claude Pearson. I enjoyed both the collegiality and the opportunity to work with other lawyers. At the end of my first year I was, unaccountably, reappointed a second year. This service got me interested in state bar activities. Statistically speaking, I was lucky to get that appointment.

Fifteen years later, not much has changed. It's still easier to get into Harvard than to get appointed to a WSBA committee. The current committee preference form gives appropriate disclaimers:

> Although openings are limited, the Board would appreciate hearing from all interested WSBA members ... a small number of service opportunities exist on the WSBA committees.

Last year, this committee preference form was sent out to 13,658 practitioners. Fifteen hundred lawyers dutifully filled it out and got put onto a list, and then that list was circulated to the board, who burned up about 40 meeting hours making 209 appointments out of 1,256 committee memberships. Of those 209 appointments, 57 didn't count because they were made to the Special District Council or fee arbitration panels, which aren't really committees. In summary, only about 150 of the 1,500 lawyers who applied actually got appointed to a committee. Only the Washington State lottery gives worse odds than that.

This is partially explained by the fact that among the 28 committees, we only have an annual 17 percent turnover. There just aren't that many vacancies. I'm not the first lawyer to complain about this. I hope I will be among the last. Like many of you, I wrote our hardworking Long-Range Planning Task Force and asked them to think about the gridlock created in our committee selection process. Fifteen hundred lawyers applying for 150 positions is ridiculous.

Because our bar depends upon viable working committees for its own governance, and because the process is as important as the results, then the many lawyers who each year are turned down for committees become part of a growing frustration gap. They are being cut out of a process in which they want to be involved, and their numbers grow rapidly each year. Indeed, I have spoken to lawyers in the past several weeks who are about to retire and who have been trying to get onto committees for 15 years without success. Part of the gridlock is caused by the few positions available. Maybe that could be handled by dividing the governance of the bar into five or six large geographical areas. Maybe we should have "districts" with individual committees paralleling those at the state bar level, which could then serve as feeders toward the center.

But the problem also involves the fact that appointments are made, in part, on a "who you know" basis. Take a look at that committee selection process form. You are specifically prohibited from doing more than providing a "brief paragraph describing any special skills or background you have to offer." There is no place in the application to mention the diversity you could bring to a committee (gender, race, age, area of practice, etc.) during the board selection process, a form of frenzied feeding, in July-August of each year; the primary consideration comes down to "diversity based upon geographics and who you know." Last year, for example, substantial debate raged over whether certain Seattle area congressional districts were getting their precise proportionate representation on the committees. The voice for other forms of diversity simply did not get heard.

I would like to say that things have changed in the 14 years since I served on the board as the Seventh District Representative. But I can remember making similar committee appointments based solely within my congressional district. Then and now, your chances of getting appointed to a committee are directly proportional to how many governors you know, and how well.

I propose a more rational approach to this process. The board should have a standing commission on committee selections, which operates year-round and which receives more extensive resumés than are currently allowed. The pool of applicants should be interviewed for interest, ability, experience and certainly, diversity. The complexion of each committee should be measured by an objective standard to ensure that we are appointing the very best persons from among the many constituencies that are found within the bar. A model already exists. This year, for the first time, in designating a long range planning group, the board chose to name organizations which would then designate individuals to serve. As a result, we have a very diverse group of Long Rangers who bring a greater breadth and depth of views to the planning process than our board has ever encountered before.

If you want to be appointed to a committee under our current process, I

urge you to personally write to all the Governors you know and enclose a resumé and a photograph. Call them on the telephone and talk to them about your interests, your ideas and what you are going to do for that committee next year. You will improve your odds by at least 50 percent. Do it today.

Another complaint I've had about the governance of the bar concerns the representational nature of our sections. Sections are different from committees. They rely on volunteer efforts, but their interests are more substantively directed toward a particular field of law. They are semi-autonomous, relying on self-governance and internal oversight rather than management from the Board of Governors. They can put on their own CLE; they can elect their own leadership; and, with limitations, they can do their own legislative lobbying. Certain sections, however, tend to be dominated by the same individuals, who by virtue of experience, reputation in the area of practice, or administrative skills, continue to people the governing boards. Other sections tend to be dominated by what can only be called "The Seattle Crowd." The more arcane the area of practice, the more likely a Seattle contingent is to occupy the leadership positions. Maybe the sections should consider bylaws which will dissolve perpetual fiefdoms and make a place for new blood. Maybe these sections should consider bylaws which require that at least a significant percentage of the leadership positions be filled by persons outside Seattle. Maybe these sections should consider nominating committees which are instructed to place particular emphasis on diversity of membership (here, read race, sex, age, place of origin, etc.)

To most of you who applied this year to serve on a committee, let me give you the usual message: Thanks, but no thanks. There is no room at the inn, and if there were, you didn't know the right governor. Keep trying. Maybe someday...

Now if you're willing to put up with that message, let me offer you another proposition. Sign up for the Lawyer-to-Lawyer Committee. Like the Arbitration and Special District councils, this is not really a committee. But it is of measurable service to the bar if you sign up. Here is a chance for you to truly make a mark. We need experienced volunteers who can pass their skills and their values on to the next generation of lawyers. We need to close the generation gap. On May 24, about 300 new lawyers were admitted by reason of their passage of the winter bar exam. We need a pool of at least 400 lawyers who we can then pair up with these new admittees, and we need them by the third week of June. Will you help? If so, tear out the application form on page 36 of the April *Bar News.*

Lowell K. Halverson

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The Lawyer's Role in Business Ethics

by **John E. Impert**

Lawyers have always been the font of authority on laws and regulations. Today, in addition, lawyers are increasingly asked to make judgments on questions of business ethics, where the mooring to bodies of law may be tenuous at best. When serious questions of improper conduct arise, companies often call upon independent outside counsel to conduct an investigation and make recommendations. Counsel's recommendations generally encompass changes in company policies and procedures which would hopefully prevent similar occurrences in the future. These changes can affect not merely compliance with law, but the broad conduct of daily business.

While outside counsel's input on ethical business conduct can be far reaching, it is typically sporadic, as such investigations are fortunately a rare event in most companies. Inside counsel, however, must deal with all aspects of business conduct on a daily basis. Clients expect inside counsel to be familiar with the company's business plans and to provide legal advice neatly tailored to the business facts of the day. Legal, business, and ethical considerations are brought to bear upon the problem, and part of the lawyer's challenge is to make clear what aspect of his or her advice draws upon special legal expertise and what draws upon conscience or common sense. This article will describe how many large companies approach business ethics today and will amplify upon the various roles lawyers can be expected to play.

A minimal goal of any company is compliance with applicable laws and regulations. As the legal authority, inside lawyers must ensure that important legal strictures are understood throughout the company, and must follow up to see that they are observed in practice. This responsibility for compliance with laws unhappily tends to thrust upon the lawyer the role of policeman as well as that of counselor. The chief executive invariably describes the general counsel's primary role as that of "keeping me out of trouble." To retain the job, the general counsel must place the responsibility for compliance on a par with the task of counseling. Employees throughout the company know that making a full accounting of a possibly illegal action to an inside lawyer can result in the lawyer's not simply counseling on damage control, but also turning in the wrongdoer to the chief executive or board of directors. There is no way out of this dilemma other than to encourage clients to seek early counseling so that possible wrongdoing and subsequent reporting can be avoided from the start.

Today, the lawyer's traditional role as counselor, and inside counsel's additional role as policeman, are but the beginning of the lawyer's role in business ethics. Since allegations of corporate political contributions and international bribes in the middle 1970s, companies have been struggling to define and enforce standards of business conduct. Defense contractors and others working for the federal government have been additionally assailed in the 1980s with allegations of waste, fraud and abuse in the government contracting process. Efforts to respond to these charges, and to reform corporate self-governance so that new charges will be avoided in the future, have focused on corporate codes of conduct, training and education of employees, internal audits of employee attitudes and practices, and the institution of new functions such as an ombudsman or hotline to respond to employee concerns. Lawyers typically find themselves in the middle of each of these types of initiatives.

Codes of Conduct

Codes of conduct were originally published by many companies as little red booklets superficially similar to Chairman Mao's aphorisms which were waved about by Chinese students during the Cultural Revolution. Finding inspiration in whatever corporate policies already existed on conflicts of interest, antitrust compliance and the like, lawyers frequently wrote these booklets during the late 1970s and early 1980s in ten-commandment-like language intended to circumscribe employee behavior and provide the basis for swift punishment of transgressions. The ordinary employee was the enemy, with a focus on controlling his or her conduct. The theme was preventing bad behavior, and the favorite verb "prohibited." It is no wonder that many such booklets quickly wound up in the bottoms of desk drawers, available to be displayed during an audit of business conduct, but nearly useless as a means of inspiring behavior as leaders strive to do.

As the 1990s begin, there is an awareness that emphasizing prohibitions has not put an end to misconduct by corporate employees. To have a trustworthy employee, the employee must be trusted. Employees should be encouraged to raise questions about conduct that appears doubtful; more open communications, and dialogue between supervisors and those supervised, is seen as a better way to focus on possible misconduct and head it off at an early stage. To sensitize employees to questionable practices, the company's basic values must be constantly stressed. The resulting tension between such values and the questionable practice will hopefully lead to the dialogue which will result in the practice being examined and stopped.

New codes of conduct tend to be tied to the company's traditional values; for

example, to remain one of the world's foremost companies in their industry; to produce high quality products; to recognize and reward employee achievement; and to maintain the highest standards of integrity. The new code of conduct should be firmly anchored in the company's culture and values. It should provide the clearest possible guidelines as to proper conduct and encourage dialogue whenever ambiguous situations arise. Employees should be exhorted to talk to their manager, or to a business unit "ethics advisor," a senior manager with a particular interest and background in business conduct, or to call a company-wide ombudsman or hotline.

Lawyers have a key role to play in preparing such newer, more inspirational, codes of conduct. For one thing, lawyers may be the only occupational group in the company skilled in writing rules of behavior. For another, lawyers are trained in separating clear situations from ambiguous ones. The code of conduct should emphasize relatively clear cases, both for ease of understanding among employees, and to combat cynicism. If every situation is presented as ambiguous, many employees will retreat to an uneasy moral relativism and dismiss the whole venture. Lawyers more than any other occupational group are trained to highlight bright line cases to illustrate major points, yet to retain a capacity to recognize ambiguity and find less than perfect solutions when necessary in a less than perfect world.

Lawyers have a key role to play in...inspirational codes of conduct.

The content of codes of conduct should spring from the company's traditions and experience. Applying a well-written code from another company would rarely be credible. The standards of conduct of my own company, The Boeing Company, are in nine parts and include the following:

An overview of the Boeing business ethics program, requirements for training, and guidance on how to resolve business ethics questions and concerns;

Guidance on acceptable and unacceptable activities in marketing products and services to government and commercial customers, and procedures regarding the disclosure and use of proprietary information;

Guidelines about offering business courtesies or gratuities to commercial customers and to federal, state, local, and foreign government employees or representatives;

Procedures to assist employees in avoiding activities or personal interests that could influence their objectivity in performing company responsibilities;

Guidelines about receiving business courtesies and the circumstances under which they may be accepted or retained for personal use;

Guidance about appropriate conduct with suppliers or potential suppliers; prohibitions against soliciting, offering,

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Information on the prohibition of buying or selling stock or other securities of any firm while in possession of material, nonpublic information about that firm.

Many other areas could well be covered. Political contributions, antitrust compliance, and U.S. government audits and investigations are subjects which spring to mind. Areas of emphasis inevitably relate to past traumas the company has experienced, to closing the barn door after the horse has escaped. They also relate to the possibility of avoiding vicarious liability through company-wide policies and programs. The Anti-Kickback Act of 1986, 41 U.S.C. §51-58, which can impose vicarious liability unless the company has adopted procedures to prevent kickbacks on government contracts, and the Insider Trading and Securities Fraud Enforcement Act of 1988, 15 U.S.C. §78u-1, which can penalize a corporate employer if employees engage in insider trading, are the genesis for some sections of standards of conduct.

Education and Training

Lawyers must of course advise which federal and state laws mandate some policy response on the part of the company, and where--in the ethics policies or elsewhere--the company's program should be published. The increasing trend to penalize employers for misconduct of employees must be monitored.

It is unfortunate that Congress has determined to make other organizations than the body politic responsible for so many instances of individual misconduct in society. Respondeat superior, and other doctrines under which principals are liable for acts of agents, make sense where the employee acted or thought he or she was acting in the company's interest. Where there is congruence of interest between employer and employee, the employer will not find it hard to understand that employees should be trained and their actions monitored. However, where the employee acts solely in his or her own interest and contrary to the employer's interests, it becomes farfetched to make the employer liable.

An example of this latter excess is the Insider Trading and Securities Fraud Enforcement Act of 1988, which potentially penalizes all employers, not simply brokers and investment bankers, for insider trading by employees. When, for example, an employee purchases securities in a firm his employer is considering for acquisition, he drives up the stock of the target and potentially

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makes the acquisition more expensive for his employer. There is no community of interest, yet in its zeal to combat insider trading, Congress has made the employer potentially liable unless it has shown due diligence to deter insider trading. Industrial companies like aircraft manufacturers face enough challenges remaining competitive in a worldwide market without requiring the allocation of resources to train employees. This is something as far afield from daily business as insider trading.

When it is determined that training of employees is required, lawyers can assist in preparing or editing the course manuals, as well as in conducting training when the subject is sufficiently legally sensitive. To be effective, leadership in ethics programs must originate from top management to ensure that sufficient priority is given by employees. Lawyers will therefore rarely be the leaders in ethics initiatives and training, but may well be responsible to assist in implementation.

Internal Audits

While Congress has mandated certain areas of ethical concern, Congress can hardly be relied upon to set a company's ethical priorities. An effective but time consuming approach is to conduct an internal audit of compliance with laws and standards of conduct, a sort of self review. After identifying areas of concern, such as labor charging under government contracts, compliance with export controls, equal employment opportunity problems, or awareness and clarity of the company's standards of ethical business conduct, interviews of employees can be conducted on a random basis.

The focus of inquiries might be the adequacy of the company's existing policies and procedures, or specific acts and transactions that have been of concern to the employee being interviewed. Confidentiality may or may not be promised. To the extent the audit has a transactional focus, it is advisable to organize it on an attorney-client privilege basis and have some or all of the interviews conducted by lawyers. In any large organization, it is to be expected that some past transactions could raise questions of civil or even criminal liability. An effective attorney-client focus, where the company is the beneficiary of the attorney-client privilege, can both enable the investigators to conduct a better inquiry and protect the results of the investigation from unwanted disclosure. Several large law firms, particularly government contract firms in Washington, D.C., are specialized in organizing and conducting such broad based audits. The audit results and recommendations then provide the basis for changes in the company's policies and procedures and training programs. A four-year program of such audits throughout The Boeing Company—styled the Compliance Review Program—led to over 1,000 action items, most of which have now been implemented.

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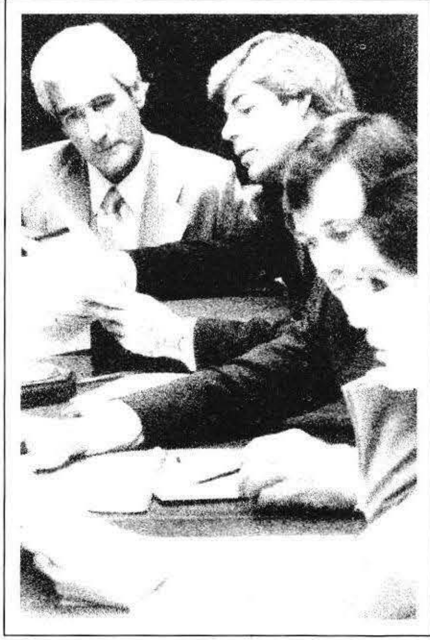

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open environment for communications from employees, and to encourage problems to "trickle up" to top management, some companies have established ombudsmen or hotlines. These are people, often reachable by an 800 telephone number, whose mission is to investigate problems raised by employees and to act as an employee advocate if a serious issue is found. As might be expected, many calls from employees amount to routine gripes; many employees believe it is "unethical" to treat them in a manner they perceive as unfair when their manager is simply doing his or her job in evaluating them and making distinctions based on performance. Answering a hotline thus demands exceptional patience and understanding, and few lawyers would volunteer for the job.

> ***In private practice, lawyers can sometimes provide pious but impractical advice...***

Lawyers, however, have a key role in investigating serious complaints uncovered by the ombudsman. An attorney-client relationship may again be advisable to protect the investigative results from unwanted disclosure to third parties, particularly the government. Once a professional investigation is completed, probably by the company's internal audit or security staff, a lawyer will be needed to summarize the findings and recommend appropriate action, ranging from internal remedial steps to voluntary disclosure of criminal activity to the government.

In private practice, lawyers can sometimes provide pious yet impractical advice, and then insulate themselves from the very real difficulties encountered by their client through the expedient of never inquiring what actually was done. Inside counsel have never enjoyed that luxury, since they cannot shut their doors to the client's response. In today's ethics climate, most companies are trying hard to stimulate and ensure right behavior by employees. From early penal-like codes of conduct, companies are moving to more value-driven written guidance. Although not expected to lead the company's resulting ethics program, lawyers are often asked to lead in its preparation and supervise its implementation. This represents a new opportunity for lawyers to exemplify right behavior in a much broader context than has been provided by traditional lawyers' advice. ☐

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Large Real Estate Credit May Become Even Harder to Find in Light of the New Appraisal Requirements Mandated by FIRREA

by **Joanne Robbins Hicken**

Title XI of the Financial Institutions Reform, Recovery and Enforcement Act of 1989 ("FIRREA") mandates two major reforms relating to appraisals of real estate in transactions involving financial institutions. 12 U.S.C.A. §3331 *et seq.* The first reform, which went into effect in August of 1990, is that the appraisal must be written and conform to specific uniform standards. 12 U.S.C.A. §3339. The second reform, which becomes effective in July of 1991, is that the appraisal must be prepared by an appraiser who is either licensed or certified by the state in accordance with specific uniform standards. 12 U.S.C.A. §3343.

These reforms will have a substantial impact on the real estate appraisal industry in Washington state. The demand for appraisals will increase as financial institutions strive to comply with the new law. The pool of qualified appraisers may be small because the reforms require them to pass a written examination which Washington did not even offer until April of 1991. As a result, both the length of time to obtain an appraisal and the price of appraisals will increase.

FIRREA is Directly Aimed at Banks, Savings Associations and Credit Unions

The overvaluation of real estate securing repayment of loans made by savings associations was one of the factors contributing to the recent crisis in that industry. One of the major causes of the overvaluation was fraudulent or poor-quality appraisals used or relied upon by savings associations. Congress adopted the Real Estate Appraisal Reform Amendments, Title XI of FIRREA (Title XI), in order to protect the public interest by imposing specific standards regarding appraisals and the people who prepare appraisals. 12 U.S.C.A. §3331.

The appraisal requirements generally apply to any appraisal prepared in relation to any real estate transaction engaged in by a financial institution including bank and thrift holding companies and their subsidiaries; national banks; federal savings associations; state banks and state savings associations insured by the Federal Deposit Insurance Corporation (FDIC); and credit unions regulated by the National Credit Union Administration. 12 U.S.C.A. §3339. A real estate transaction generally is any sale, lease, purchase, investment or exchange of real property or the financing of those transactions or any use of real property as security for a loan or investment. 12 U.S.C.A. §3350(5).

Appraisal Requirements

Title XI required the federal banking regulators to implement new regulations for appraisals by August 1990, and each of the federal regulators has adopted nearly identical regulations. The regulations adopted by the FDIC are referenced in this article. 12 C.F.R. §323 *et seq.*

When an appraisal conforming to the new standards is required. The FDIC regulations provide that all real estate transactions require an appraisal which complies with the new standards except for the following transactions:

- The loan amount or the value of real estate being purchased or sold is less than $50,000.
- The real estate is taken as security solely as an abundance of caution.
- The transaction involves a lease that is not the economic equivalent of a purchase or sale.
- The transaction involves a renewal of credit for which the borrower has performed satisfactorily, no new funds are advanced, the credit history of the borrower has not deteriorated and no obvious deterioration of the value of the real property has occurred.
- The acquisition of all or part of a loan or an interest in real property if an earlier appraisal of the related real property complied with the new appraisal requirements. 12 C.F.R. §323.3(a). Although the transactions listed above do not require an appraisal which meets the new standards, prudent banking practices and existing regulations may require a financial institution to obtain an appraisal of some type in those situations.

Appraisal by certified appraiser as opposed to a licensed appraiser. Title XI provides that the appraisals which must meet the new standards must be performed by either a certified or a licensed appraiser; a certified appraiser, however, is required for all transactions having a value in excess of one million dollars ($1,000,000) and for transactions involving one to four unit residential real estate of which the value or complexity requires a certified appraiser. 12 U.S.C.A. §3342. Title XI generally gives the federal banking regulators the authority to prescribe by regulation which type of appraiser is required in other circumstances. 12 U.S.C.A. §3342.

The FDIC regulations [12 C.F.R. §323.3(b)] provide that the following transactions require an appraisal which is prepared by a certified appraiser:

- All transactions having a value of $1,000,000 or more.
- Nonresidential transactions of $250,000 or more.

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• Complex one- to four-unit residential transactions of $250,000 or more. A transaction is complex if the property, its form of ownership or the market conditions relating to the property is atypical. (Atypical factors may include the age and size of improvements, the architectural style, the lot size, the neighborhood land use, potential environmental hazard liability or leasehold interests.)

In all other transactions which require an appraisal meeting the new standards, the appraisal must be prepared by either a certified appraiser or a licensed appraiser. The distinctions between a certified appraiser and a licensed appraiser are discussed in a later section of this article. The chart presented below summarizes the FDIC appraisal requirements.

SUMMARY OF FDIC APPRAISAL REQUIREMENTS

L = Licensed Appraiser
C = Certified Appraiser

Transaction value	Residential		Nonresidential
	Noncomplex	Complex	
Under $50,000	None	None	None
$50,000 to $250,000	L or C	L or C	L or C
$250,000 to $1,000,000	L or C	C	C
Over $1,000,000	C	C	C

Appraisal standards. The FDIC regulations, as required by Title XI, provide that appraisals which must conform to the new standards generally must meet the Uniform Standards of Professional Appraisal Practice (USPAP) adopted by the Appraisal Qualifications Board of the Appraisal Foundation. 12 C.F.R. §323.4(a)(1). The Appraisal Foundation is a nonprofit organization located in Washington, D.C. which was established in 1987 by several professional appraiser organizations in order to enhance the quality of professional appraisals. A copy of the current version of the USPAP is available for $25 from:

Appraisal Standards Board
Appraisal Foundation
Suite 900
1029 Vermont Avenue N.W.
Washington, D.C. 20005
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The USPAP includes professional ethics and competency standards for appraisers and substantive standards for appraisals. The substantive standards are numerous and detailed and relate to such issues as the appropriate presentation of value, analysis of comparables and disclosures required of the appraiser.

In addition to the standards found in the USPAP, the FDIC imposes other standards with which the written appraisals must comply. 12 C.F.R. §323.4. The FDIC standards are similar to the USPAP standards. A financial institution is free to impose additional standards for its appraisals if it deems that appropriate. 12 C.F.R. §323.4(c).

Appraiser Requirements

Title XI establishes a structure for the development of appraiser certification and licensing programs by each state. Title XI provides that as of July 1, 1991, all appraisals which must meet the new standards must be prepared by appraisers certified or licensed by a state in accordance with Title XI. 12 U.S.C.A. § 3348(a)(1). Title XI defines the terms "certified appraiser" and "licensed appraiser" to include those persons who have satisfied the respective requirements for certification or licensing by a state of which the criteria for certification and licensing

meets the minimum standards established by the appraiser Qualifications Board of the Appraisal Foundation. 12 U.S.C.A. §3345. These standards are available at no charge from the Appraisal Foundation.

• *Certification and licensing standards.* The present certification and licensing standards of the Appraisal Foundation may be summarized as follows.

(1) Certified appraiser. The Appraisal Foundation recognizes two levels of certification: residential certification and general certification. Both types of certification generally require 165 hours of approved coursework, two years of specific experience and a passing grade on a written examination which covers specific topics. Various distinctions exist between each of these standards for the two types of certification.

(2) Licensed appraiser. A licensed appraiser must have 75 hours of approved coursework, two years of specific experience and a passing grade on a written examination which covers specific topics.

• *States have an incentive to develop programs which comply with the standards set by the Appraisal Foundation.*

(1) Compliance is not mandatory. Title XI does not require any state to establish an appraiser certification or licensing program. The incentive for each state to develop and implement a certification and licensing system, however, is that, effective July 1, 1991, Title XI prohibits financial institutions from making most types of real estate loans unless they are able to hire properly certified or licensed appraisers to prepare the necessary appraisals. 12 U.S.C.A. §§ 3348 and 3349. If a financial institution fails to use a certified or licensed appraiser when it is required, it is subject to civil penalties of up to $5,000 per day during which the violation continues. 12 U.S.C.A. § 3349. Accordingly, credit secured by real estate may become unavailable in a state which does not have a licensing and certification system.

(2) Role of Appraisal Subcommittee. Some flexibility as to the July 1, 1991 date exists. Title XI established the Appraisal Subcommittee, a group composed of representatives of the federal banking regulators, to monitor the certification and licensing systems implemented by the states. 12 U.S.C.A. §3332. The Appraisal Subcommittee has the authority to extend the date to December 31, 1991 but only if it has made a written finding that the state seeking the extension has made substantial progress in establishing a certification and licensing system. 12 U.S.C.A. §3348(a)(2). The Appraisal Subcommittee also may waive certification or licensing standards for appraisers on a case-by-case basis if it determines that a scarcity of appraisers is leading to inordinate delays in the performance of appraisals. 12 U.S.C.A. §3348(b).

Washington State's Response

Certified Real Estate Appraiser Act. Washington state enacted a law regulating certified real estate appraisers shortly after the enactment of FIRREA. Certified Real Estate Appraiser Act, Ch. 18.140 RCW (the Act). The Act provides a method only for certification of real estate appraisers and does not refer to licensed appraisers. RCW 18.140.070. The Act delegates responsibility for the education, experience and examination requirements for state certification to the Director of the Department of Licensing (Department). RCW 18.140.080, .090 and .100.

The Department has proposed rules for the implementation of the Act. WSR 90-23-094, to be codified at WAC 308-125-010 *et seq.* (Rules). The Rules generally reflect the standards established by the Appraisal Foundation as required by Title XI.

• *Certification standards.* The Rules establish two types of certified appraisers, general and residential.

(1) Certified General Appraiser. The standards for a Certified General Appraiser are equivalent to the standards adopted by the Appraisal Foundation for certified appraisers. WAC 308-125-030. Those standards include 165 hours of education, two years of experience and a passing grade on an examination.

(2) Certified Residential Appraiser. The standards for a Certified

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Residential Appraiser are equivalent to the standards adopted by the Appraisal Foundation for licensed appraisers. WAC 308-125-040. Those standards include 75 hours of course work, two years of experience and a passing grade on a written examination.

• *Continuing education re-quirement.* All certified appraisers must complete twenty classroom hours of instruction in approved courses every two years. WAC 308-125-090.

Does Washington state's system comply with Title XI? How does it determine whether the Appraisal Subcommittee believes it complies?

• *Does Washington state's system comply?* The certification system developed in Washington state appears to present at least two potential problems: terminology and the location of the state agency.

(1) Terminology. The first potential problem is that the Act fails to utilize the terminology set forth by Title XI. Title XI refers to certified and licensed appraisers; Washington State recognizes only certified appraisers and certifies two types of certified appraisers.

This discrepancy probably is not a significant problem. A Washington state certified general appraiser is equivalent to a certified appraiser and a Washington state-certified residential appraiser is equivalent to a licensed appraiser. Accordingly, financial institutions in the state of Washington likely will be in compliance with Title XI and the federal regulations if they hire a certified general appraiser for all appraisals which must meet the new standards or if they hire a certified general appraiser when the applicable federal regulations require a certified appraiser and a certified residential appraiser when the applicable federal regulations require a licensed appraiser.

(2) Location of state agency. The second potential problem is the location of the agency responsible for the appraiser function in the state governmental structure. The legislative history of Title XI indicates that states should adopt an organizational structure for implementing their real estate appraiser functions that avoids potential conflicts of interest with real estate sales functions. House Committee on Government Operations, *Impact of Appraisal Problems in Real Estate Lending, Mortgage Insurance, and Investment in the Secondary Market,* H.R. Report, No.99-891, 99th Congress, 2nd Session (1986) at pages 43-44.

The Appraisal Subcommittee has issued guidelines advising states that the state agency responsible for appraisers should be totally independent from real estate sales activities; it should report to the governor or to a cabinet level officer who has no authority regarding the latter. The Appraisal Subcommittee believes that this structure would provide maximum insulation for the agency from any industry or organization whose members have a financial interest in the outcome of the agency's decisions. Federal Financial Institutions Examination Council, Appraisal Subcommittee, Notice of Guidelines, 55 Fed. Reg. 2409, Jan. 24, 1990, compiled at CCH *Federal Banking Law Reports* ¶ 87,916 (1989-1990 Transfer Binder).

In Washington state, the agency responsible for appraiser certification is a section within the Department of Licensing. RCW 18.140.030. The agency responsible for licensing real estate brokers and sales people is another section in the same Department. RCW 18.85.040. Each section, however, has its own separate administration (WAC 308-124-005) and is headed by a different individual. Accordingly, Washington state's system appears to adequately address the concerns of the Appraisal Subcommittee.

Even if the Appraisal Subcommittee were to criticize this structure, however, the extent of its authority to impose sanctions is not certain. Title XI does not prohibit or even mention the combining of appraiser licensing and real estate sales licensing in the same state agency. Title XI gives the Appraisal Subcommittee the responsibility for monitoring the certification and licensing procedures of the state to ensure compliance with Title XI and also provides that the Appraisal Subcommittee may adopt

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procedures to reject a state's practices. 12 U.S.C.A. §3347. Title XI, however, does not authorize the Appraisal Subcommittee to promulgate rules and regulations beyond the scope of Title XI. Accordingly, even if the Appraisal Subcommittee perceived a problem, it may have no authority to impose sanctions.

How does Washington State determine whether its system complies? Washington's certification system generally appears to meet the standards imposed by Title XI; however, no formal mechanism appears to exist to make this determination. The Department has requested a written opinion from the Appraisal Subcommittee that its certification system is in compliance; however, the Appraisal Subcommittee does not appear to have any formal obligation to issue such an opinion and the Department has not yet received a written response.

Title XI provides that the Appraisal Subcommittee shall monitor each state's certification and licensing procedures and must give written notice to the state of any intention not to recognize the state's certified or licensed appraisers. 12 U.S.C.A. §3347. Assume the Appraisal Subcommittee issued such a written notice to the Department; the Department then must have ample opportunity to correct the situation or to provide rebuttal information. 12 U.S.C.A. §3347. If the Department were to fail to convince the Appraisal Subcommittee, the latter may issue a written finding that the state's procedures are not acceptable. 12 U.S.C.A. §3347(c). Were Washington State to be the recipient of such a written finding, the appraisers certified by Washington state would not be eligible to prepare the appraisals which must meet the new standards imposed by Title XI. 12 U.S.C.A. §3348. To date, the Appraisal Subcommittee has not given notice to Washington State that any problem with its certification procedures exists.

Conclusion

Although FIRREA was directed primarily at financial institutions, its Title XI and the implementing regulations impose substantial changes regarding real estate appraisals and the appraisers who prepare them. Title XI forces the states to adopt mechanisms for the certification and licensing of appraisers. To the extent that any state fails to do so, residential, construction and permanent financing of real estate may abate in the state as financial institutions discover that they are unable to lend without an appraisal prepared by a certified or licensed appraiser. Throughout the country, real estate appraisals which meet the new standards will become more expensive and the length of time for their completion will increase. □

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Preventive Law: *An ounce of due diligence could save clients from taking a pounding*

by **Roger E. Dunn**

Due diligence exemplifies preventive law just as the well-adult physical symbolizes preventive medicine. But like the overweight man who puts off going to the doctor until he starts getting chest pains, many business people reserve such risk assessments only for their biggest potential traps.

While that might save money in the short term, the due-diligence investigation is overlooked as an inexpensive legal tool in helping reduce the risks in ordinary business affairs. It's the smaller traps that can nickel-and-dime a business to death, especially when times are tough.

"We know this already," many attorneys may be saying to themselves, "our clients pay us to keep them out of trouble."

That might be so, but the truth remains that businesses keep losing millions of dollars annually by trusting too much and verifying too little. Many still fail to look before they leap into new business entanglements or recruiting. Blind faith disregards the fact that independent verification can uncover dishonesty, incompetence and other dangers hiding behind images.

Business people don't often think of their lawyers as practitioners of prevention. This is, in part, because attorneys don't market services their clients haven't requested. But it's hard to imagine a client scoffing at an opportunity to spend a little in return for saving, potentially, a whole lot of exposure.

This is especially so today, when the need for risk assessment has never been greater. Fraud is a growth industry, preying on legions of trusting entrepreneurs increasingly blinded by the prospect of profit. Taking an incalculable toll, as well, are the suppliers and vendors who betray their customers through bankruptcy or reorganization.

Customers may not think to look for telltale symptoms until it's too late, *nor to ask a lawyer's opinion if it isn't offered.*

The due-diligence investigation involves a skilled analysis of a range of public records—compiled nationally, if need be, or even internationally. This document search may be coupled with an inquiry of private sources such as credit bureaus, and interviews with other knowledgeable parties. It may even include covert surveillance operations.

Accessing this kind of information enables lawyers to effectively counsel their clients on decisions ranging from supplier relationships and executive hirings to joint ventures and personal investments. Most lawyers who handle due diligence matters use investigators or train paralegals to know where to look, what to look for and how to analyze what's found. This information, in short, strengthens the attorney's role as a watchdog for his or her client.

Lynn Prunhuber, senior deputy in the Fraud Division of the King County prosecutor's office, noted that it is "fairly common" for bookkeepers who are accused of embezzlement to have prior offenses. However, "it does appear that a lot of people hired for bookkeeping or comptroller positions —and especially those who are hired through temporary services—are not checked out at all."

Ironically, when investigating criminal allegations, prosecutors review many of the same documents that had been available to the public before the crime occurred. "When we evaluate whether a person who may have committed an investment-type fraud has a similar pattern of behavior, we always look at the court records and see what civil suits that individual has been involved in," Prunhuber said.

Many businesses people don't realize that civil and criminal histories, licensing records, bankruptcies and liens, county records and other public documents often hold a treasure of insights into the strengths and weaknesses of both individuals and companies.

Similarly, in the absence of a lawyer's guidance, businesses frequently overlook the value of scrutinizing private records of job candidates or firms with which they do—or want to do—business. These include bank statements and tax records. Many clients don't realize that specifically focused permission letters and hold-harmless waivers can alleviate privacy concerns.

Are businesses diligent enough in job screening? Robert Half International Inc., personnel recruiters, announced a study which found padding in more than one in four resumés—while the Northwest University Lindquist-Endicott Report says 18 percent of employers don't verify work histories,

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and 21 percent don't verify education. Verifying bachelor's, master's and doctorate degrees is often as simple as calling the registrar's office.

Sometimes, of course, unless an individual is conditioned to think this way, it's hard to see a reason not to trust without verifying.

For instance, a Seattle recreation-goods store owner once offered to sell a prominent local businessman a big-ticket item—out of season—which ostensibly was on order. The businessman saw nothing unusual and paid a $3,500 advance. A quick check of King County Superior Court would have revealed why the owner was so aggressive and wanted the money in advance: he faced more than $200,000 in outstanding judgments from over a dozen lawsuits. In the end, the businessman received neither the item nor a refund.

In another instance, this same businessman recognized the value of investigating a Canadian developer who had proposed a multimillion-dollar joint venture even though the developers credentials appeared in order. A scouring of records and other sources by private investigators in Washington and Canada revealed why the developer seemed so financially strong. They uncovered a snake pit of intertwined companies with the same officers, who wrote promissory notes from one to another to inflate business worth. Little real collateral could be found.

While this setup might have been perfectly legal, the investigation revealed the joint venture to be too risky to join. The quantitative analysis thus represented the proverbial ounce of prevention. Some businesses, however, don't assess their risks and end up taking a pounding. Whether it is of their own making or not, businesses often fall into traps because no one was looking over their shoulder to warn them. □

The author is president of the Roger E. Dunn Company, an investigative consulting firm in Seattle. He is a former chief investigator in the Fraud Division of the King County prosecutor's office and an investigator in the Antitrust Division of the Washington State Attorney General's Office.

Managing Fiduciary Responsibility in Participant-Directed 401(k) Plans

by **Ellen Grant**

New regulations proposed by the Department of Labor on Section 404(c) of ERISA could significantly alter fiduciary responsibility in participant-directed 401(k) plans. The regulations provide guidance for plan sponsors and fiduciaries to limit their liability for poor investment performance in a 401(k) plan where investment choices are controlled by the individual participant.

There are a number of issues covered by the Department of Labor (DOL) 404(c) regulations that should be examined. These include: 1) providing investment choices, 2) frequency of investment switching opportunities and 3) information requirements.

Section 404(c) of ERISA sets out an exception to fiduciary responsibility: where the participant controls investments in a participant-directed plan, the sponsor and fiduciaries are not liable for investment losses that result from that exercise of control. [1]

Key to this exception is the element of "participant control" over investments. Under the new regulations participant control exists when participants are given:

1 Broad selection of investment vehicles
2. Quarterly switching options
3. Diversification within investment vehicles
4. Proper information for informed investment decisions [2]

The most controversial issues involve the investment choices that must be provided to participants and the frequency of investment switching from one investment to another. While raising less controversy in the discussion of the proposed 404(c) regulations, providing adequate information to plan participants is extremely important in the management of fiduciary responsibility. The purpose of this article is to examine the DOL's actions associated with 404(c) and to review the broader concepts of fiduciary responsibility contained within ERISA which can enable plan sponsors to shift the responsibility for investment performance from plan fiduciaries to plan participants themselves.

Contributions to 401(k) plans since 1981 exceed $282 billion according to the Department of Labor. More than 90% of the Fortune 500 companies have 401(k) plans. They are also becoming increasingly prevalent among smaller companies. As the size and number of plans has grown, fiduciary responsibility has become an increasingly important issue.

Plan asset management is described as "the area of greatest fiduciary risk, a highly technical area where small lapses can generate large losses for the fiduciary to shoulder."[3] Early efforts to improve accounting controls in the retirement plan area prompted J. Brian Hyland, Inspector General for the Department of Labor to say, "Today's S & L bailout may become tomorrow's ERISA nightmare." [4]

A participant-directed 401(k) plan allows employees to contribute pre-tax dollars to a group of investment options provided by the plan sponsor. The participant selects the investment options which best meets his individual objectives. Investment options might range from stock and bond funds to company stock and guaranteed investment contracts.

The explosive growth of participant-directed 401(k) plans and the significant fiduciary risk of plan sponsors could make this a costly problem for large and small companies alike. It is, therefore, not surprising that this clarification of 404(c) has been described as the Labor Department's "most important regulatory project affecting investment of defined contribution plans." [5]

Providing Investment Choices

Regulations originally proposed in 1987 contained specific requirements for fiduciary protection against investment losses in participant-directed plans. They required, among other things, sufficient investment choices to materially affect the potential risk and return on assets. They required that the choices pursue a variety of investment objectives. At a minimum, the choices were to include 1) capital preservation and income, 2) capital appreciation and 3) liquidity with a high degree safety. [6]

The revised proposed regulations are far more general.[7] Rather than requiring the three defined investment alternatives, the Department of Labor proposes that plan sponsors provide a range of diversified investment alternatives without specifying the investment objectives of these options. The options provided to the participants must materially affect the risk and reward of the participant's investment portfolio. At least three alternative investment vehicles are required.

The stated purpose of requiring a broad range of investments is as follows:

> ...to give a participant the ability to allocate his account among the three categories of investments, so as to minimize the risk presented by his portfolio at any given expected rate of return, while allowing maximum flexibility in plan design. [8]

The insurance industry has been accorded much of the responsibility for the elimination of specific objectives from the revised proposed regulations. The concern was that employers would have been required to offer a fund that competed with a Guaranteed Investment

Contract (GIC).[9] GICs issued by insurance companies have historically been a popular investment vehicle for participant-directed retirement plans. Participants currently allocate over 60 percent of their funds to GICs.[10]

Frequency of Investment Switching

Under the revised proposed regulations, the Department of Labor specified a quarterly switching opportunity to shift liability for investment performance to plan participants. Commentators expressed concern that quarterly switching was more frequent than commonly offered among existing plans and could increase administrative expenses. Nonetheless, the DOL felt that quarterly switching was a minimum to provide participants the opportunity to exercise control over their accounts. Switching frequency was to be judged in relation to investment volatility.

Some suggest that the new regulations merely give great flexibility to individually directed defined contribution plans, but impose a greater fiduciary burden on employers.[11] Viewed in the broader context of ERISA fiduciary responsibility principles, the new 404(c) proposed regulations can provide flexibility to plan participants and provide guidance to reduce the fiduciary burden on employers.[12]

Despite the elimination of specific standards that fiduciaries could satisfy to gain safe harbor protection from performance liability, there is important guidance within the new regulations. In a recent interview, David Ball, Assistant Secretary of Labor for the Pension and Welfare Benefits Administration, indicated that the Department of Labor's 1987 proposed 404(c) regulation should provide employers and the courts with some useful guidance.[13]

Information Requirements

While much attention has been given to the issue of investment options and switching frequency, the issue of participant access to information deserves careful examination. Access to information and the issue of control are inextricably connected. The 1991 proposed regulations continue to make affirmative decision-making an essential element of participant control. The regulations do not create an absolute obligation for plan sponsors to provide investment or market information to participants. The DOL does contend that "participants cannot exercise meaningful control over their investments unless they have access to information on the basis of which informed investment decisions can be made."[14]

This obligation continues beyond the initial investment. The DOL suggests that information broadly available to the public will be sufficient to satisfy the information requirement. The amount of information that must be made available to permit informed investment decisions by participants will likely be an issue raised with increasing frequency as the regulations are adopted and

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Communication with and education of the plan participant will become an increasingly important issue. While there is no obligation for the fiduciary to advise the participant, certain obligations are inherent in the requirement to provide an opportunity for participant control. In the final analysis, participants cannot exercise "control" over their own accounts without effective communication from the plan sponsor and a rudimentary understanding of the risks and rewards associated with plan investments. Providing plan participants with "broad selection" and quarterly switching options is meaningless without sufficient information to insure informed investment decisions.

At a minimum, the participant must understand the concepts of investment risk and reward. A plan fiduciary must provide both options and information to, in the words of the DOL, empower participants to materially affect potential returns while at the same time controlling risk through proper diversification among a broad range of investment options. [15]

Periodic participant seminars and market information are an advisable part of a basic 401(k) package. An ongoing gauge of effective participant communication and education will be the level of participation in the plan and diverse investment allocation. The days of the one or two choice 401(k) plans are numbered. The breadth of investment allocation will likely increase.

Once the key issues of investment choices, switching frequency and information requirements are considered, there is hope that the liability for investment performance can be shifted from plan sponsors and fiduciaries to plan participants. It is important to remember, however, that 404(c) is an exception to the rule. It relieves the plan fiduciary only from investment losses resulting from the participants' exercise of control over their own accounts. Section 404(c) does not relieve sponsors of their general fiduciary responsibilities associated with the prudent management of the plan.

Plan sponsors attempting to review their own plans for section 404(c) compliance should begin with a more generalized review of basic ERISA prudence standards. [16] In addition to the broader concepts of fiduciary responsibility contained within ERISA, DOL policy statements and common industry standards must be considered.

A number of issues can raise problems for plan fiduciaries. Among the most common are the selection process used for investment funds offered to participants, periodic performance evaluation, ongoing due diligence of the investment advisors to the plan.

Clear investment objectives must be developed by the investment committee. The selection process itself may open a plan sponsor to liability. Funds should be selected from a diverse group of investment alternatives and a diverse group of advisors. The poor selection

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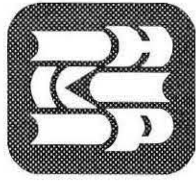

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of the types of funds or the specific managers can be problematic. The statute specifically requires that the trust assets must be sufficiently diversified to minimize the risk of large losses. [17]

Conflicts of interest in the fund manager selection process is another troublesome area. ERISA imposes a duty on plan trustees to act solely in the interests of participants. [18] A non-competitive selection of the pooled funds available at ABC Bank which provides cheap borrowing for the corporation may subject the plan sponsor to scrutiny.

Regular reviews of fund performance are an important safeguard against fiduciary liability. Periodic reviews should include comparisons to broad market indices and other funds of similar investment objectives. The plan fiduciaries have an affirmative obligation to independently investigate and evaluate the plan investment managers. [19] This practice can alert the plan sponsor to performance problems and allow fund management changes before poor performance gets out of hand.

The monitoring of fund performance should go beyond a review of performance numbers. Another area of potential liability involves the investment practices of the fund manager. It is possible for a fund manager to produce good numbers while using questionable investment practices. The consistent implementation of an investment philosophy is an important measure of a fund manager's effectiveness. Inconsistent, contradictory market strategies can flag a performance disaster waiting to happen.

Navigating the uncertain waters of ERISA and particularly 404(c) with its new regulations will demand increased reliance on knowledgeable investment advisors. From the initial drafting of the investment policy to the selection of appropriate investment vehicles; from investment advisor due diligence to performance monitoring; from the initial participant enrollment and beyond, communication and education will be key to avoiding plan sponsor fiduciary responsibility for investment performance in participant-directed 401(k) plans. □

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Footnotes

[1] *See* ERISA, §404, 29 U.S.C. §1104.

[2] *See* 56 Fed. Reg. 10724 (Mar. 13, 1991).

[3] *See* McArthur, "The Fiduciary Trap," *Corporate Cash Flow* (May, 1990).

[4] *See* Chernoff, "DOL Eyes Full Plan Audits," *Pensions and Investment Age* (Oct. 2, 1989).

[5] *See* Chernoff, "New Rule Increases Flexibility," *Pensions and Investments* (Dec. 24, 1990).

[6] *See* Proposed Regulation Regarding Participant Directed Individual Account Plans, 52 Fed. Reg. 33508, 33515 (1987).

[7] *See* Revised Proposed Regulations, 56 Fed. Reg. 10724, 10727 (Mar. 13, 1991).

[8] See 56 Fed. Reg. 10724, 10727 (Mar. 13, 1991).

[9] *See* Chernoff, "New Rule Increases Flexibility," *Pensions and Investments* (Dec. 24, 1990).

[10] *See* Miller/Rafter, "Long Awaited 404(c) Will Appear in a Watered-down Version," *Pension World* (Feb., 1991).

[10] *See* Chernoff, "New Rule Increases Flexibility," *Pensions and Investments* (Dec. 24, 1990).

[12] *See generally* ERISA, §404, 29 U.S.C. §1104.

[13] *See* Miller/Rafter, "Long Awaited 404(c) Will Appear in a Watered-down Version," *Pension World* (Feb., 1991).

[14] *See* 56 Fed. Reg. 10724, 10728 (Mar. 13, 1991).

[15] *See* 56 Fed. Reg. 10724, 10727 (Mar. 13, 1991).

[16] *See* ERISA §404, 29 U.S.C. §1104.

[17] *See* 56 Fed. Reg. 10724, 10728 (Mar. 13, 1991).

[18] *See* ERISA §404, 29 U.S.C. §1104.

[19] *See Whitfield v. Cohen*, 682 F.Supp. at 188 (S.D.N.Y. 1988).

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Customer Actions Against Commodities Brokers

by **Fredrick D. Huebner**

As the American economy has grown more volatile, investors seeking higher than average rates of return have engaged in trading commodities futures contracts and related options. The marketing of commodities futures to small investors has led to stricter regulation and an increase in the number of lawsuits brought by dissatisfied customers against commodities brokers. This article reviews the law and practice of disputes between customers and commodities brokers.[1] It examines the types of claims which may typically be brought against commodities brokers, the defenses to those claims, the alternate forums in which commodities disputes may be brought, and damages.

Basics of Commodities Futures Trading

A lawyer representing an aggrieved customer or commodities broker should have thorough understanding of commodities futures trading and the markets in which it takes place. A commodities futures contract is a bilateral executory agreement for the purchase and sale of a particular commodity. The seller commits himself to deliver the commodity at a fixed date in the future and the buyer undertakes to accept delivery at the agreed price. More than thirty commodities are traded on exchanges, ranging from hog bellies and frozen orange juice to wheat, platinum and treasury bill futures. Every aspect of the futures contract is standardized except price.

The seller of the futures contract is in the short position. The purchaser, who is committed to accept delivery of the commodity, is in the long position. Actual delivery takes place in less than one percent of contracts traded. Normally, the holders of the short and long positions liquidate their positions prior to the close of trading in the particular contract by purchasing an opposite contract for the same quantity of the same commodity, so that the obligations under the two contracts will offset each other. Money is made or lost in the price differential between the original contract and the offsetting position. If the futures price has declined, the short will make money. If the futures price has risen, the long will make money. Futures trading is a zero sum game. Every gain is matched with a corresponding loss.[2]

Commodities futures trading is speculation, but is not gambling. It serves two social functions. First, it increases the amount of information that actual consumers of the commodity have about future price trends by creating incentives for traders and their advisors to study and forecast demand and supply conditions in the commodity. Second, it enables the risk averse to hedge against future uncertainties. Thus, a manufacturer who uses platinum in known amounts can hedge against a rise in the price of platinum by buying a long futures contract for the time he will actually need to acquire the metal.[3]

The mechanics of commodities futures trading for a retail customer can best be described by illustration. Typically, an individual is either solicited by or contacts a registered representative of either an "introducing broker" or a "futures commission merchant." "IBs" and "FCMs" solicit and accept orders for commodities futures contracts, and are licensed by the Commodities Futures Trading Commissions (CFTC).

The FCM will require the customer to deposit a margin payment, typically ten to fifteen percent of the value of the contracts to be purchased or sold. The FCM delivers its customer orders to one of its "floor brokers" trading on a commodities exchange. Commodities futures contracts are traded by "open outcry," that is, the brokers stand on the outside of a "pit" with other brokers and traders. The brokers buy or sell by shouting and using hand signals. Observers on pulpits alongside the pit record the transactions and feed the information into a communication system. When the trade is made, the FCM informs the customer, typically by both confirmation statement and monthly account statement.

Actual execution of trades is handled through the clearinghouse associated with the exchange, which operates as a seller to all buyers and a buyer from all sellers. The clearinghouses require the FCM to "mark to market" the position they hold for customers at the close of each trading day.[4]

Customer Actions

It is more difficult to sue and recover for commodities trading losses than for securities investment losses. Commodities futures contracts and related options are not investments, they are speculations. Futures trading is inherently more risky, because of rapid price movements, than securities trading. Commodities accounts are much more leveraged than securities margin accounts. The courts, if not customers, are well aware that 90% of the people who speculate in commodities lose money. Consequently, they demand stringent proof of *fraud*, not just proof of *loss*.

Despite the risks inherent in commodities trading, fraud in

connection with the purchase or sale of commodities futures contracts and related options is actionable under the Commodities Exchange Act (CEA), various state statutes and the common law. CEA §4b (7 U.S.C. §6b) is the functional equivalent of §10(b), the anti-fraud provision of the Securities Exchange Act of 1934.

7 U.S.C. §25(a) creates a private right of action for violations of the CEA. Although the CEA preempts certain state laws with respect to regulation of commodities markets, it generally does *not* preempt state statutory and common law causes of action for conduct which might also violate the CEA.[5] The customer claims discussed below are typically brought against the individual registered representative, the introducing broker (if one is involved) and the futures commission merchant.[6]

1. Suitability.

A "suitability" claim is a form of breach of fiduciary duty claim which has been recognized in securities brokerage law. The claim has its origins in the "Know Your Customer" rules of the New York Stock Exchange and the National Association of Securities Dealers. Those rules require securities brokers to investigate their customers' financial circumstances and risk thresholds, and to refrain from recommending investment in securities which are not suited to the customer. In making a suitability claim, a customer alleges that a specific fiduciary relationship with a broker existed under which the broker had a duty to select only appropriate securities.

Attempts to sue commodities brokers on a suitability theory have generally failed. In *Phacelli v. Conticommodity Services, Inc.*,[7] the Commodities Futures Trading Commission (CFTC) has held that suitability complaints do not state a claim under CEA §4b. The CFTC reasoned that a customer who makes a knowing decision, based on the mandatory risk disclosure statement, to undertake the risks of commodities future trading cannot, in the absence of a misrepresentation or a special customer disability such as age, illness, or limited mental capacity,[8] recover losses by claiming that the broker should have warned him that he was unsuitable for the risk. The Ninth Circuit Court of Appeals and the Washington courts have not directly considered this issue, but judicial decisions from other courts generally follow the CFTC's position and reject suitability claims.[9]

The CFTC has preferred to deal with the suitability problem by the adoption of its Rule 1.55, which requires the distribution of risk disclosure statements to customers. The absence of a suitability claim, however, does not foreclose the possibility of recovering trading losses on the basis of a misrepresentation claim.

2. Misrepresentation.

A misrepresentation or material non-disclosure in connection with the sale of a commodities future or related product violates CEA §4b and may be the basis for a suit under CEA §25. In most commodities customer actions, the misrepresentation relates to trading strategy and the risk of loss in trading commodities.[10] Other cases have found liability on the basis of misrepresentations as to the broker's registration status, trading track record, the customer's ability to earn profits after paying high management fees, and the trading actions taken in the customer's account.[11]

The fact that the customer received a written risk disclosure statement does not preclude a misrepresentation claim. The courts recognize that verbal and face-to-face contacts are much more persuasive, and accordingly hold that verbal misrepresentations by a broker negate the risk disclosure statement.[12]

A customer may recover the losses incurred in trading that are proximately caused by a misrepresentation.

3. Churning.

Simply stated, churning is excessive trading by a broker in a customer's account for the purpose of generating commissions. Churning violates CEA §4b. A commodities churning claim has three elements:

(a) Broker control of the account;
(b) Excessive trading;
(c) Scienter, or the broker's fraudulent intent.[13]

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a. Broker control of the account. The control element is proved in one or two ways. First, if the account is formally discretionary, that is, if the customer has signed a written power of attorney authorizing the broker to trade the account, control is presumed. Second, the broker may exercise *de facto* control over a nondiscretionary account. The existence of *de facto* broker control is a question of fact. It is proved by showing at least some of the following elements:

(1) A lack of customer sophistication in commodities trading, and/or generally.
(2) A lack of prior commodity trading experience on the part of the customer and a minimum of time devoted by him to his account.
(3) A high degree of trust and confidence reposed in the broker by the customer.
(4) A large percentage of the customer's transactions entered into based upon recommendations of the broker.
(5) The absence of prior customer approval for transactions entered into on the customer's behalf.
(6) Customer approval of recommended transactions where approval is not based upon full, truthful and accurate information supplied by the broker.[14]

A finding of control does not require the presence of all six factors, and subsequently acquired sophistication in commodities does not preclude a finding of broker control.[15]

If a customer discusses each trade with the broker, authorizes the trade, or is physically present during trading, the broker does not possess *de facto* control over the account.[16]

b. Excessive Trading. Trading is excessive when it is done to benefit the broker rather than the customer. The CFTC and the courts have developed a variety of tests to determine whether trading is excessive. These tests fall in two categories.

The first category looks at the numeric trading data for the account, including:

(1) The ratio of total commissions to initial investment in the account;
(2) The monthly commission/equity ratio;
(3) The number of "day trades" and the percentage of all trades which are day trades;
(4) The average daily commissions;
(5) The percentage of available trading days when the account is in fact traded;
(6) The number of "round turn" trades.

The second category is based on principles of commodities trading strategy. These tests support a finding of churning when the broker:

(1) Departs from the agreed or promised trading strategy;
(2) Performs "in and out trading" in the same commodities, particularly when positions are closed and then reestablished at higher prices;
(3) Actively trades the account while it is undermargined;
(4) Actively trades the account while equity is dropping;
(5) Takes small profits while allowing "losses to run," i.e., not closing out losing trades;
(6) Does not put in stop loss orders which could justify in and out activity;
(7) Places seemingly random trades in dozens of different commodities.[17]

c. Scienter. As a general rule scienter need not be proved by independent evidence. It is inferred from the conduct of the broker. Once a plaintiff has established by objective measures that the trading in the account was excessive, the burden of proof shifts to the broker to demonstrate a justifiable, rational reason for the trading strategy.[18]

4. Fraudulent Trade Allocations.

Since many commodities accounts are managed by the broker, some brokers have developed a practice of placing "batch orders" and then distributing the futures contracts to customer accounts. While this practice is not *per se* illegal, it can be misused. For example, a broker who sees that a large batch order has become profitable may simply allocate the entire order to his or her

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own account. A broker may also trade ahead of a large batch order to make money when the large order moves the market, an improper practice known as "front-running."

A broker who wrongfully allocates or transfers trades among customer accounts violates CEA §4b.[19] Such conduct may also violate CEA §6c(a), which bars the execution of fictitious sales.[20] It may also constitute mail and wire fraud.[21] Fraudulent allocation may be proved by circumstantial evidence, such as a pattern of profits in the broker's account and losses in the customer's account.

5. Washington Consumer Protection Act (CPA) and Common Law Fraud Claims.

RCW 19.86.090 creates a civil cause of action for "unfair or deceptive acts or practices in the conduct of any trade or commerce." A person injured by such practices may sue for damages, treble damages up to a limit of $10,000, plus attorney fees.[22] From the plaintiff's point of view, establishing a CPA claim is necessary to recover attorney fees and costs since the CEA does not provide for attorney fees.

No Washington court has declared churning or fraudulent misrepresentations in the sale of commodities futures to be unfair or deceptive acts or practices. However, a court should conclude that they are.[23]

Although bringing common law fraud and misrepresentation claims may seem redundant, a plaintiff should bring them both for at least two reasons. First, the common law misrepresentation claim contains a lower standard of proof, in that only negligence need be shown in order to recover proximately caused damages. Second, a common law fraud claim is useful in the event that one or more of the defendants seek protection in bankruptcy. Generally, a bankruptcy court will treat a common law fraud judgment as nondischargeable under § 523 of the Bankruptcy Code.

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Alternative Forums for Resolving Customer Claims

1. Arbitration.

Commodities account agreements typically contain an arbitration clause requiring that any controversy arising out of or relating to the account be settled by arbitration, usually before the Arbitration Department of the National Futures Association. Normally such agreements, even if contained in the "boilerplate," are valid and enforceable under the Federal Arbitration Act.[24]

Because of concerns that such arbitration agreements be entered into voluntarily, the CFTC has enacted a rule, 17 CFR 180.3(b), which specifies the exact content and form of such agreements. If the arbitration clause does not comply with the CFTC regulations, it is void. *Felkner v. Dean Witter Reynolds, Inc.*, 800 F.2d 1466 (9th Cir. 1986). In *Felkner*, the Ninth Circuit Court of Appeals held that (1) the CFTC had the power to regulate the making of arbitration contracts in commodities agreements, and (2) agreements that did not comply with the CFTC rules were void, even as to claims that were based on legal theories other than the CEA. The *Felkner* case appears to be good law today, despite the Supreme Court decision in *Shearson/American Express, Inc. v. McMahon*, which upholds the use of arbitration clauses in stock broker account agreements. The distinction is that CFTC directly regulates the contents of commodities arbitration agreements, while the SEC does not have a similar content rule for securities arbitration agreements.

2. Reparation Proceedings.

CFTC "reparation" proceedings are also an available option that should be considered since the customer has the right to choose them even if they have signed an arbitration agreement. Reparation proceedings are authorized under CEA §14, and are conducted by CFTC administrative law judges. The ALJs "ride circuit" and conduct trials in most major cities, including Seattle. ALJ decisions may be appealed to the CFTC Commissioners, and enforced in federal court.

The major drawback to CFTC reparation proceedings is that they are limited to claims for violations of the CEA, which does not provide for attorney fees. CPA claims, for example, may not be brought in reparation proceedings.

Defenses to Customer Actions

A commodities brokerage defendant will normally assert the defenses of waiver, estoppel and ratification. "Estoppel" arises from words or conduct of one person on which a second person might reasonably rely, and does in fact rely. "Ratification" is the knowing acceptance and adoption of wrongful conduct. "Waiver" is the intentional relinquishment of a known right. All three concepts boil down to the notion that a person may not wait to see how a wrongfully induced investment turns out before deciding whether to sue. An investor may not "keep the winners and sue on the losers."

A commodities customer has a duty to review carefully daily and monthly statements for errors and unauthorized trades, and the customer's failure to object promptly to errors or unauthorized trades will be deemed a ratification.[25] On the other hand, a customer who is inexperienced in commodities trading will not be held to have ratified churning, since an

inexperienced customer will not know or be able to determine without help the appropriate level of trading for the account.[26] Similarly, ratification and estoppel will not be found where a customer makes reasonable efforts to express concern about the level of trading or unauthorized trading [27]

Damages

1. Compensatory Damages.

The normal measure of damages for churning in commodity cases is recovery of commissions paid plus interest.[28] Since churning is frequently accompanied by misrepresentations or other wrongful conduct, a defrauded customer in such cases may also recover trading losses proximately caused by the wrongful conduct. In essence, this means that the customer may recover the losses on trades induced by misrepresentation, unauthorized trades, and fraudulently allocated trades.

In securities cases, the Ninth Circuit Court of Appeals has held that a customer injured by churning and misrepresentations or suitability violations may recover *both* commissions and trading losses, even if the total amount of damages exceeds the customer's out-of-pocket loss. Thus, if a customer invested $40,000, had $30,000 in trading losses, and paid $30,000 in commissions, the total recoverable damages would be $60,000, even though the customer's total investment was $40,000.[29]

In commodities cases, however, the CFTC has imposed, in reparation proceedings, a limitation that a customer may not recover more than the total out-of-pocket loss. Thus, in the example above, the maximum that the customer could recover would be $40,000. The CFTC has adhered to this rule despite several challenges.[30]

It is unclear whether a court hearing a commodities case will apply the Ninth Circuit or the CFTC measure of damages. Logically, the Ninth Circuit position makes more sense. The commissions and losses borne by the account are damages for two different, although often related, kinds of frauds. The money which paid for losses and commissions came from the same source—the customer—and did not simply spring into existence. Finally, limiting damages to out-of-pocket loss means that the broker gets to keep the fruit of the fraud—the commissions.

2. Punitive Damages.

Washington courts will not award punitive damages, even in fraud cases, except as authorized by statute. Accordingly, the only Washington punitive damages statute available, the Washington Consumer Protection Act, would normally limit punitive damages to $10,000. However, some customer account agreements contain a choice of law clause naming another state which permits punitive damages.

A federal court sitting in Washington must, even if it decides that the foreign choice of law clause is valid, determine whether a *Washington* court would permit punitive damages to be awarded under foreign law. Washington courts award punitive damages under a choice of law clause naming another state only if the other state has the most significant interest in and relationship to the facts of the case.[31] Normally, the state with the "most significant relationship" is the state where the injured plaintiffs reside, and where the conduct complained of occurred.[32] □

Footnotes

[1] This article is limited to typical customer/broker problems. Litigation involving commodity pool operators and commodities trading advisors is beyond its scope.

[2] This discussion of commodities contracts is adapted from *Leist v. Simplot*, 638 F.2d 283, 286-88 (2nd Cir. 1980).

[3] *United States v. Dial*, 757 F.2d 163, 165 (7th Cir.), *cert. denied*, 474 U.S. 838, 106 S. Ct. 116 (1985).

[4] *Leist v. Simplot*, 638 F.2d 283, 287, (24 C.r. 1980)..

[5] *McCarthy v. Painewebber, Inc.*, 618 F. Supp. 933, 942 (N.D. Ill. 1985) (state CPA claim not preempted).

[6] The registered representative is licensed as an "associated person," and is the direct employee or agent of the entity for whom she solicits customers. The "introducing broker," typically a small brokerage firm, is a legal entity created by the 1982 amendments to the CEA. There are two types of IBs. A "guaranteed" IB is a firm whose financial responsibility is secured by an FCM. Nonguaranteed IBs are independent forms which must meet, on their own, the net capital requirements of the CFTC. 17 CFR §1.17; *Reed v. Sage Group, Inc.*, Comm. Fut. L. Rep. (CCH) ¶ 23,943 (CFTC 1987).

An FCM is liable, as a principal, for the fraudulent conduct of an IB whom it guarantees. *Reed, supra.* An FCM may or may not guarantee contract. Liability depends on whether the IB is deemed to be the FCM's agent under CEA §2(a)(1)(A), which provides for *respondeat superior* liability. The test for whether agency liability exists is whether the FCM/IB relationship extends beyond the customary clearing activities in which the FCM clears trades on a fully disclosed basis, provides "back-office" accounting and regulatory reporting services, and sends the customer account statements. *See Farmland Industries v. Frazier-Parrott Commodities*, 871 F.2d. 1402 (8th Cir. 1989) (directed verdict for FCM when

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no more than usual clearing broker services shown). If the FCM exerts substantive control over the IB, or retains rights to treat the IB as if the IB were its servant, the FCM will usually be liable. Substance is what counts, but even the creation of an appearance of agency may be enough. *Dohmen-Ramirez v. CFTC*, 837 F.2d 847, 858 (9th Cir. 1988).

In addition, the FCM may try to limit its relationship and duties to the customer by disclosing to the retail customer that it is a clearing FCM only and assumes no liability for the acts of the IB. Such restrictive provisions have been upheld. *Rothwell Cotton Co. v. Rosenthal & Co.*, 827 F.2d 246 (7th Cir. 1987).

[7] Comm. Fut. L. Rep. (CCH) ¶22,345 (CFTC 1984); *reversed*, Comm. Fut. L. Rep. (CCH) ¶23,250 (1986).

[8] Markham *Commodities Regulations: Fraud, Manipulation and Other Claims* §10.07 at 1021 (1990) (Hereafter "Markham").

[9] *See*, e.g., *Schofield v. First Commodity Corp.*, 793 F.2d 28, (1st Cir. 1986); *Sherry v. Diercks*, 29 Wn. App. 433, 628 P.2d 1336 (1981) (not considering whether suitability claim may be brought for commodities trading; deciding instead that no special fiduciary duty on facts present existed).

[10] *See*, e.g., *Levine v. Refco, Inc.*, Comm. Fut. L. Rep. (CCH) ¶24,488 (CFTC 1989) ("guarantee") of profits.)

[11] See, e.g., *Hunt v. National Monetary Fund, Inc.*, Comm. Fut. L. Rep. (CCH) ¶22,652 (CFTC 1985) (track record); *Clayton v. Ace American, Inc.*, Comm. Fut. L. Rep. (CCH) ¶ 22,120 (CFTC 1984) (misrepresentation that trailing stops had been placed in account).

Maloley v. R.J. O'Brien & Associates, Inc. Comm. Fut. L. Rep. (CCH) ¶ 24,162 (CFTC 1988) (reliance on broker's false representation as to his registration status is presumed); *Leal v. Prestige Capital Investments Corporation*, Comm. Fut. L. Rep. (CCH) ¶ 24,489 (CFTC 1989) (failure to disclose that some of broker's customers had heavy losses); *Weissman v. Bull Market Commodities, Inc.*, Comm. Fut. L. Rep. (CCH) ¶ 23,312 (CFTC 1986) (downplaying risks of investment loss in commodities trading is a misrepresentation).

[12] *Weissman*, Comm. Fut. L. Rep. (CCH) ¶ 23,312 (CFTC 1986); *Clayton Brokerage v. Commodity Futures Trading Commission*, 794 F. 2d 573 (11th Cir. 1986).

[13] Markham, §11.01 at 11-1.

[14] Markham, §11.05[2] at 11-13, citing *Smith v. Siegel Trading Co.*, Comm. Fut. L. Rep. (CCH) ¶ 21,105, at 24,454 (CFTC 1980); and *Ball v. Shearson Hayden Stone, Inc.*, Comm. Fut. L. Rep. (CCH) ¶ 21,184 at 24,874 (CFTC 1981). The test, ultimately, is whether the broker trades the account as though it were discretionary and whether the customer, under the circumstances and given the level of information supplied by the broker, could intelligently determine trading was excessive, and had the ability to say "no" to further trading. *Follansbee v. Davis, Skaggs & Co., Inc.*, 681 F.2d 673 (9th Cir. 1982).

[15] *Lehman v. Madda Trading Company*, Comm. Fut. L. Rep. (CCH) ¶ 22,417 (CFTC 1984); but *see Hill v. Bache Halsey Stuart Shields, Inc.*, 790 F.2d 817 (10th Cir. 1986) (holding that customer's subsequent trading activities were probative of customer's intentions and state of mind at time of the trading complained of.)

[16] *Rollins v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, Comm. Fut. L. Rep. (CCH) ¶ 22,101 (CFTC 1984); *Ball*, Comm. Fut. L. Rep. (CCH) ¶ 22,184 (CFTC 1981); *Matso v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, Comm. Fut. L. Rep. (CCH) ¶ 22,312 (CFTC 1984). However, if the broker uses batch orders, or allocates trades among accounts, that is prima facie proof of broker control. *Walton v. Heinhold Commodities*, Comm. Fut. L. Rep. (CCH) ¶ 24,162 (CFTC 1988).

[17] Markham, §11.05[3] and cases cited therein; *Fields v. Cayman Associates, Ltd.*, Comm. Fut. L. Rep. (CCH) ¶ 22,688 (CFTC 1985). Of all the factors, the commission/equity ratio is most important. Failure to plead the ratio may lead to a Rule 9(b) dismissal. *Khalid Bin Alwaleed Foundation v. E.F. Hutton & Co., Inc.*, 709 F. Supp. 815 (N.D. Ill. 1989).

[18] *Parciasepe v. Shearson Hayden Stone, Inc.*, Comm. Fut. L. Rep. (CCH) ¶ 22,464 (CFTC 1985).

[19] *In re Lincolnwood Commodities, Inc., of California*, Comm. Fut. L. Rep. (CCH) ¶ 21,986 (CFTC 1984).

[20] *Merrill Lynch Futures, Inc., v. Kelly*, 585 F. Supp. 1245, 1251 n.3 (S.D.N.Y. 1984).

[21] *United States v. Dial*, 757 F.2d 163 (7th Cir.), *cert. denied*, 474 U.S. 838, 106 S. Ct. 116 (1985) (front running).

[22] A plaintiff must prove five elements to recover under the CPA. These are:

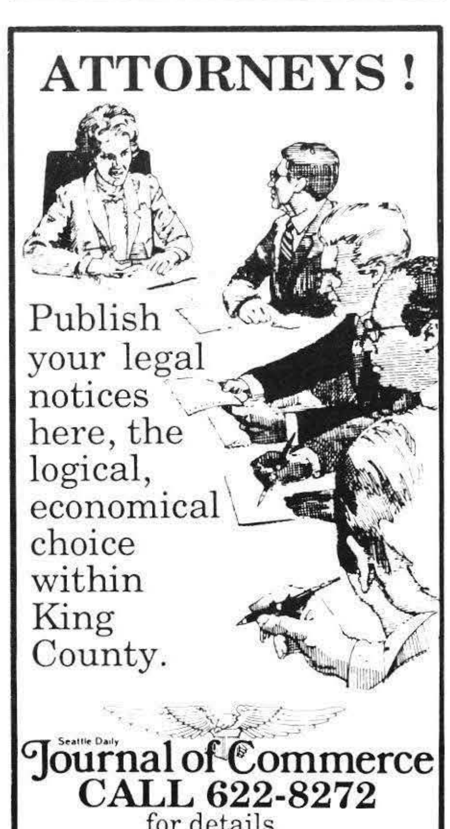
"(1) An unfair or deceptive act or practice;

(2) In the conduct of trade or commerce;

(3) Which impacts in the public interest;

(4) Injury to the plaintiffs in their business or property; and

(5) A causal link between the unfair or deceptive act and the injury suffered." *Mason v. Mortgage America, Inc.*, 114 Wn.2d 842, 852, 792 P.2d 142 (1990), citing *Hangman Ridge Training Stables, Inc., v. Safeco Title Insurance Co.*, 105



Wn.2d 778, 719 .2d 531 (1986).

[23] Securities churning is recognized as a scheme to defraud by WAC §460-20-010. Misrepresentations in the sale of a security have been held to violate the Washington Consumer Protection Act. *Reeves v. Teuscher*, 881 F.2d 1495 (9th Cir. 1989). Finally, courts in Illinois have held that its similar consumer protection statute applies to commodities violations. *Heinold Commodities, Inc. v. McCarty*, 513 F. Supp. 311 (N.D. Ill. 1979).

[24] 9 USC §3. *See also Shearson/-American Express, Inc. v. McMahon*, 482 U.S. 220, 107 S. Ct. 2332 (1987).

[25] *Stevens v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, Comm. Fut. L. Rep. (CCH) ¶ 21, 839 (CFTC 1983).

[26] *Hecht v. Harris Upham & Co.*, 283 F. Supp. 417 (N.D. Cal. 1968), *as modified*, 430 F.2d 1202 (9th Cir. 1970).

[27] *Peterson v. Henley*, Comm. Fut. L. Rep. (CCH) ¶ 23,494 (CFTC 1987).

[28] *Lehman v. Madda Trading Company*, Comm. Fut. L. Rep. (CCH) ¶ 22,417 (CFTC 1984).

[29] *Hatrock v. Edward D. Jones Co.*, 750 F.2d 767 (9th Cir. 1984); *Nesbit v. McNeil*, 896 F.2d 380 (9th Cir. 1990).

[30] *Lehman*, Com. Fut. L. Rep. (CCH) ¶ 22,417 (CFTC 1984); *Reinhard v. Ace American, Inc.*, Comm. Fut. L. Rep. (CCH) ¶ 24,375 (CFTC 1988).

[31] *Kammerer v. Western Gear Corp.*, 96 Wn. 2d. 416, 635 P.2d 708 (1981); *Barr v. Interbay Citizens Bank*, 96 Wn.2d 692, 649 P.2d 827 (1981).

[32] *Barr*, 96 Wn.2d at 699 n.30.

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Notice of Deadline for Filing WSBA RESOLUTIONS

Pursuant to Article VII, Section 5 of the WSBA Bylaws, any ten (10) active members of the Washington State Bar Association may present a written resolution to the Board of Governors for consideration at the Washington State Bar Association's Annual Business Meeting. **The WSBA Annual Meeting will be held on Friday, September 6, 1991, beginning at 9 a.m. at the Washington State Convention Center, 800 Convention Place, Seattle.** Resolutions must be filed with the Board of Governors at least twenty (20) days before the Annual Meeting and must be accompanied by a written report explaining the resolution. The resolution and explanatory report together shall not exceed a total of one thousand (1,000) words.

Resolutions are to be filed with the executive director of the Washington State Bar Association at 500 Westin Building, 2001 Sixth Avenue, Seattle, WA 98121-2599. **The deadline for filing resolutions and explanatory reports this year is 5 p.m. on August 16, 1991.**

The Board of Governors shall refer any resolution within the purposes of the Association (as set forth in Article I of the WSBA Bylaws) to the WSBA Resolutions Committee.

The Resolutions Committee will hold ***public hearings*** to consider the views of the proponents and opponents of resolutions on *Thursday, August 29, 1991* beginning at 9:30 a.m. and on *Thursday, September 5, 1991* beginning at 9:30 a.m. Both hearings will be held at the offices of the WSBA, 500 Westin Building, 2001 Sixth Avenue, in Seattle.

Proponents and opponents of resolutions are urged to attend the first hearing on August 29, 1991 or to present their views in written form for consideration by the Committee. At the September 5, 1991 hearing, preference in presenting views will be given to those with viewpoints which were not expressed at the earlier session.

If you want a proposed resolution published in the *Bar News*, it must be received by the executive director at least sixty (60) days prior to the Annual Meeting (on or before July 8, 1991).

The members of the WSBA Resolutions Committee are:
Ted D. Zylstra, Chair, Hugh K. Birgenheier, Scott A. Collier, Jack R. Dean, Gary D. Gayton, Paul C. Gibbs, Harry H. Goldman, Gary L. Hemingway, James T. Johnson, Edward N. Lange, Frederick W. Lieb, Gregory H. Pratt, Edward F. Shea, and Phillip L. Thom.

THE BOARD'S WORK

by **Lindsay Thompson**

Spokane, Washington, May 17-18, 1991

Present: President Halverson, president-elect Joe Delay, and all the governors save governors Gould and Hester, who were absent on other business. Governor Alva Long was absent on other business May 18. Also present: Don Brockett (Prosecuting Attorneys' Assn.); Harold Clarke (WSBA/YLD); Sheryl Garland (Washington Women Lawyers); Dennis P. Harwick (WSBA Executive Director); Frank Johnson (Legal Foundation of Washington); Mike Larson (SKCBA/YLD); Judge Dan Phillips (Magistrates/District Court Judges' Assn.); Judge Richard Pitt (Superior Court Judges' Assn.); Geoff Revelle (SKCBA Trustees); Lee Ripley (WSBA Disciplinary Counsel); Lindsay Thompson (*Bar News* Editor); Judge Philip Thompson (Court of Appeals); Morton Tytler (Government Lawyers Assn.); and Robert Welden (WSBA General Counsel).

An overcast weekend in Spokane greeted both the Board and those come to town for the Lilac Festival. A high school marching band filled most of the hotel, and practiced for the parade in the parking lot outside the Board's meeting room. At intervals this gave remarks in the meeting a background soundtrack of patriotic tunes; at other, less coordinated times it sounded like a performance of the Fourth of July movement from Ives' Three Places in New England.

The Board met in executive session to deal mainly with disciplinary matters. In open session the President hefted another two large volumes of correspondence he'd received since last month and talked about meetings he'd attended.

It Sure Helps to Have A Reliable Source: Executive director Dennis Harwick kicked off his report by repeating a remark one of the governors had made in executive session. Noting the president's enthusiasm for his job, that governor had observed, "Lowell is the president with more solutions than there are problems." Handed a line like that, this writer had to use it.

That out of the way, Harwick said he was continuing the spring bar exam tour, visiting the state's law schools and telling final-year students what their summer will be like. Work continues on the '91-'92 budget, and the hotel where the 1995 convention won't be held has been notified. Harwick said when he told them, there was a long, stricken silence. Shouldn't have been, Governor Alva Long observed. One of his ex-wives lives there, he said, and had seen to getting it into the local paper. Harwick also proposed a formal policy for making WSBA mailing labels available to commercial vendors of law-related products, a matter that was taken under consideration by the Board.

And They're Off: The filing period closed for Board of Governors candidates. Running for Jeff Tolman's First Congressional District Seat are Wayne Blair and Sally Carpenter. In the Fifth Congressional District, Paul Bastine and Joe Nappi, Jr. seek the seat now held by Governor Don Curran. And Ron Gould's King County at Large seat is being sought by Judith Eiler and Mike Larson.

Their Object So Sublime, Etc.: Discipline continues to be a large item on the Board's agenda. Friday morning, there was a report from the Board's Disciplinary Subcommittee on a recent meeting with the Supreme Court to discuss issues of common interest in the attorney disciplinary process. There is interest among some members of the Court in requiring the Bar Association to follow California's lead and hire administrative law-type judges to handle disciplinary matters to ensure they are handled according to the guidelines set out recently in In re Curran 115 Wn.2d 747, 801 P.2d 992 (1991) and In re Johnson, 114 Wn.2d 737, 790 P.2d 1227 (1990). The cost of such a plan would be significant, and members of the Board felt that the interest of some justices in the idea reflected an insufficient appreciation of the way the current system works, particularly in light of the Board's improvements in the system over the past 18 months. There was discussion of having a "school" once a year for special district counsel and lawyers who represent accused or suspended lawyers, to polish up skills and keep people advised of developments. There was also discussion of a proposal to have an annual meeting with the court to review the system and how it works. Governor Tom Chambers thought that a very good idea. "Why do they need to speak to us solely through formal opinions?" he asked, and moved to set up such a meeting for later in the year.

Discussion followed. Governor Lem Howell said the Board was caught between the Supreme Court and the Disciplinary Board, which actually runs the disciplinary process. When the Court is unhappy, they talk to the Board often, but the Board often can't necessarily tell the Disciplinary Board what to do. Part of the issue arises from the Court's increasingly vocal preference that disciplinary proceedings follow ABA model rules for discipline, and the Disciplinary Board's disagreement with some elements of those rules.

Governor Steve Tubbs expressed concern that the Board was rushing off to set up a big meeting without running the plan through a budget analysis first. Curran withdrew his second so the fiscal impact of such meetings could be studied, but Governor John Schultz said he thought all the resolution called for was to set up a date for a meeting, and that wouldn't cost anything. He seconded Chambers' motion, which then passed 7-1, Governor Lem Howell opposed (noting for the record that he did so on fiscal grounds alone).

Check Your Math: WSBA Disciplinary Counsel Lee Ripley told the Board the new rule requiring banks to notify the Association of trust account overdrafts had triggered twenty more notices since last month, for a total of 62 since it went into effect in March. Of the 62 cases, 52 were found to be due to bank errors and other minor mistakes and were resolved without further proceedings.

Peter Pan, Meet the Young Lawyers Division: Being a YLD Board member is such fun that some want to hang around after aging out of Young Lawyerness entirely. That was the genesis of a YLD proposal to create a YLD Fellows Program. Former YLD president Harold Clarke presented the Board with bylaws amendments to establish to program. Under it, YLD board members and trustees would be automatically invited to become a Fellow upon leaving office. They would have their own board, would get *De Novo*—the YLD newspaper—and would contribute their experience and advice when called to do so.

"But when do you age out?" wondered Governor John Schultz. There was no age limit in the Fellows' bylaws provisions, conjuring images of the Canadian Senate, the mainland members of the Taiwanese parliament, or the British House of Lords. Over time, Fellows will lose contact with their recent contemporaries still on the YLD board, Clarke said, so they will likely move on to other things. Or, one supposes, consoled by the knowledge that the friends they left behind will soon be Fellows too, hang on forever.

Governor Lem Howell thought the proposal would create an elite within the Bar Association, but Clarke said it was just creating another niche for people to stay active in Bar Association affairs. But other governors noted that it all seemed harmless enough, and the YLD could manage its own affairs. The proposal was approved 5-2-1, Governors Tubbs and Chambers opposed and Howell abstaining.

More Disciplinary Matters: Governor Don Curran presented the Board with a menu of policy choices on issues they've considered recently, developed by the Board's Disciplinary Subcommittee and WSBA Disciplinary Counsel. Here's the lot, and what they did about each of them:

• Recommendation: the Board should adopt a policy of case by case consideration of whether to investigate and prosecute additional acts of misconduct against a vanished lawyer who has already been suspended for failure to comply with CLE requirements and payment of dues, giving due weight to the overall disciplinary caseload, resources and the like. Approved, 6-0-1, Curran not voting and Tubbs abstaining.

• On the same case by case review standard, disciplinary counsel should investigate and prosecute lawyers accused of unethical and possibly criminal conduct (not involving misconduct representing a threat of harm to the public, thus precluding attorney suspension under RLD 3.2, when a prosecuting attorney has the matter under investigation). Approved, 5-0, Curran and Long not voting.

• The WSBA should conduct an annual school in Seattle and Spokane to educate Hearing Panel Officers on their duties and responsibilities conducted by an independent person with input from the WSBA disciplinary counsel and attorneys experienced in representing accused lawyers. After some discussion about the fiscal impact of this idea, it was approved, 6-0, Curran not voting.

• The chairman of the Disciplinary Board should personally contact potential hearing officers to determine their availability and potential conflicts of interest, if any, in order to expedite matters. Approved, 5-1, Howell opposed and Curran not voting.

Keller Rebates! Sounds Like An Appliance Sale, But It's Not: The Board adopted a policy for handling rebates of Bar Association dues for political activity of the WSBA. Modeled on the plan of the Florida bar, the policy requires the Board to publish legislative positions it takes in the *Bar News*. Members will have 45 days from publication to object to any of them as nongermane under Keller. After review by the Board, an objection, if upheld, will be referred to the executive director for determination of the rebate amount. Governor Tom Chambers thought his alternate plan, proposed last month, was simpler, but the Board unanimously adopted the staff proposal.

Oh, And Don't Forget the Balanced Budget Amendment: Governor Don Curran gave the Board a memo proposing a survey of past WSBA presidents, past and present board members, senior WSBA staff and sections, divisions and committees on whether, and how, the WSBA bylaws should be amended. He included some possible topics for a review committee to consider: membership classifications, creating the president-elect as a formal officer of the WSBA, Chief Justice Dore's suggestion that the WSBA president serve a
term, popular election of the WSBA president, and addition and deletion of standing committees.

Governor John Schultz said he now understood why politicians dislike the idea of convening a constitutional convention. "Some of the things on this list are frightening," he told the Board. "I'd rather have no change than do this." The Board approved the plan, 4-2-1, with Chambers and Schultz opposed and one abstention.

Saturday the Board tackled a complex series of issues relating to ethics. First came a proposed ethics opinion relating to whether attorneys have an obligation to tell the IRS everything it wants to know in Form 8300, which requires reporting cash transactions over $10,000. Rules of Professional Conduct Committee chair Ellen Dial told the Board her committee and UPS law professor David Engdahl had studied the matter at length and determined that lawyers must file Form 8300, but may not disclose client secrets in doing so unless the client consents or a court orders the disclosure. The IRS may, if it chooses, then bring the lawyer before a federal court for a hearing on whether the lawyer may disclose the information.

The U.S. Attorney's Office submitted an eleven-page reply letter just before the meeting. Dial presented it and a shorter response by Professor Engdahl, saying the U.S. Attorney's letter presented nothing new, not already considered and addressed by the committee.

Governor Lem Howell moved to approve the opinion. Government Lawyers Association representative Morton

Tytler criticized it, saying it was an unethical opinion. "It tells me and the world that it is ethical to take dirty money, but not ethical to tell where it came from". He said the RPC Committee was just parsing the language of the rules and statutes: "You should tell lawyers they can't accept money on the basis that its source be kept secret". Governor John Schultz agreed, calling the matter a clear case of federal preemption.

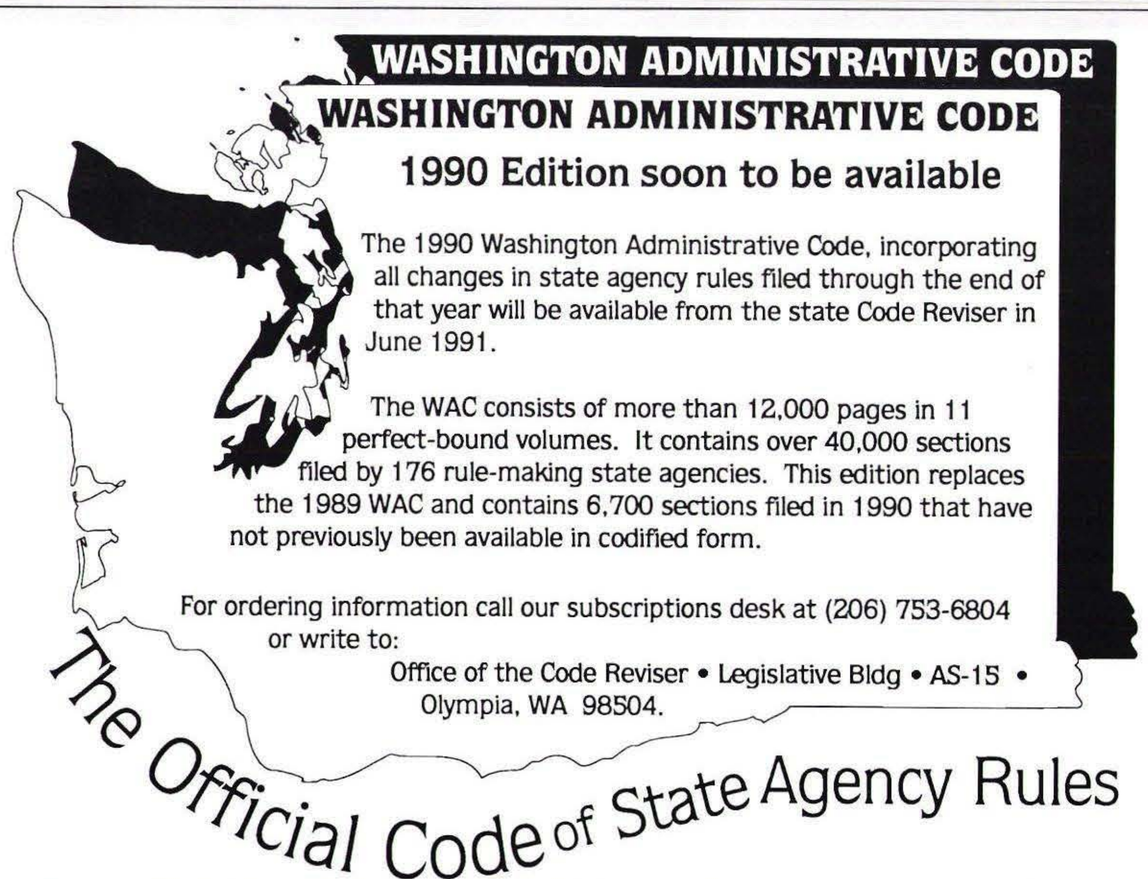
But Governor Lem Howell disagreed, saying there had to be some way to protect client confidences. Governor Steve Tubbs quoted an article on the Bill of Rights , noting that it existed to protect citizens from their government. "The ability to confidentially seek the advice of counsel is paramount', he said. Then Howell moved to postpone a vote. The plan is to try to get the U.S. Attorney to send someone down to talk about the matter, along with Professor Engdahl from UPS. The motion to defer passed 6-1, Schultz opposed.

The A-Peel of Advertising: Dial then brought up a proposed formal opinion to amend RPC 7.4 to bring it into line with the U.S. Supreme Court's decision in *Peel v. Attorney Registration and Disciplinary Committee of Illinois,* 110 S.Ct. 2281 (1990). Now lawyers can indicate they are, in effect, specialists to the extent they have been certified as such by some organization as long as it's not misleading or deceptive, the conferring organization is listed, and the reference states that the Supreme Court of Washington doesn't recognize specialization. Some concern was expressed that the rule would be unenforceable, given WSBA staff time and resources, and Governor Don Curran objected that the rule went beyond the *Peel* decision by including awards like "Trial Lawyer of the Year," which are nice to put in Yellow Pages ads. On the other hand, Governor Tom Chambers said he thought the rule an improvement. The Board approved it, 6-1, Curran opposed.

What's In A Name? Less Than There Used to Be: What to do about lawyers who use trade names? The RPC Committee proposed an amendment of RPC 7.5 to prohibit use of trade names which imply a benefit to a government agency or public or charitable legal service group, or which include use of a geographical designation unless the name(s) of one or more lawyers associated with it are included. Electing to give this one some more thought, the Board unanimously tabled it for a month.

And You Can't Use the Little Rabbit With the Drum, Either: Next, the Board pressed ahead to a new opinion on lawyer advertising which would require that any written communication for the purpose of soliciting professional employment be plainly marked "advertisement" in red ink, and the lower left-hand corner of the envelope do the same.

Discussion of the implications of the rule change, which the RPC Committee felt was mandated by the U.S. Supreme Court decision in *Shapero v. Kentucky Bar Association,* 108 S.Ct 1916 (1988), was wide-ranging. The current Washington rule, RPC 7.3, is more permissive than necessary under Shapero, Dial said, and could use tightening up. Governor Jeff Tolman agreed,



citing a case of a client of his who was solicited for a personal injury case by a lawyer while the client was still in the hospital. SKCBA Trustee Geoff Revelle wondered if the rule would affect firm brochures and newsletters. It might, Dial said. It would if they contained anything that could be considered solicitation. How do you determine when a client ceases to be a client for purposes of being kept on a newsletter mailing list when you're not doing anything for the client just now, wondered Governor Steve Tubbs. Lem Howell wondered if taking a biographical listing in Martindale-Hubbell would be advertising under the rule?

Clearly, here was a can of worms. After further discussion, a consensus rapidly developed to put a decision off and have the Committee think about it some more. But Governor John Schultz saw no reason to put it off and moved to adopt the rule change. The Board split, three aye (Howell, Schultz and Slater), three nay (Chambers, Curran and Tubbs), with Tolman out of the room. The president voted nay; Tolman, returning, said he'd have voted nay, too.

No, It's Not A Restaurant Divider: The Board next took up the question of Chinese Walls, a screening device used to keep government lawyers entering private practice from knowing about cases presenting potential conflicts of interest as a result of former government service. Firms are now expressing a growing interest in their broader application, such as instances in which a lawyer moves from one firm to another. Federal courts are allowing their use in that way, but not state courts. Dial told the Board this issue is still under RPC Committee study. More information was requested by the Board in aid of a decision.

A Little Private-Sector Initiative: After a lengthy review of its lack of activity, the Board voted to terminate the Washington State Bar Association Insurance Trust Fund, a late '70s vehicle for providing medical and disability insurance to members, 258 of which remain. The trust has done no business since the early '80s, WSBA members being generally able to find better rates and plans individually. Making a philosophical determination that the Association shouldn't be in the general insurance business, the Board voted 5-1 (Howell opposed, Tubbs not voting) to terminate the trust and abolish the Insurance Trust Committee. The Association will assume the Trust's position as policyholder for the remaining members.

More Attempts to Tame the Beast: Governor Steve Tubbs reported on the recent meeting of all the parties interested in the computerization of Washington law. The general status of matters is that the computerization will more likely than not be done in collaboration with the Office of the Administrator of the Courts (by adding onto the various court support computer systems and databases they already have) than with the Washington Digital Law Library Foundation (a CD-ROM oriented, cottage industry approach starting from scratch).

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It was felt that matters are now concentrating in the hands of a few policymakers at OAC and in the courts, and what was called for was a WSBA Committee of Really Important People to deal with the other Really Important People. So a new standing committee was created unanimously, with nary a word spoken about budgetary impact.

Wrap-up in Spokane: In other action the Board heard a report on GhostTown '91, the San Diego convention; the WSBA-endorsed insurance program; and made some appointments. They reappointed Seattle lawyers Tom Fitzpatrick and Lew Pritchard to ABA House of Delegates seats and named Tacoma lawyer Beth Jensen to the Young Lawyer ABA seat. They appointed Doug Ferguson to the Commission on Judicial Conduct. Next meeting: June 21-22 in Kelso, home of the Cowlitz River smelt so dear to the president's palate.

Notices of Interest to Association Members

Disciplinary Notices

Disbarred: Tacoma attorney **Mary J. Johnson** (admitted October 28, 1983) has been ordered disbarred pursuant to a Stipulation for Discipline, approved by the Supreme Court on April 4, 1991, based on her mishandling and misappropriation of client funds.

Public Notices

In re RCW 19.52.120(1): Legal Interest Rates ("Usury Rate"): The average coupon equivalent yield from the first auction of 26-week treasury bills in May 1991 is 5.87%. The maximum allowable interest permissible for **June 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, ***and page 55 of this issue for 1985-1991.***

(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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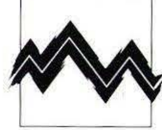

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4 The Washington chapter of the National Lesbian and Gay Law Association (NLGLA) is holding an introductory gathering, 5:30-7:30 p.m., Seattle Center, Northwest Rooms Complex, Fidalgo Room. *For information:* Janet Nelson, (206) 553-2670 (days); (206) 324-9568 (evenings).

7 Eighth Annual Pacific Rim Computer Law Institute, Seattle. *Sponsored by:* WSBA CLE, Oregon State Bar CLE and Computer Law Section. *For information:* (206) 448-0433.

7-9 1991 Family Law Section Midyear Meeting and Seminar, Vancouver, WA, *Sponsored by:* WSBA CLE and Family Law Section. *For information:* (206) 448-0433.

21 Practicing Preventive Employment Law, Seattle. *Sponsored by:* WSBA CLE. *For information:* (206) 448-0433.

22 Northwest Regional Trial Advocacy Program, Seattle. *Sponsored by:* National Institute for Trial Advocacy amd UW School of Law. *For information:* (800) 225-6482; fax (219) 282-1263.

27-30 WSTLA Annual Meeting and Convention, Whistler, B.C. *For information:* (206) 464-1011

28-29 1991 Litigation Section Midyear Meeting—Winning Without Trial: Negotiation and Mediation Workshop, Chelan. *Sponsored by:* WSBA CLE and Litigation Section. *For information:* (206) 448-0433.

July, 1991

12 The Essentials of Real Estate, Spokane. Also presented July 17 in Seattle. *Sponsored by:* WSBA CLE and YLD. *For information:* (206) 448-0433.

17 The Essentials of Real Estate, Seattle. Also presented July 12 in Spokane. *Sponsored by:* WSBA CLE and YLD. *For information:* (206) 448-0433.

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

26 Criminal Law, Seattle. *Sponsored by:* WSTLA. *For information:* (206) 464-1011.

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

August, 1991

1-4 National Lawyers Guild National Convention, Seattle. *For information:* Sylvia Cedillo, (206) 622-5144.

9 Understanding and Analyzing Financial Statements for Attorneys, Seattle. *Sponsored by:* Performance Seminars, Inc. *For information:* (800) 635-9615, fax (904) 222-4862.

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

31 Deadline for applications for 1992 grants from Legal Foundation of Washington. *For information:* (206) 624-2536.

September 1991

5 WSBA Board of Governors meeting, Seattle. *For information:* (206) 448-0441.

6 WSBA Annual Meeting, Seattle. *For information:* (206) 448-0441

11-14 WSBA Convention, San Diego. *For information:* (206) 448-0441.

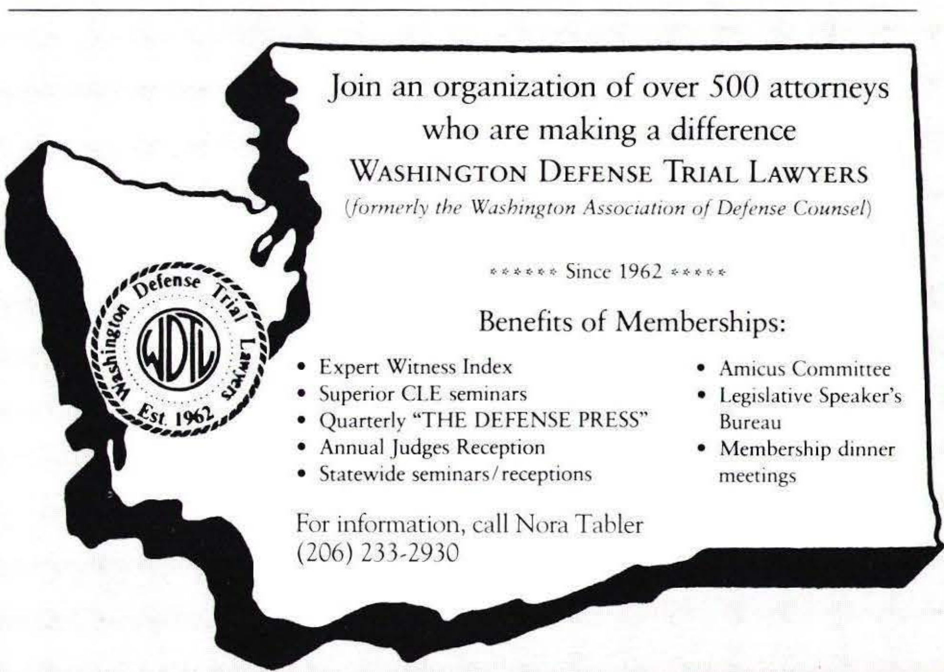
October 1991

4-5 Macs and Tax, 18th Annual Gonzaga University School of Law Tax Symposium, Priest's Lake, Idaho. *Sponsored by:* Gonzaga School of Law. *For information:* John Maurice, (509) 328-4220.

31-Nov 3 National Asian Pacific Bar Association Convention, Seattle. *For information*: Sharon Sakamoto, (206) 682-9932, *or* Mimi Castillo, (206) 624-1913.

November 1991

15 Inaugural Community Property Symposium honoring professor emeritus Joseph Nappi. *Sponsored by:* Gonzaga School of Law. *For information:* (509) 328-4220.



Caveat Emptor:

The Duty of Buyers to Withhold Income Tax

by **Stephen A. Cohen**

Foreign investment in Washington real property has increased dramatically over the past ten years, running the gamut from downtown office towers and suburban shopping malls to tracts of raw land and personal dwellings. Foreign investors have acquired Washington real property in two ways: (a) by purchasing direct ownership interests in Washington real property; and (b) by purchasing ownership interests in entities that own Washington real property.

As with most real property, this foreign-held real property will be sold or otherwise disposed of at some point, and the proceeds may be removed from the United States. The income tax ramifications of the U.S. Foreign Investment in Real Property Tax Act on these activities are often ignored by buyers and, sometimes, by their attorneys. This article is designed to shed some light on this area of practice.

FIRPTA

The Foreign Investment in Real Property Tax Act (FIRPTA) imposes a comprehensive scheme of income taxation on foreign transferors and domestic and foreign transferees of U.S. real property interests. P.L. 96-499, as amended by P.L. 98-369, P.L. 99-514 & P.L. 100-647. Codified under Sections 897, 1445 and 6039C of the 1986 U.S. Internal Revenue Code (IRC), FIRPTA also consists of several sets of permanent and temporary Regulations (Reg.) issued by the Secretary of Treasury for IRC §897 and §1445. T.D. 7999, 1985-1 C.B. 189; T.D. 8113, 1987-1 C.B. 259; T.D. 8198, 1988-1 C.b. 270. However, regulations necessary to implement the information reporting provisions of IRC §6039C have not been adopted to date.

Subject to certain exceptions discussed in a separate section of this article, IRC §1445(a) places an income tax withholding obligation on anyone who buys a United States real property interest (USRPI) from a nonresident alien or a foreign corporation. The buyer is required to deduct and withhold from the seller's proceeds an amount equal to 10% of the amount realized by the seller and is then required to pay over the withheld amount to the Internal Revenue Service (IRS). Reg. §1.1445- The withholding tax complements the provisions of IRC §897(a) which subject a nonresident alien or a foreign corporation to income tax on the gain or loss derived from the sale of a USRPI as if the gain or loss were effectively connected with the conduct of a trade or business within the U.S. See: IRC §871(b), §882(a), §861(a)(5).

If a foreign seller fails to pay the underlying tax due on a a transaction and the buyer did not withhold any tax from the seller's proceeds, the buyer could be held personally liable to the IRS for the amount of the unpaid withholding tax, plus applicable penalties and interest. IRC §1461, §1463; Reg. §1.1445-1(e).

Indeed, a buyer's attorney could be held personally liable to the IRS under certain circumstances for payment of unpaid withholding tax up to the amount of compensation the attorney earns from a transaction. For example, while acting as the buyer's agent in negotiating a transaction with the seller or the seller's agent, the attorney may acquire actual knowledge before the transaction is closed or before all of the consideration is paid that a nonforeign status certificate or a nonUSRPI certificate submitted to his client under IRC §1445(b)(2) or (3), excusing his client from the duty to withhold income tax, is false. If the attorney fails to communicate this knowledge to his client in writing and the seller fails to pay the underlying tax due, the attorney may become liable to the IRS. IRC §1445(d); Reg. §1.1445-2(b)(4); Reg. §1.1334-2(c)(3); Reg. §1.1445-4.

FIRPTA's reach extends beyond straight-forward sales and purchases of USRPIs. FIRPTA also applies variously to distributions of USRPIs made by domestic and foreign corporations, partnerships, estates, trusts and real estate investment trusts to their shareholders, partners and beneficiaries. IRC §897(d), (f), (g) & (h); IRC §1445(e). Due to space limitations, this article focuses only on sales and purchases of USRPIs.

OPERATION OF IRC §897

Definition of Terms:

The withholding tax provisions of IRC §1445 are based upon and are keyed to the provisions of IRC §897 subjecting a nonresident alien or a foreign corporation to income tax on the gain or loss realized from the disposition of a USRPI. Accordingly, a brief overview of the operation of IRC §897 must be undertaken before the IRC §1445 withholding tax provisions can be understood.

To begin, IRC §897 does not apply unless the following three elements exist: (a) the transferor of the property must be a nonresident alien or a foreign corporation; (b) the property must be disposed of; and (c) the property disposed of must be a USRPI. These terms are defined in FIRPTA and other parts of the IRC, and are explained below.

• ***Nonresident Alien/Foreign Corporation***

A nonresident alien is any individual who is neither a citizen nor a resident of the United States. IRC §7701(b)(1)(B); Reg. §1.897-1(k). Residency is determined under the tests set forth in IRC §7701(b).

A foreign corporation is any

Under the U.S. Foreign Investment in Real Property Tax Act

corporation that is not a domestic corporation of the United States. IRC §7701(a)(3) & (5). A domestic corporation is a corporation that is created or organized in the United States or under its laws. IRC §7701(a)(4); Reg. §1.897-1(j),(k) & (l).

The United States refers to the fifty states and the District of Columbia. IRC §7701(a)(9).

• ***Disposition***

A disposition is any transfer of property that would constitute a disposition by the transferor for any purpose under the IRC. Reg. §1.1.897-1(g).

A disposition includes a sale or an exchange of property. However, not all transfers of property are treated as dispositions under FIRPTA. For instance, gifts are not regarded as dispositions for income tax purposes unless and to the extent that the gifted property is subject to a liability in excess of the donor's adjusted basis in the property. Reg. §1.897-1(h), Example 1; Reg. §1.1445-1(b)(1). Payments of principal and interest on indebtedness are also not normally dispositions. Reg. §1.897-1(h).

A disposition subject to FIRPTA may be made to any transferee, foreign or domestic. IRC §1445(f)(2); Reg. §1.1445-1(g)(4).

• ***United States Real Property Interest***

A USRPI is either a direct or indirect interest in U.S. real property. IRC §897(c)(1)(A); Reg. §1.897-1(c).

A direct interest in U.S. real property is the ownership of an interest (other than solely as a creditor) in real property located in the United States or the Virgin Islands. IRC §897(c)(1)(A)(i).

Real property consists of land and unsevered natural products of the land, improvements on the land and personal property associated with the use of the real property. IRC §897(c)(6)(B); Reg. §1.897-1(b).

A direct interest in U.S. real property includes fee ownership and co-ownership of land or improvements thereon, leaseholds of land or improvements thereon, options to acquire land or improvements thereon and options to acquire leaseholds of land or improvements thereon. IRC §897(c)(6)(A). It also includes time-sharing interests in real property and remainder or reversionary interests in real property. Reg. §1.897-1(d)(2).

An indirect interest in U.S. real property is any interest (other than solely as a creditor) in a domestic corporation. An interest in a domestic corporation is not a USRPI if the taxpayer can establish, at such time and in such manner as provided in the Regulations, that the corporation was at no time a United States real property holding corporation (USRPHC) during the shorter of the period after June 18, 1980 while the transferor held such interest, or the five year period ending on the date of the disposition of such interest. IRC §897(c)(1)(A); Reg. §1.897-1 through §1.897-2.

A domestic corporation is a USRPHC if the fair market value of the USRPIs it holds equal or exceed 50 percent of the sum of the fair market values of (a) its USRPIs, (b) its real property located outside of the U.S., and (c) any other of its assets which are used or held for use in a trade or business. IRC §897(c)(2); Reg. §1.897-2(d) & (e). Thus, a nonresident alien or a foreign corporation owning stock in a domestic corporation, the assets of which comprise 50 percent or more of USRPIs, has an indirect interest in U.S. real property which qualifies as a USRPI. Reg. §1.897-2(b)(1).

Certain interests in real property are excepted from the definition of a USRPI. For example, any class of stock in a corporation that is regularly traded on an established securities market is not treated as a USRPI if the owner of the shares has owned 5 percent or less thereof during the shorter of the periods referred to above. IRC §897(c)(3); Reg. §1.897-1(m) & (n).

Taxation of Transferors:

• ***Interest in Domestic USRPHC***

The sale of stock owned in a domestic USRPHC is a disposition of a USRPI. The gain or loss derived from such a disposition is taxed no differently to a nonresident alien or a foreign corporation under IRC §897(a) from the case if the gain or loss were derived from the disposition of a direct interest in U.S. real property, since both are USRPIs. IRC §897(c)(A)(i) & (ii).

• ***Interest in Foreign USRPHC***

Neither gain nor loss derived by a nonresident alien or a foreign corporation from the sale of capital stock owned in a foreign USRPHC is subject to tax under IRC §897(a). The sale of shares owned in a corporation is a disposition of a USRPI *only* if the corporation is a domestic USRPHC and not a foreign USRPHC. IRC §897(c)(1)(A)(ii); Reg. §1.897-2(a) & (e)(1).

A foreign USRPHC is subject to tax under IRC §897(a) on the gain or loss it realizes from either the sale of a direct interest it owns in U.S. real property or the sale of capital stock it owns in a domestic USRPHC, since both are USRPIs. IRC §897(c)(1)(A). A foreign USRPHC is also taxed on the gain (but not loss) it realizes from the distribution of a USRPI to its foreign or domestic shareholders. IRC §897(d); Temp. Reg. §1.897-5T(c)(1) & (2)(i). However, a foreign USRPHC does not have to recognize gain on such a distribution if, at the time of the receipt of the distributed property, the distributee is subject to taxation on a subsequent disposition of the distributed property

and the basis of the distributed property in the hands of the distributee is no greater than the adjusted basis of such property before the distribution, increased by the amount of gain, if any, recognized by the foreign USRPHC.

Except in the case of a distribution made by a foreign USRPHC to its domestic or foreign shareholders and as provided by the Regulations, the nonrecognition provisions of the IRC apply to the disposition of a USRPI if the USRPI is exchanged for an interest in property the sale of which would be subject to taxation under Chapter 1 of the Code. IRC §897(e); Temp. Reg. 1.897-6T. A nonrecognition provision is any provision of the IRC which provides that gain or loss not be recognized if the requirements of that provision are met. Temp. Reg. §1.897-6T(a)(2). Thus, gain or loss realized by a transferor in a tax deferred exchange of like kind property made under IRC §1031 will not be subject to taxation under IRC §897(a) at the time of the transfer. The same also applies to gain realized from the sale of one's principal residence if the residence is timely replaced under IRC §1034. Temp. Reg. 1.897-6T(a)(7).

Operation of IRC §1445

Duty to Withhold:

• ***In General***

As previously indicated, one who buys a USRPI from a nonresident alien or a foreign corporation is required by IRC §1445(a) to deduct and withhold from the transferor's proceeds an amount equal to 10 percent of the amount realized by the transferor and is then required to pay over the withheld amount to the IRS. Reg.§1.1445-1. The duty to deduct, withhold and pay over can also apply if a transferee acquires a USRPI from a foreign partnership, a foreign trust or a foreign estate because IRC §1445(a) covers dispositions made by all foreign persons. IRC §1445(f)(3); Reg. §1.1445-1(a) & (b); Reg. §1.1445-2(b)(2).

Since a disposition subject to FIRPTA may be made to any transferee, domestic or foreign, both types of transferees are under a duty to withhold income tax. IRC §1445(f)(2); Reg. §1.1445-1(g)((4).

• ***Procedure***

The withheld amount, together with IRS Forms 8288 and 8288-A, must be remitted to the IRS within 20 days after the date of the transfer of the USRPI. Reg. §1.1445-1(c). The date of the transfer of the USRPI is the first date on which consideration is paid or a liability is assumed by the transferee. An earnest money deposit paid to the transferor to bind the transferor prior to the passage of legal or equitable title is not considered the date of transfer. Reg. §1445-1(g)(8).

The amount realized by the transferor, upon which the 10 percent withholding rate must be applied, is the sum of: (a) the cash paid or to be paid; (b) the fair market value of other property transferred or to be transferred; and (c) the outstanding amount of any liability assumed by the transferee or to which the USRPI is subject immediately before and after the transfer. Reg. §1445-1(g)(5). The amount realized is generally equal to the contract price to be paid for the USRPI. The contract price is the sum that is agreed to by the transferee and the transferor as the total amount to be paid for the property. Reg. §1.1445-1(g)(6).

The duty of the transferee to withhold 10 percent of the amount realized by the transferor is not affected by the amount of cash to be paid by the transferee or the fact that the transferee will pay the contract price on an installment basis. If insufficient cash to pay the 10 percent withholding tax exists on the date of the transfer, the transferee can apply to the IRS for a withholding certificate eliminating or reducing his withholding tax obligation. Reg. §1.1445-1(b); §1.1445-2(d)(4). Withholding certificates are discussed below in a separate section of this article.

If two or more persons are joint transferees of a USRPI, each transferee is subject to the obligation to withhold. That obligation is fulfilled with respect to each transferee if any one of them withholds and pays over the required amount. Reg. §1.1445-1(b)(1).

If joint transferors of a USRPI are both U.S. and foreign persons, the transferee must withhold only with respect to the foreign transferor. This amount is determined by an allocation of the amount realized from the disposition among all of the transferors, based upon each transferor's capital contribution to the property, and by the subsequent attribution of the relevant amounts to the foreign transferors. For this purpose, a husband and wife each is deemed to have contributed 50 percent of the aggregate capital. they jointly contributed toward purchase of the USRPI. Reg. §1.1445-1(b)(2); IRC §1445(f)(3).

Elimination or Reduction of Duty to Withhold:

The duty of a transferee of a USRPI under IRC §1445(a) to withhold 10 percent of the amount realized by a foreign transferor is eliminated or reduced in the following cases. Reg. §1.1445-1(b)(4).

• ***$300,000 residence***

No withholding is required if one or more individual transferees acquire a USRPI for use as a personal residence and the amount realized on the transaction by the foreign transferor is $300,000 or less. IRC §1445(b)(5); Reg. §1.1445-2(d)(1). A USRPI is acquired for use as a residence if the transferee or a member of his or her family has definite plans to reside at the property for at least 50 percent of the number of days that the property will be used by any person during each of the first two 12-month periods following the date of the transfer. A transferee is considered to reside at a property on any day on which a member of the transferee's family resides at the property. No form or other document need be filed with the IRS to claim this exemption. Reg. §1.1445-2(d)(1).

• ***Interests in Publicly Traded Corporations***

Withholding is not required by a transferee of capital stock in a domestic USRPHC if the disposition is of shares of a class of stock that is regularly traded on a established securities market. IRC §1445(b)(6); Reg. §1.1445-5(b)(4)(ii).

• ***Interests in Foreign USRPHCs***

Withholding is not required by a transferee if (s)he acquires stock in a foreign USRPHC because an interest in a foreign USRPHC is not a USRPI. IRC §897(c)(1(A)(ii); Reg. §1.987-2(a) & (e)(1).

• Nonforeign Status and Non-USRPI Certificates

Withholding is not required by a transferee if, on or before the date of a transfer, the transferee receives a nonforeign status certificate from the transferor which states, under penalty of perjury, that the transferor is a not a foreign person. IRC §1445(b)(2); Reg. §1.1445-2. No particular form of certificate is required as long as the required information is set forth in the certificate. Reg. §1.1445-2(b)(2)(iii). A transferee must retain the certificate for a period of five years and make it available to the IRS when requested. Reg. §1.1445-2(b) & (3).

A nonforeign status certificate is particularly useful to foreign partners of a domestic partnership disposing of a USRPI. The foreign partners are subject to the withholding of tax at the partnership level at the rate of 34 percent on their pro rata shares of gain derived from the partnership's disposition of a USRPI. IRC §1445(e)(1). To prevent double withholding caused by the transferee also withholding 10 percent of the amount realized by the domestic partnership, a nonforeign status affidavit can be submitted to the transferee.

Withholding is not required by a transferee who acquires stock in a domestic corporation if, on or before the date of the transfer, the transferor provides him with a nonUSRPI certificate issued by the corporation which states, under the penalty of perjury, that the corporation is not and has not been a USRPHC during the periods or under the circumstances specified in IRC §897(c)(A)(ii) or IRC §897(c)(1)(B). IRC §1445(b)(3). Reg. §1.1445-2(c); Reg. §1.897-2(h). No particular form of certificate is required as long as the required information is specified. A copy of the certificate must be sent to the IRS. Reg. §1.897-2(h)(2). A transferee may not rely on a nonUSRPI certificate if it is dated more than 30 days before the date of the transfer of the property. Reg. §1.1445-2(c)(3).

If a transferor fails or refuses to produce a nonforeign status certificate or a nonUSRPI certificate, the transferee may deduct, withhold and pay over the 10 percent tax to the IRS under IRC §1445(a) without incurring any liability to the transferor. IRC §1461; Reg. §1.1445-2(b)(1).

A transferee is not required to obtain a non-foreign status certificate or a nonUSRPI certificate, and can rely on other means to determine whether the transferor is a nonforeign person or the interest being disposed of is not a USRPI. However, if the transferee's determination is incorrect, he can be held personally liable to the IRS for failing to withhold as previously indicated. IRC §1461 & §1463; Reg. §1.1445-2(b)(1).

A transferee is not entitled to rely on a transferor's nonforeign status certificate or nonUSRPI affidavit if, on or before the date of the transfer, the transferee has actual knowledge that the certificate is false or receives notice from either the transferor's agent or his own agent that the certificate is false. IRC §1445(b)(7). In such circumstance, the transferee must ignore the affidavit and withhold pursuant to IRC §1445(a). If belated notice of the false certificate is received after the date of the transfer, withholding must be undertaken on any remaining unpaid consideration. IRC §1445(b)(7); Reg. §1.1445-2(b)(4).

Mention has already been made of the potential liability that can accrue to an agent of a transferee, or to an agent of a transferor, if the agent fails to notify the transferee of a false nonforeign status certificate or a false nonUSRPI certificate.

• Nonrecognition Certificate

Withholding is not required by a transferee if, on or before the date of the transfer, the transferee receives a nonrecognition certificate from the transferor which states, under the penalty of perjury, that any gain or loss realized by the transferor is subject to an applicable nonrecognition provision of the IRC. Reg. §1.1445-2(d)(2); Temp. Reg. §1.1445-9T. No particular form of certificate is required as long as the required information is provided. Reg. §1.1445-2(d)(2)(iii). The transferee is required to provide the IRS with a copy of the certificate by the twentieth day after the date of the transfer. However, withholding is not excused if the transferor qualifies for nonrecognition treatment with respect to part, but not all, of the gain realized by the transferor, or the transferee knows or has reason to know that the transferor is not entitled to claim nonrecognition treatment. Reg. §1.1445-2(d)(2)(ii).

• Withholding Certificate

A transferee's duty under IRC §1445(a) to deduct, withhold and pay over is modified if, on the date of the transfer, a transferee has either received a withholding certificate from the IRS or

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an application for a one is pending before the IRS. IRC §1445(b)(4) & (c).

A withholding certificate is a written determination made by the IRS that withholding can be eliminated or reduced. Reg. §1.1445-3. It is issued at the request of either a transferor or a transferee. and can be requested where reduced withholding is appropriate; where the transferor is exempt from U.S. tax; and where an agreement with the IRS for the payment of tax will be sought by the transferor or the transferee. Since the amount to be withheld must not exceed a transferor's maximum tax liability on a disposition; a withholding certifidate can be requested to establish a transferor's maximum tax liability and to authorize withholding at less than 10 percent of the amount realized by the transferor. IRC §1445(c); Reg. §1.1445-3(a).

Resort to a withholding certificate is advisable where a transferee doubts the correctness of a nonrecognition certificate received from a transferor. Reg. §1.1445-2(d)(2) & (7); Reg. §1.1445-3(c)((2)(i); Rev. Proc. 88-23, 1981-1 C.B. 787. A withholding certificate is also advisable where insufficient cash will be available on the date of the transfer to pay the 10 percent withholding tax or the contract price will be paid on an installment basis. Reg. §1.1445-3(e); Rev. Proc. 80-23.

However, a withholding certificate should not ordinarily be sought to claim either an exemption from tax or a reduction of tax based upon an income tax treaty existing between the U.S. and the transferor's country. Such treaty benefits have been generally overridden by FIRPTA since 1985. P.L. 96-499, §1125(c); Reg. §1.1445-3(c)(2)(i) & (d)(2).

The IRS is required to approve or deny a request for a withholding certificate within 90 days after the request is received. IRC §1445(c)(3)(B). In complicated cases, the IRS may request additional time. Reg. §1.1445-3(a). If a request for a withholding certificate is pending on the date of the transfer, the transferee is still required to deduct and withhold 10 percent of the amount realized by the transferor. However, the amount withheld, or such lesser amount as may be determined by the IRS, need not be reported and paid over to the IRS until the twentieth day following the IRS's final determination of the transferee's application. Reg. §1.1445-1(b)(c).

The procedure for requesting a withholding certificate is set forth in Reg. §1.1445-3 and Rev. Proc. 80-23.

Conclusion

Caution should be exercised by anyone buying a direct or indirect equity interest in U.S. real property from a foreign person. If the transferor requests the buyer to refrain from withholding income tax under IRC §1445(a), the buyer or the buyer's attorney should demand that the transferor produce a nonforeign status certificate, a non-USRPI certificate, or a nonrecognition certificate, as the case may be, unless the property to be transferred is a residence valued at under $300,000, publicly traded stock or stock in a foreign corporation. The buyer or the buyer's attorney should also consider applying to the IRS for a withholding certificate if there is doubt as to the buyer's duty to withhold. If none of these alternatives transpires or is practical, the buyer should play it safe by deducting, withholding and paying over the 10 percent withholding tax to the IRS. □

Stephen A. Cohen is special assistant attorney general and general counsel in the Division of Revenue and Taxation to the Commonwealth Government of the Northern Mariana Islands.

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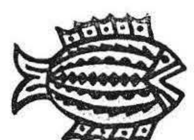

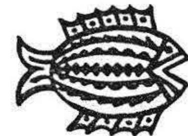

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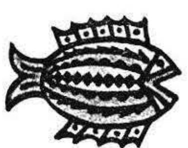

Article 9 Stuff in B.C. Province: Personal Property Security Act

by **Dale Ursel**

The Province of B.C. has enacted, effective October 1, 1990, a statute based on Article 9 of the UCC. The new Personal Property Security Act [PPSA] follows similar legislation in the western provinces of Alberta (1990), Saskatchewan (1980) and Manitoba (1973), which are also modelled on the U.S. code. Yukon Territory also has an Article 9-type secured transactions statute. A variant of Article 9 enacted in the province of Ontario in 1967, a Model PPSA adopted by the CBA in 1970, a 1975 Report by the Law Reform Commission of B.C. and the 1982 Uniform PPSA approved by the Canadian Bar Association, all served as the foundation for the new B.C. legislation.

The PPSA takes much of its draftsmanship and policy from the 1982 Uniform Act and the Saskatchewan statute, thus being generally in accordance with the personal security legislation in the other three western provinces and Yukon. In 1988, the province of Ontario brought in revisions to its 1967 provincial legislation, which was inspired by Article 9 but, even as revised, the Ontario statute has important differences from the 1982 *Uniform Act* and, therefore, the personal property legislation found in the four western provinces and Yukon.

The *PPSA* (Bill 28 Statutes of British Columbia 1989 Chapter 36) has been supplemented by near-contemporaneous legislation, the Personal Property Security Amendment Act (Bill 26 S.B.C. 1990), which revised and supplemented certain of the provisions in the PPSA, particularly relating to terminology and definitions.

For introductory purposes, foreign counsel can view the PPSA as one with Article 9 in its purpose and approach. Much of the terminology ["security interest," "financing statement," "PMSI," security agreement"], the concepts of attachment, perfection and priorities, and the rationale for the act, follow those of Article 9.

Until the PPSA, B.C. laws relating to personal property financing consisted of 19th century common law precepts and their statutory embodiments carried over or set out in laws such as the Chattel Mortgage Act, the Book Accounts Assignment Act, the Sales of Goods on Condition Act and other statutes affecting various forms of security interests. As with its U.S. predecessor, the PPSA is meant to recognize and provide for modern commercial financing practices and non-possessory secured transactions, and to bring efficiency and clarity to what the B.C. Law Reform Commission's 1975 Report noted as "the bewildering complexity and lack of systemization" in B.C.'s secured transaction laws.

Security interests registered under the old system will be continued into the PPSA regime over a three-year transition period, and all new filings in B.C. as of 1 October 1990 are required to be in accordance with the provisions of the act and the regulations introduced under it.

The scope of the PPSA covers "all consentual security interests in personality" and includes (unlike the Ontario statute) commercial consignments [see UCC 9-114 and 2-326] and leases with a term of more than one year [see UCC 9-104(j)]. The PPSA is a notice-filing system. Rather than file the financing agreement itself, the secured party will perfect by filing a notice form; under Section 18, the Act provides for release of pertinent information directly from the secured party upon request by the interested third parties.

The PPSA brings to B.C. modern security interests provisions for inventory financing, consignments, chattel leases of a term over one year and all assignments of account (not just a general assignment as in pre-PPSA legislation). Its other significant effects include the alteration of the "floating" (or equitable) charge into a fixed charge and the introduction of a central registry for all PPSA filings in place of three different provincial registries maintained for registrations under former various secured transactions statutes.

The act is organized into six parts: (1) interpretation; (2) validity of agreements and parties' rights; (3) perfection/priorities; (4) registration; (5) default/consequential rights and remedies; (6) miscellaneous and transitional provisions.

PPSA Section 2(1) sets out that the act applies to "every transaction that in substance creates a security interest." A security interest includes "an interest in goods, chattel paper, a security, a document of title, an instrument, money or an intangible that secures payment or performance of an obligation...and the interest of a transferee arising from the transfer of an account." Also included in the "security interest" definition are interests arising in chattel paper or under a commercial assignment of goods and a lessor's interest where the lease term is more than one year.

Under PPSA Section 12 [which reflects UCC 9-203(1) and (2)], a security interest attaches (unless the parties have specifically agreed to post-

pone the date of attachment) when (1) value is given; (2) the debtor has rights in the collateral; and (3) the secured party takes possession *or* the debtor has signed a security agreement which properly sets out the parties' intent and the goods' description.

Section 1(1) of the *Act* defines goods as "tangible personal property, fixtures, crops and the unborn young of animals." The "goods" definition specifically excludes chattel paper, title documents, instruments, securities, money, unsevered trees and unextracted minerals. [The UCC definition is at 9-105 (1)(h).]

The "consumer goods" definition in PPSA is identical to that in UCC 9-109(1), except for the substitution of the word "acquired" in place of the UCC's "bought."

"Inventory" is defined as goods which are: (1) held by a person for sale or lease, or that have been provided by that person under a lease; (2) to be furnished by a person, or have been furnished by that person, under a contract of service; (3) raw materials or work in progress; or (4) materials used or consumed in a business. This reflects the UCC wording in 9-109(4).

"Equipment" under the PPSA refers to "goods that are held by a debtor other than as inventory or consumer goods." [See UCC 9-109(2.)]

The PPSA definition of "Purchase Money Security Interest" extends past that in UCC 9-107 to include the interests of a commercial consignor and a lessor under a lease with a term of over one year. It also specifies that the value or advance given as a PMSI includes credit or interest charges. A sale and lease-back scenario is specifically excluded from the definition. Section 4 of the act, reflecting UCC 9-104, sets out exclusions to its application, *inter alia*: a security agreement arising pursuant to federal law such as the Bank Act; an assignment to creditors under federal insolvency law; a statutory lien or other interest arising by law; an interest in present or future wages or compensation (excluding, however, professional service fees); a sale of accounts or chattel paper arising as part of a sale of a business; and a transfer of accounts made only to assist in collection on behalf of the assignor. Other exclusions are certain interests or rights to payment relating to land, to insurance or annuities, and to tort damages.

As a notice-filing system, the PPSA has adopted the UCC "objective" approach to the issue of knowledge by a party of another's interest in personal property. Section 1(2) states, in part, that a "person knows or has knowledge when information is acquired under circumstances in which a reasonable person would take cognizence of it." Accompanying provisions set out similar guidelines for notice to corporations, partnerships, associations and government agencies. Section 47, however, expressly states that mere registration in the PPSA registry is not deemed to be "express, constructive or implied notice or knowledge" of the contents of the filing to any other party.

Registrations under the act will be effective only to the extent that they accommodate the computerized information format of the PPSA Registry. The regulations to the act specify the detail required for individual, corporate and other debtors, and secured parties will need to adhere to the Registry's requirements in order to avoid a "seriously misleading defect, irregularity, omission or error" in the filing information which, under Section 43(7), would lead to a failure in perfection. PPSA 43(8) provides that where an error or defect in registration information is claimed, "it is not necessary to prove that anyone was actually misled" by the error or defect for the challenged registration to be held invalid; thus, an inadvertent error or omission by the secured party in filing may lead to an inequitable result where a third party, despite not actually being misled by the information as filed, prevails in a priority contest.

The act, in Part 5, "Rights and Remedies on Default," reflects the default provisions of Article 9. Part 5 also includes a specific provision for the court to make orders relating to the collateral and interested parties' rights, and other provisions relating to the appointment and duties of receivers and the court's supervision of a receiver in a default situation. Section 67 provides for the parties' rights and obligations upon default where the security interest is in consumer goods, and Section 74(1) specifies that the PPSA will defer to provincial consumer protection and trade practices legislation where conflicts in the PPSA and those statutes' provisions arise.

PPSA Section 68(2) reflects UCC 9-504(1), in that it calls for rights and obligations under a security agreement, or the PPSA generally, to be "exercised in good faith and in a commercially

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reasonable manner." However, unlike Article 9, at 9-507(2), the PPSA does not provide examples of "commercially reasonable" conduct, and it will be case law that determines commercial reasonableness in a given situation. Section 68(3) adds that "a person does not act in bad faith merely because the person acts with knowledge of the interest of some other person."

Although the PPSA generally follows its U.S. precursor, UCC Article 9, differences remain. For example, in B.C., holders of security interests in consumer goods, or of an assignment of accounts which does not in itself transfer a significant part of the debtor's business, must file under the PPSA for perfection of those interests There is no equivalent of UCC 9-302(1)(d) or (e). In the next several years, however, we may expect amendments to the PPSA which reflect not only future B.C. judicial rulings on the new act, but further procedural provisions which may streamline this long-overdue legislation and assist in its implementation.

The PPSA, modeled after Article 9, will allow B.C. practitioners at long last to "speak the same language" as their U.S. colleagues when referring to secured transactions in personality. We now have in B.C., admittedly rather belatedly, the benefit of the clarity and organization brought by U.S. jurists, such as professors Llewellyn and Gilmore, to personal property security law. The PPSA will no doubt experience an assortment of growing pains in its first few years of implementation, but its enactment eases the way to further integration of the economies of western Canada, California and the northwestern U.S., and it allows commercial interests on both sides of the border to take more efficient advantage of the business potential offered by the Canada-U.S. Free Trade Agreement. □

***Dale Ursel** is a member of the B.C., Oregon and California bars. His practice has focused on trade law, corporate/commercial and construction law. He has studied E.E. law, practiced in Europe and Asia, and recently returned to B.C., where he is corporate counsel to a Vancouver-based company.*

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

Criminal law and procedure.
(*Case 1.*) In felony murder prosecution in which burglar shot householder during armed burglary, trial court properly refused self-defense instructions. Though decedent allegedly fired first shot, defendant in felony murder is not acting in self-defense until he has withdrawn from underlying felony. In this case, flight from scene of burglary was held not to constitute withdrawal. (*Comment.* Presumably, since burglary is the unlawful entry with intent to commit a crime, the crime was completed before the defendant encountered the decedent. Once a crime has been completed, there cannot be a legally effective withdrawal from it. Therefore, the holding of this case, that flight from the burglary crime scene cannot be withdrawal from the crime, may be limited to crimes such as burglary that are completed crimes at a relatively early stage in the criminal episode.—J.A.) ***State v. Dennison***, 115 Wn.2d 609, 801 P.2d 193 (11/21/90).

(*Case 2.*) When DWI suspect was denied right to consult with attorney prior to deciding whether to take breath test, proper sanction was suppression of evidence acquired after violation of suspect's right to counsel, not dismissal of criminal charge. This decision overrules in pertinent part *State v. Fitzsimmons*, 93 Wn.2d 436, 610 P.2d 893 (1980). ***City of Spokane v. Kruger***, 116 Wn.2d 135, 803 P.2d 305 (1/10/91).

(*Case 3.*) In sentencing for domestic violence conviction, reconciliation of victim with defendant does not support exceptional sentence below standard range for the offense. ***State v. Hobbs***, 60 Wn.App. 19, 801 P.2d 1028 (Div. 1, 12/27/90).

(*Case 4.*) Defendant may be convicted of "carrying a gun" under RCW 9.41.050(3) when he knows the vehicle he occupies contains a gun. ***State v. Thierry***, 60 Wn.App. 445, 803 P.2d 844 (Div. 2, 1/30/91).

(*Case 5.*) Defendant may not suppress evidence obtained as result of violation of Washington Constitution, Art. 1, Sec. 7, unless violation was of defendant's own right of privacy. Defendant in this case lacked standing to complain of violation of constitutional rights of others. ***State v. Estorga***, 60 Wn.App. 298, 803 P.2d 813 (Div. 2, 1/17/91).

—*J. Ainsworth*

Evidence. In prosecution for second-degree murder, evidence that victim was homosexual and that victim made homosexual advances against defendant was not admissible. Victim's alleged homosexuality and attempts to grab defendant's crotch and kiss him were irrelevant to defendant's theory of self-defense, since these acts would not reasonably be thought to place defendant in imminent danger of great personal injury. ***State v. Bell***, 60 Wn.App. 561, 805 P.2d 815 (Div. 2, 2/22/91).

—*K. B. Tegland*

Real property. Vendors on real estate contract elected to sue for damages under clause that, as alternative to forfeiture of earnest money, allowed them "actual damages." *Held*, that "actual damages" included not only difference between contract purchase price and price for which vendor later sold land, but also mortgage interest, utilities charges, and real estate taxes during interval between the two sales. ***Mueller v. Johnson***, __ Wn.App. ____, 806 P.2d 256 (Div. 2, 3/14/91).

—*W. B. Stoebuck*

Real property security.
Mortgagee judicially foreclosed mortgage, but by mistake failed to join junior lienor as defendant. In what court says is case of first impression on this question in Washington, court holds that mortgagee may, upon later discovering junior lienor, reforeclose its lien. When junior lienor is omitted from a foreclosure action, as between foreclosing senior and omitted junior, no foreclosure of junior's lien has occurred. Therefore, it is still liable to be foreclosed. (*Comment.* This decision is in line with the generally recognized principles of mortgage law on this important question and is clearly right—W.B.S.) ***U.S. Bank of Washington v. Hursey***, 116 Wn.2d 522, 806 P.2d 245 (3/14/91).

—*W. B. Stoebuck*

FROM THE ARCHIVES

TEN YEARS AGO: JUNE 1981:

William S. Bailey and Hugh D. Spitzer wondered in an article, "Is Washington Ready for Merit Selection of Judges?" WSBA President Bradley T. Jones warned members in his monthly column that increasing membership ("now more than 10,000 and no indication of a slackening in the admission process"), increasing disciplinary costs and demand for services was pressing the budget hard. "The Board's Work" reported Jones told the Spokane County Bar Association "the Bar is facing an impending budget crisis which will either reduce Bar services, increase dues and fees, or all of the above. According to Jones, such programs as the *Bar News*, Continuing Legal Education and the Bar Examination, among others, are financially burdensome to the Bar's coffers." The Board also tried to figure out what to do when the Legislature finished bickering about the creation of an eighth congressional district. "Because of the opacity of the political situation, the Board voted to conduct its June elections in accordance with now existing congressional districts, but to hold a special election when a new eighth district is finally determined."

In "Around the State" George Kelley made his debut as reporter of Pierce County happenings. Ten years later, he's still keeping the bar informed of the local scene.

TWENTY YEARS AGO: JUNE 1971

"The Board's Work" reported that the Governors "discussed at length the qualifications of applicants for the position of State Bar executive director to succeed Mrs. Alice Rawls, who has announced plans to retire." They voted $300 each toward the expenses of a law student from UW and one from Gonzaga to attend the World Peace Through Law Conference in Belgrade in July.

You never know where people will end up. In the Watergate tapes, Richard Nixon referred to one of his Supreme Court appointments as "that guy Renchberg." The *Bar News* reported editor Edmund Raftis would serve on an ABA Young Lawyers Section panel on the right to privacy during the ABA's annual meeting in London, alongside "Assistant Attorney General William H. Rahnquist, Anthony Lewis, and Professor Samuel Dash of the Georgetown University Law Center."

FORTY YEARS AGO: JUNE 1951

The Stevens County bar entertained members of the Supreme Court and families at the Little Pend Oreille Lakes. Following lunch there they repaired to Nelson, B.C. and were entertained by its lawyers. Next, they traveled to Trail and on to Colville. All survived, it seems.

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FIFTY YEARS AGO: *WASHINGTON LAW REVIEW AND STATE BAR JOURNAL*: APRIL1941:

"One of the problems your Board of Governors is now wrestling with is that of the unauthorized practice of law. We are all well aware of the fact that many groups are rendering legal service who are not properly equipped either by training or education to render such service, and are not authorized to practice law. All of this is to the detriment of the public. We, as lawyers, owe the duty, not only to ourselves but to the public, to do all within our power to stop the unlawful practice of law. Members of the Board individually receive complaints from various members regarding this matter, but when efforts are made to secure the evidence of specific acts, only upon which specific action could be taken, we find that the evidence is insufficient for prosecution. Many lawyers who complain to us of such unauthorized practice, when approached with the view of them furnishing specific evidence of violation, often demur on the ground that some of their own clients may be affected or they feel that in furnishing the information that they will antagonize some person or corporation in their community which might result in injury to their business.

"We have invited and do now invite members of the Bar to report to us specific instances of drafting of documents, especially wills, leases, real estate contracts or 'adjusting claims,' etc., together with the evidence upon which a court could base a decision, so that such action might be taken by us as the facts would seem to warrant. Your Board is of the opinion that such violations can be reached through contempt proceedings initiated in the Superior Court, but without the assistance of lawyers we do not have the facilities or money with which to procure the evidence to secure a conviction."

Lawyer-to-Lawyer: The Call

by **George W. Scott**

In the spring of 1989, 27 percent of the bar, or 3,900 attorneys, returned an all-member survey. "The commanding concern of the profession," read the 52-page final report, "is the erosion of status and credibility with the public, and to a lesser extent [about] ...competency and ethics..." Discussions of the Long-Range Planning Task Force chaired by Bill Gates echo with calls for more "connectedness" and "purpose." Lawyer-to-Lawyer is a way you can meet all these needs at once and get the personal reward of helping a new lawyer into a lifetime of rewarding practice.

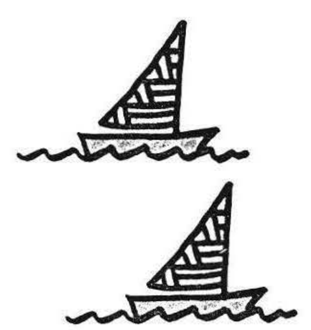
LTL is not coaching in a field of expertise, or an extension of law school, or an open-ended commitment by the "senior partner." It is a pairing of a new admittee with an attorney who has been a member of the bar for at least five years. Over breakfast or lunch, a minimum of 12 times during a year, the new lawyer can learn from you what could not be learned in law school.

Suggested starter topics in the 12-panel brochure going to new admittees and their partners include items on the work environment ("Organizing Your Time"); practice ("What to Expect in Tactics"); professional and personal development ("How Do You Flesh Out an Expertise?" or "...Cope with Stress?"); and ethics (from "Abusive Discovery" to "Stonewalling"). Hypothetical ethical questions are included, and so is a calendar.

Fill out and send in the enrollment form on the reverse side. You will go into a pool and be matched with a new lawyer in your county. If the match does not take, either attorney can ask the bar for a rematch. After six months, we will ask you for a brief progress report and suggestions for improvement.

The time has come for all those who have expressed concern in the 1989 questionnaire and since about the direction of the profession to turn a hand to its future. If you want to see the best traditions of the profession continued, here is your chance! This is a volunteer-dependent program.

Make it work!



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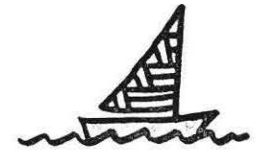

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TO: Beth Jensen, Esq., Lawyer-to-Lawyer Coordinator, c/o WSBA Department of Public Affairs

I accept the LTL Committee's invitation, and wish to be placed in the WSBA's matching pool as a prospective "Senior Partner." I agree to: 1) Be in touch with a "new lawyer" I have been paired with within seven days of notification, 2) arrange meetings at least monthly for a year, 3) notify Sharlene Steele at the WSBA (at (206) 448-0441, Ext. 281) if one of us wishes to end the partnership, and indicate whether I wish to stay in the pool.

I have never been formally disciplined, nor is discipline pending against me.

I have been in practice at least five years.

Name (Please Print) ________ WSBA # ________ Date ________

Signature ________ County I Practice In ________

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Career and Life Planning for Lawyers

Starting May 1, the Lawyers' Assistance Program opened an Office of Career and Life Planning Services by taking over operation of the programs which had been developed under the name, Lawyers in Transition.

The History of Lawyers in Transition

When former Seattle practitioner Deborah Arron closed her law practice in 1985, she wanted to get as far away from other lawyers as she could. By the end of 1987, though, after completing the first stages of research for her book, *Running from the Law: Why Good Lawyers Are Getting Out of the Legal Profession*, she realized that she had a lot more in common with other lawyers than she thought. In January, 1988, Arron placed a small announcement in the Seattle-King County Bar Bulletin, asking lawyers interested in talking about job or career change to telephone. Thirty-five phone responses in two weeks decided the next step. She organized a free informational meeting at the Seattle Public Library, featuring a career counselor and lawyer-psychologist. Amidst a crowd of about 50 lawyers, Lawyers in Transition was born.

During its three years of operation, Lawyers in Transition attracted over 1,000 lawyers and law students to its programs, which included regular information and networking meetings, career evaluation workshops, CLE-accredited seminars, individual consultations and a monthly newsletter. But with increasing participation came increasing administrative duties. What had started out as a labor of love for Arron (who thrives when starting new programs and dies when maintaining them!) turned into drudgery. Earlier this year, Arron began to explore ways of continuing the operation of Lawyers in Transition—preferably with at least some free programs—while relieving her of administrative duties. Her first choice was a transfer to the Lawyers' Assistance Program . . . which gladly accepted the challenge.

The Merger

The Office of Career and Life Planning Services provides an empathetic, intellectually stimulating and fun setting in which to learn about and accomplish job or career change. Taking advantage of both peer and professional support services, free and low-cost services currently include:

- Referral lists of self-assessment and job-finding books, career con-sultants, counselors and testing services;
- Regular information, support, and discussion meetings;
- Career evaluation workshops;
- Job search workshops;
- Information sheets on topics such as "Finding a Government Law Job" and "Tips for Prospective Entrepreneurs";
- Regular CLE-accredited seminars on topics of interest to lawyers thinking about job or career change, and those experiencing career or job-related stress;
- A peer counselor program, matching lawyers in the midst of job or career change with those who have successfully completed a similar transition; and
- A quarterly newsletter, featuring self-assessment and job-finding tips and resources, as well as periodic job listings (send four self-addressed, stamped business-sized envelopes to WSBA LAP, 500 Westin Building, 2001 Sixth Avenue, Seattle, WA 98121-2599).

In this new marriage, Joyce Elven of the LAP office is coordinating Career and Life Planning Services with the assistance of an advisory committee of lawyers who either are anticipating or involved in transition or have already completed their job or career changes. Deborah Arron continues to act as the primary facilitator and instructor of the programs, and developer of new seminars and workshops.

Operating Committee Members Wanted

The Career and Life Planning Services Advisory Committee, chaired by Deborah Arron, will meet monthly, acting not only as a working committee, but also as a peer support, networking and discussion group. Responsibilities of the committee will include organizing, planning and facilitating free lectures and informational meetings, brainstorming ideas for new seminars and services, and providing logistical support. Meetings are held the fourth Wednesday of every month from noon to 1:30 in the WSBA fourth-floor conference room. The next meeting will be June 26th. All interested lawyers are invited to attend!

Next Free Informational Meeting

Karen Ramsey, a fee-only certified financial planner and frequent lecturer, will teach you "How to Finance a Job or Career Change" on Monday, June 24, from 6:30 to 8:30 p.m. at the Seattle Public Library, main auditorium, Fifth

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and Madison in downtown Seattle. Ramsey will explain what to do before you begin a transition and will have you examine how you currently spend your money, what expenses you need to plan for in your job search, additional sources of income you may want to consider, and what to do when all apparent sources of income run dry. Ample time for questions and networking will be provided. No registration is required.

Upcoming CLE-Accredited Seminars

Career and Life Planning Services will sponsor a series of CLE-accredited seminars on career planning for lawyers during the month of October. Save the following dates:

Wednesday, October 2, 1991, 6:30 to 9:30 p.m. *Charting a Course in the Legal Profession: Career Planning for Young Lawyers.*

Thursday, October 3, 1991, 6:30 to 9:30 p.m. *Lawyers at Midlife: Planning the Second Half of Your Career.*

Friday, October 4, 1991, 9 a.m. to noon. What Can You Do with a Law Degree?: *A Career Planning Intensive for the Un-, Under-, or Unhappily Employed Lawyer.*

All three programs will be held in Seattle's Security Pacific Bank Building 6th floor auditorium. Details regarding fees and registration will be announced in August. Contact Joyce Elven at 448-0605 if you reside outside the King/Pierce/Snohomish County area and would like to receive notice of these and other Lawyers' Assistance Program CLE seminars.

Rule of Confidentiality

In keeping with both Lawyers' Assistance Program and Lawyers in Transition policies, all participation in career and life planning services will be treated confidentially. With nearly 2,000 clients making use of the services of Lawyers' Assistance Program and Lawyers in Transition since 1986, not one breach of confidentiality has ever been reported to either organization.

To obtain additional information about LAP Career and Life Planning Services, please contact Joyce Elven at (206) 448-0605.

SPONSORED BY THE LAW OFFICE ECONOMICS AND MANAGEMENT SECTION

Evaluating Your Reception Area

by **Gregory S. Morrison**

Regardless of how good a lawyer you are, your clients' first impressions of you will probably be greatly influenced by your reception area. As such, it should be given due regard in its design, layout, use and furnishings. This article briefly examines the most important factors in its evaluation.

A well designed reception area should convey a feeling of comfort and professionalism to your clients. It should also be furnished and appointed consistent with your type of practice. Finally, the privacy and confidentiality of your clients should be shown due respect.

Proceeding under the assumption that a calm and relaxed client is much easier to work with than one who is tense and irritated, it then follows that your reception area should be comfortable and soothing. Emphasis should be placed on having soft colors with easy contrasts. Pictures and/or artwork should be gentle on the eye. Stark contrasts and busy artwork tend to be too demanding on people, especially those that are waiting to see their lawyer.

Furniture selection should emphasize comfort rather than status. Just because a chair costs a fortune, that doesn't mean it's comfortable. Although your clients may be in awe of your collection of priceless antiques, if they fail to put your clients at ease, what good are they? In fact, your clients may actually resent obvious extravagance which could put your otherwise reasonable bill under needless scrutiny.

Chairs should be arranged so that your clients don't feel crowded. People tend to guard their "personal space" and, knowing this, we should be sure that they are not forced to wait in cramped quarters.

A reception area is more than just a room with chairs in it: you should pay attention to even the smallest details. Evaluate your clientele, and stock reading material that will appeal to those persons. *The Wall Street Journal* that is extremely interesting to business clients may be meaningless to low-income, domestic-practice clients.

Additional matters to consider are soothing background music, carpeting to deaden sound, comfortably bright (but not harsh) lighting, and decorative plants. All of these should be oriented towards making your clients feel comfortable and relaxed.

Finally, your receptionist should be trained to act in a warm but professional manner. Your receptionist's desk and immediate work area should be kept neat and uncluttered. Conversation should be kept to a minimum while clients are waiting. Confidential or personal matters should never be discussed in front of clients. Files should not be left open on the receptionist's desk unless their confidentiality can be protected.

It should take you only a few minutes to grade your reception area for client comfort. If you find some areas that could stand a little adjusting, then give them the attention they deserve. And always remember that your office actually begins in the reception area.

This column is a clearinghouse 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.

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

These are the average coupon equivalent yields from the auction of 26-week treasury bills from January 1985 to date. The highest rate of interest permissible under RCW 19.52.020(1) is computed by the addition of four percentage points or is 12% per annum, whichever is higher.

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

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

The average coupon equivalent yield from the first May 1991 auction of 26-week treasury bills applicable to the computation of the maximum allowable interest rate for June 1991 is 5.87%. According to the state treasurer's office, the maximum allowable interest rate for June 1991 is 12%. Note that when the equivalent bond yield is below 8%, the maximum interest allowable remains at 12%.

January	1985	9.19%	**13.19%**
February	1985	8.48%	**12.48%**
March	1985	8.78%	**12.78%**
April	1985	9.54%	**13.54%**
May	1985	9.06%	**13.06%**
June	1985	8.38%	**12.38%**
July	1985	7.53%	**12.00%**
August	1985	7.44%	**12.00%**
September	1985	7.93%	**12.00%**
October	1985	7.69%	**12.00%**
November	1985	7.71%	**12.00%**
December	1985	7.69%	**12.00%**
January	1986	7.64%	**12.00%**
February	1986	7.48%	**12.00%**
March	1986	7.42%	**12.00%**
April	1986	7.22%	**12.00%**
May	1986	6.46%	**12.00%**
June	1986	6.37%	**12.00%**
July	1986	6.72%	**12.00%**
August	1986	6.11%	**12.00%**
September	1986	5.98%	**12.00%**
October	1986	5.38%	**12.00%**
November	1986	5.34%	**12.00%**
December	1986	5.52%	**12.00%**
January	1987	5.69%	**12.00%**
February	1987	5.79%	**12.00%**
March	1987	5.83%	**12.00%**
April	1987	5.76%	**12.00%**
May	1987	6.07%	**12.00%**
June	1987	6.46%	**12.00%**
July	1987	6.40%	**12.00%**
August	1987	5.95%	**12.00%**
September	1987	6.45%	**12.00%**
October	1987	6.66%	**12.00%**
November	1987	7.33%	**12.00%**
December	1987	6.55%	**12.00%**
January	1988	6.42%	**12.00%**
February	1988	6.67%	**12.00%**
March	1988	6.41%	**12.00%**
April	1988	6.20%	**12.00%**
May	1988	6.21%	**12.00%**
June	1988	6.41%	**12.00%**
July	1988	7.05%	**12.00%**
August	1988	7.04%	**12.00%**
September	1988	7.52%	**12.00%**
October	1988	7.79%	**12.00%**
Novermber	1988	7.86%	**12.00%**
December	1988	8.13%	**12.83%**
January	1989	8.73%	**12.73%**
February	1989	8.86%	**12.86%**
March	1989	9.04%	**13.04%**
April	1989	9.18%	**13.18%**
May	1989	9.38%	**13.38%**
June	1989	9.16%	**13.96%**
July	1989	8.44%	**12.44%**
August	1989	8.05%	**12.05%**
September	1989	8.12%	**12.12%**
October	1989	8.31%	**12.31%**
November	1989	8.36%	**12.36%**
December	1989	7.89%	**12.00%**
January	1990	7.69%	**12.00%**
February	1990	7.93%	**12.00%**
March	1990	8.15%	**12.15%**
April	1990	8.22%	**12.22%**
May	1990	8.24%	**12.24%**
June	1990	8.28%	**12.28%**
July	1990	8.03%	**12.03%**
August	1990	8.01%	**12.01%**
September	1990	7.56%	**12.00%**
October	1990	7.75%	**12.00%**
November	1990	7.59%	**12.00%**
December	1990	7.41%	**12.00%**
January	1991	7.31%	**12.00%**
February	1991	6.82%	**12.99%**
March	1991	6.91%	**12.00%**
April	1991	6.36%	**12.00%**
May	1991	6.06%	**12.00%**
June	1991	5.87%	**12.00%**

List of Approved Financial Institutions as a Depository for Lawyer Trust Accounts

Pursuant to Rule 13.4 of the Rules for Lawyer Discipline and an amendment to RPC 1.14 (a) (both effective March 1, 1991), lawyer trust accounts can now be maintained only in financial institutions which are approved because they have filed an agreement to file a report to the Disciplinary Board in the event any properly payable instrument is presented against a lawyer trust account containing insufficient funds, whether or not the instrument is honored. The following list contains all of the approved financial institutions as of March 18, 1991. The list will be published annually. Any lawyer who wants to make inquiry regarding whether any particular financial institution has been added to the list should direct such inquiry to the Office of Disciplinary Counsel, Washington State Bar Association, 2001 Sixth Avenue, Suite 500, Seattle, WA 98121-2599, (206) 448-0307.

American First National Bank
American Marine Bank
American National Bank
Baker Boyer Bank
Bank of California
Bank of Fairfield
Bank of Grays Harbor
Bank of Latah
Bank of Northshore
Bank of Pullman
Bank of Sumner
Bank of the Pacific
Bank of the West
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Enterprise Bank of Bellevue, N.A.
Evergreen Bank
Farmers and Merchants Bank
Farmers State Bank
First Community Bank
First American State Bank
First Bank Washington
First Federal Savings of Renton
First National Bank in Spokane
First Federal Savings Bank
of Washington
First Heritage Bank of Snohomish
First Independent Bank,
Downtown Office
First Interstate Bank
of Washington, N.A.
First National Bank of Port Orchard
Frontier Bank/Branch Operations
Grant National Bank
Great Western Bank
Heritage Bank
Harbor Community Bank
Horizon Bank
Horizon Credit Union
Industrial Credit Union
Inland Northwest Bank
Intalco Employees' Credit Union
Islanders Bank
Key Bank of Puget Sound
Kitsap Bank
Klickitat Valley Bank
Metropolitan Federal Savings
and Loan Association of Seattle
Mid State Bank
Mt. Rainier National Bank
National Bank of Tukwila
North Cascades National Bank
North Pacific Bank
Northwest National Bank
Northwestern National Bank
O Bee Credit Union
Olympia Credit Union
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Redmond National Bank
Riverview Savings Bank
San Juan County Bank
Seattle-First National Bank
Security Pacific Bank
Washington, N.A.
Security State Bank
Silverdale State Bank
Skagit State Bank
Social and Health Services
Federal Credit Union
Sound Banking Company
Sound Savings and Loan Association
Spokane Catholic Credit Union
Spokane Police Credit Union
Spokane Postal Credit Union
Spokane Teachers Credit Union
State National Bank of Garfield
Sterling Savings Association
Timberland Savings Bank
Twin County Credit Union
U.S. Bank of Washington
United Health Services Credit Union
United Security Bank
Valley Commercial Bank
Washington Federal Savings
and Loan Association
Washington First International Bank
Washington Mutual Savings Bank
Washington State Bar Association
Credit Union
Washington Trust Bank
West One Bank, King County
West One Bank, Pierce County
Whidbey Island Bank
Yakima Valley Bank

CLARK COUNTY REPORT
by JOHN F. NICHOLS

Parlez Vous Mon Attorney?

One does not usually expect to utilize one's second language (the one other than English), at the domestic docket. Yet this possibility presented itself to le grande **Scott Horenstein**. M. Horenstein questioned the expenditure of his opponent for day care at what Scott called, "an expensive, yuppie, French daycare." Apparently Scott equated the daycare's name, "Le Petite School," with spendthrift money management. Scott's knowledge of French was gained through years of watching "Pépé Le Pew" cartoons and from the back of postcards. Yet he failed to take into consideration that the closest thing to expensive French tastes in Clark County is the fries at Burgerville. In any event, the wife was awarded Le Car avec enfants support but no attorney fees. Bonne chance on appeal, Scott.

Dennis Duggan was contemplating one-half century of life, when he was interrupted by a call from a local plastic surgeon. The doctor requested that Dennis see a patient who was an apparent victim of medical malpractice regarding an implant in the chestal area. Accordingly, Dennis interviewed said client at his office, noting the usual background information. As the client became increasingly insistent that Duggan inspect the area of said malpractice, the office staff at Horenstein and Duggan, including Mrs. Duggan, opened the door to the strains of "Happy Birthday." Whether the client was charged for the initial conference or not will be determined at the next billing cycle.

EAST KING COUNTY REPORT
by RANDOLPH I. GORDON

Great mysteries. What caused the mass extinction of the dinosaurs? What caused the fall of Knossus and the catastrophic end of the Minoan Golden Age? Who were the mysterious Sea People who ravaged the Mediterranean? What is the significance of the huge figures drawn on the plains of Nasca visible in their entirety only from the air, or the stone heads on Easter Island? Why has the elevator in The Chateau Condominiums on Mercer Island been inoperative for six years?

Of these modern-day bafflers, only the last falls squarely within the exclusive jurisdiction of your Reporter. Yet, even this humble query about a four-floor condominium promises a tale filled with suspense, intrigue, human suffering, petty tyranny, Byzantine bureaucracy and, as is commonly the case with such tales, a homeowner's association. We shall likely find in these circumstances a moral or an exemplar of interaction between human beings and a society of surpassing complexity. In short, we find in this tale a metaphor for modern life.

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For our protagonists, a couple in their seventies, the mystery begins with a lease-purchase of a fourth floor condominium. Concerned about having to mount flights of stairs to their unit, they make an inquiry to the association, whose response is, according to our sources, to state brusquely: "The elevator will never work again." Initial inquiries with insurance companies, city attorneys and fire marshals reportedly confirm that such a condition is legally unsupportable, creating obvious risks in the event of fire or medical emergency. Each of these queries is defeated one by one. Insurance companies lapse into stony silence and institutional paralysis. City attorneys conclude that the matter is one of a private dispute or leave office under a cloud of public calumny. Fire marshals grow foggy and lose the spark of interest. Indeed, a letter to the Governor meets with Olympian obnubilation.

Time and again, over a period of years, initially gratifying responses wither beneath an oppressive apathy or are siezed up in a bureaucratic gridlock. In the intervening period, one of the couple is literally bound to the unit for eight months on account of illness, no longer able to exit the premises. Doctors must make house calls to provide care. The remaining spouse must carry groceries up the stairs in relays, often making four trips. A meeting of the homeowner's association rejects repair based upon unsubstantiated figures; the elderly couple, as lease-purchasers, are not entitled to vote. A bona fide bid for repair is soundly rejected. Sale of the unit is thwarted repeatedly on account of the out-of-service elevator. The elderly couple are labeled "trouble-makers." And the mystery thrives. An appeal to the thousand points of light appears inevitable.

For the senior citizen more than most, the apparatus of government is distant, the time frame and financial requirements of entry into the legal system forbidding. Our legal system is asked to undertake the mediation of the myriad disputes of our complex, heterogenous society. Inevitably, a lawyer must be found whose commitment is to a just society, irrespective of the fee-generating capacity of the dispute. It is not enough to prosecute litigation in its formal context. For the legal system to serve the needs of society, each of us is duty-bound to disentangle mysteries of the modern world. Such mysteries are seldom grandiose. Consider the case of the out-of-service elevator.

One bit of local news that *is* uplifting, however, is **G. Michael Zeno**'s becoming a principal in the firm of Davidson, Czeisler & Kilpatric, to be known hereafter as Davidson, Czeisler, Kilpatric & Zeno. **Ken Davidson**'s role in the formation of the Eastside Legal Assistance Program has already been well-documented in this column. We can rely on Mike's partnership to strengthen the ranks of those who seek to penetrate the uncontrollable mysteries of the modern world.

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KITSAP COUNTY REPORT

by KATHLEEN M..S. WRIGHT

Pro Bono: **Russ Hartman**, **Karlynn Haberly** and **Susan Daniel** are active in the Neighborhood Advice Clinic, processing calls and referring them to participating attorneys. **James Dudley** recently conducted a fee-free bankruptcy clinic.

Our Man in Action: Port Orchard attorney **Richard Stocking** is a Navy Reserve Commander, and he was assigned to a cargo handling battalion at the outset of Desert Shield. Now that Desert Storm is winding down, Stocking is busier than ever processing transportation vehicles to be sent stateside. ETA to Kitsap County is probably June, but the Navy graciously invited the Commander to stay on in uniform. We await word on whether the Gulf battle compared with those at the courthouse.

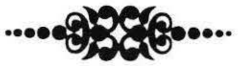
Partners: The Port Orchard firm of Shiers, Chrey & Hauge named **Jeffrey Cox** and **Susan L. Caulkins** as partners. The firm dates back to 1916, when founded by **Ray R. Greenwood**. Senior partner **Frank A. Shiers** joined the firm 42 years ago.

New addresses: **Susan Daniel** is striking out on her own from the Bremerton firm of Sanchez, Paulson, Mitchell & Laurie and will be located in the same Port Orchard office building as **Andrew Becker**, **Christopher Bell** and **David Hedger**.

Terrell Decker, **Kathleen Quinn Lappi** and **Kathleen Wright** formed the new firm of Decker, Lappi & Wright as of June 1 and are engaged in a litigation and business practice on Bainbridge Island.

Bainbridge is a popular place as former Seattle attorney **Chris Otorowski** commenced his medical malpractice and personal injury practice on Winslow Way in April.

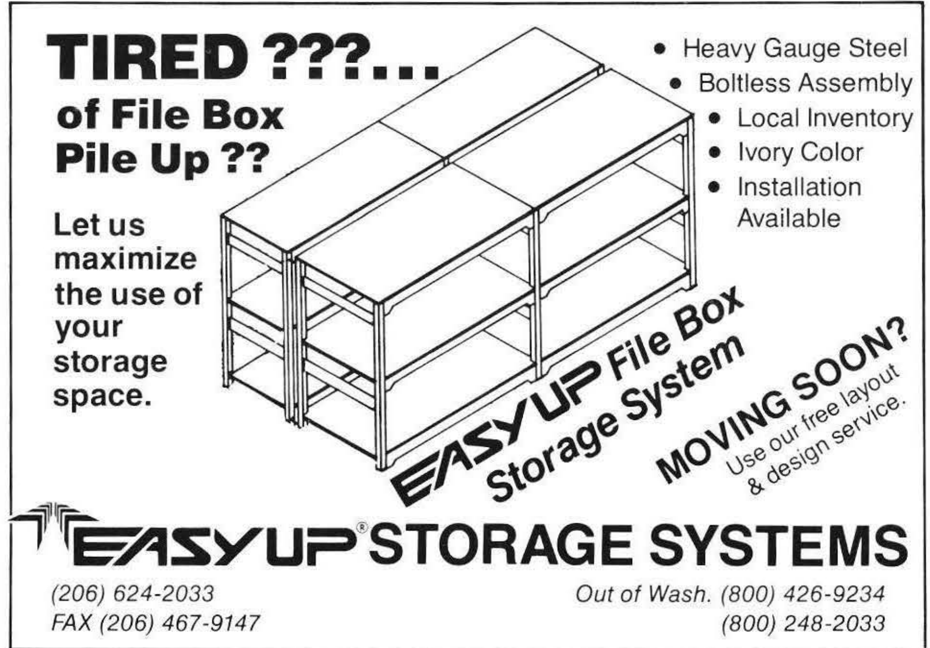
This columnist would like to thank all those who paid the ransom to release her from the terrorists who held her hostage while they submitted the April column.



PIERCE COUNTY REPORT

by **GEORGE S. KELLEY**

The judges have done it again. At least they have done it to those attorneys practicing probate and guardianship law. This atrocity takes the form of a new schedule for the two downtown court commissioners. Probate-guardianship matters will now be heard in one court on Monday, Wednesday and Friday at 1:30 p.m. instead of in the morning. Divorce practitioners will have their show cause hearings moved to Monday through Thursday at 9:30 a.m. in both courts, which in effect gives them an extra three court sessions per week to conduct their business. This change is a recognition



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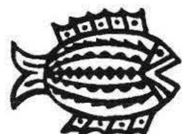

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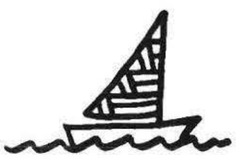

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Harvard Professor of Law Arthur Miller, brought to you by the WSBA Litigation Section, the Honorable James Dolliver of the Washington Supreme Court, noted entertainment attorney Jay Cooper, and Elden M. Rosenthal, plaintiff's counsel in the Portland "skinhead trial" will offer special presentations throughout the convention.

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SAN DIEGO

by the judges that the divorce lawyers are incapable of even agreeing on the temporary custody of the family goldfish without court assistance. It also penalizes the members of the probate-guardianship bar in that they will not be able to leave early for long weekends on Fridays or keep those coveted noon tee-off times on Wednesdays.

On the positive side, the new schedule should make it more difficult for King County lawyers to poach on this side of the county line—a sort of turnabout to the new local King County rules which appear to be designed to befuddle Pierce County lawyers or at least keep them constantly traveling I-5 for the King County motion docket.

In a counter move to take over in King County, we have word from assigned counsel director **Jack Hill** that his organization will be providing indigent criminal defense services to the new city of Federal Way.

Judge **Arthur Verheran** has won the state doubles handball championship to the amazement of those who thought that all he knew how to do was sail. Actually, he won the 50+ class which, considering his age, is hardly surprising.

Ken McCarthy and **Betty Marie Hogan** have announced the opening of an office in a new highrise on the banks of the Puyallup River. This is the tallest structure in the city of Puyallup except during the fair, when the ferris wheel takes top honors.

From the tallest building in Tacoma, Gordon, Thomas et al. announce that **Linda J. Barnard-King**, **Warren E. Martin**, **Sal Mungia** and **William R. Wilkerson** have become partners and that **Mary K. High** has been hired as an associate.

Late bulletin: Tacoma-Pierce columnist recently reached the 50-year milestone. His day began at the Pierce County Bar offices, where a "policewoman" attempted to arrest him for parking tickets. Twenty or 30 lawyers joined in watching the "arrest" by the strip teaser, who had been hired by his staff. Her presence added a new twist to the usual Friday morning motion calendar.

{contributed by Mike Turner}

WASHINGTON STATE TRIAL LAWYERS ASSOCIATION

by **LETHA J. OWENS**

WSTLA is proud to announce the forthcoming publication of the *Trial Lawyers Form Book*. This two-volume set is the long-awaited publication of **Bob Dawson**'s personal forms, letters and pleadings, which he has compiled over 12 years of practice. These forms have been used consistently by Dawson's firm, Pence & Dawson in Seattle, to manage a high-quality personal injury practice.

Attorney **Paul Stritmatter**, in his forward to the *Trial Lawyers Form Book*, notes that the two-volume set "goes from as simple as scheduling an appointment to as complex as a set of 18 motions *in limine* with supporting citations."

Paul N. Luvera, who has also penned a forward to the new book,

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His precisely worded pleadings include summonses and complaints, subpoenas, notices, motions and orders, jury demand, discovery interrogatories, request for production, inspection and admission, settlement documents, minor's claims, King County fast-track forms, sample trial brief, jury instructions and post-trial pleadings. In addition, the two volumes contain detailed case management forms such as prospective client intake sheets, fee agreements, authorizations, instructions for clients, checklists and a trial notebook.

In the past, as word of Dawson's unique automated system spread, attorneys began calling him and asking for copies of the forms. He decided last year to donate a complete set of forms to WSTLA for publication. Now revised, edited and perfected over 12 years, these model letters, forms and pleadings will be available, including accompanying computer discs in the two-volume set, available in July from WSTLA. For order information and prices, please call WSTLA at (206) 464-1000, or (800) 732-9251. Order by July 1 for a price discount.

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Ann Schindler was a member of the board of the Seattle-King County Chapter of WWL as the vice president, legislative affairs; she will be leaving the board to assume her new duties as a King County Superior Court Judge. Congratulations!

All the hard work of **Jeanne Clavere**, vice president, CLE, and her committee was seen on June 12 at the CLE, "Moxie, Manners and Methods: Ethics in the Practice of Law," held at the Holiday Inn Crowne Plaza. The keynote speaker was **Carrie J. Menkel-Meadow**, professor of law at UCLA. She is a noted legal scholar and author of such articles as "Lying to Clients for Economic Gain or Paternalistic Judgment: A Proposal for a Golden Rule of Candor" and "The Feminization of the Legal Profession: The Comparative Sociology of Women Lawyers." Joining her were many WWL members: The Honorable **Anne L. Ellington, Colleen Kinerk, Patricia Kaiser, Rita Bender, Maria Regimbal, Fred Tausend, Rosemary Daszkiewicz** and a panel discussion with **William Helsell** and **James Lobsenz**.

Other WWL members in action on the CLE circuit were: **Kay Shoudy** for "Wetlands 1991, Critical Land Use and Real Estate Development Issue in Washington"; **Carolyn M. Van Noy, Alma Kimura, Elizabeth J. Sanderson, Deborah Novachick,** and **Susan R. Irwin** for the WYLD

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seminar, "Efficiently Handling the Small Matter"; **Karen Marie Thompson** for "Washington Elder Law: The Basics and Beyond"; **Pamela S. Cowen** for "International Inbound Investment: Doing It Right"; **Evelyn Stroufe** at the Third Tulane Corporate Law Institute in New Orleans—**Katherine Gelband** co-authored her materials; **Karen Marie Thompson** for "Understanding the New Guardianship Act"; and **Ellen Conedera** as program chair for "The Growth Management Act, Will Real Estate Ever Be the Same Again?" which also included **Kristine A. Chrey** and **Alison Moss.**

Congratulations go to **Laurie Lootens Chyz,** who has become a principal in Hillis, Clark, Martin & Peterson, and to **Mary Steele,** who is a new partner at Davis Wright Tremaine. Congratulations are also extended to **Cynthia Thomas,** who became a partner at Tousley Brain. Special congratulations go to one of our board members, **Lisa Schuchman,** who is a new partner as of February 1991 at McKisson & Sargent.

Best wishes to former board member, **Alma M. Kimura,** who has relocated her office to the 30th floor of the Key Tower building. **Linda Kelly**

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March 1991

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Opportunity to enjoy practice, working with top-quality people. Small southwest Washington general practice firm with offices in Longview and Vancouver provides a perfect opportunity for attorneys who are committed to excellence in client service. Successful applicants will have an opportunity to build and improve their skills. Send cover letter outlining your interests and background along with a resumé and writing sample to: Kurt A. Anagnostou, Daggy Legal Services, P.O. Box 1793, Longview, WA 98632.

Bell & Ingram, P.S. seeks a highly motivated associate attorney with an interest in land use/environmental law and federal Indian law, and a secondary interest in business and commercial law. Applicants should have strong academic and professional accomplishments. Please send resumé, references and writing sample to Susan Anderson, Office Administrator, Bell & Ingram, P.S., P.O. Box 1769, Everett, WA 98206.

Adolph & Smyth P.S., an av-rated commercial litigation firm involved

in financial, real estate, environmental and construction litigation, seeks one and possibly two associates with a minimum of one year's civil practice experience, preferably with a large regional or national law firm. Demonstrable writing ability required. Salary negotiable. Send resumé and writing sample to 7100 Columbia Center, Seattle, WA 98104.

Attention Attorneys: Paralegal training school seeks practicing attorneys interested in teaching in the Seattle area. Commitment is one night per week, five to ten weeks. Compensation is $45 per evening. Courses being offered are American jurisprudence, criminal law, family law, torts and personal injury litigation, real estate litigation, business law, legal research & writing, estates and trusts. Please send resumé and course preferences to: A.I.P.S., One South 450 Summit Avenue, Suite 340, Oakbrook Terrace, IL 60181.

Betts, Patterson & Mines, P.S. seeks associates with a minimum of two to four years' experience to practice in commercial and tort litigation. Attorneys with excellent skills in research, writing and communication are encouraged to send a cover letter, resumé, and self-edited writing sample to Peggy Nagae Lum, Director of Hiring, Betts, Patterson and Mines, P.S., 800 Financial Center, 1215 Fourth Avenue, Seattle, WA 98161-1090. Tel: (206) 292-9988.

Nine-attorney Seattle firm seeks attorney with a minimum of one to two years' experience, high analytical and writing abilities to work on a contract or associate basis involving business and insurance law (no litigation). Part-time work would be considered. Send resumé and writing sample to Box 322, WSBA.

Bankruptcy lawyer needed by major Pacific Northwest law firm in main office at Seattle. Applicants should have at least two to four years' experience and familiarity with Washington state bankruptcy bar and courts. Reply with letter outlining objectives for practice and with resumé to Box 321, WSBA.

Five-lawyer Seattle office of respected Portland-based firm of 23 seeks an established general business lawyer to join them. A minimum of 10 years' experience preferred, with an emphasis on tax, employment/ ERISA or other welcome. Commitment to marketing and development of the firm's Seattle practice essential. Write Box 319, WSBA.

Well-established Tacoma firm with substantial client base in workers' compensation and personal injury law seeks associate with minimum three to five years' litigation experience, preferably in the personal injury field. Compensation negotiable; excellent benefits; outstanding opportunity. Please submit resumé and cover letter to Box 323, WSBA.

University of Washington School of Law. Applications are being accepted for part-time faculty to teach the following courses during the winter and/or spring quarters of 1992:

Copyrights, patents, and trademarks. Introduction to federal laws of copyrights, patents and trademarks and their relation to unfair competition doctrines under state law. Four hrs./week for one quarter. Alternatively, a separate course or courses on patents (three hrs.), copyrights (three hrs.), or trademarks (two hrs.) may be offered.

Real property security. An examination of methods by which an obligation may be secured by real property of the obligor or of a third person. Three hrs./week for one quarter.

Law in China. Introduction to the basic institutions and processes of the legal system of the People's Republic of China. Three hrs./week for one quarter.

Send resumés to Associate Dean Thomas Andrews, University of Washington School of Law, Condon Hall, 1100 NE Campus Parkway, Seattle, WA 98105. The application deadline is June 30. The University of Washington is an affirmative action/ equal opportunity employer.

Small firm in eastern Washington in need of an associate. Applicants must have outstanding academic credentials and be willing to work hard. Send resumé to: P.O. Box 908, Ephrata, WA 98823.

Small av Seattle firm, downtown, seeks associate with transactional real estate and commercial litigation experience. Send resumé and writing sample to Box 326, WSBA.

Associate position. Small Vancouver law firm seeks associate to do work in felony criminal defense work, family law and personal injury. Significant client contact, courtroom experience, and an independent caseload. Send resumé to: Attn: Angela Trumbo, 1516 Franklin Street, Vancouver, WA 98660. Phone: (206) 694-4551.

Associate position open: criminal defense and general practice. Close to hunting, fishing, skiing + low housing costs and quick commute to work. Great office staff. Send resumé and writing sample to Barton L. Jones, 314 Drumheller Bldg., Walla Walla, WA 99362.

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Davis Wright Tremaine seeks a litigation associate (at least four years' experience preferred and bankruptcy experience desirable) for its Bellevue office and two real estate associates (at least two years' experience preferred), one each for its Bellevue and Seattle offices. Candidates must have excellent academic credentials, writing skills and references. Send resumé to Ms. Toni Turner, Recruitment Coordinator, Davis Wright Tremaine, 10500 NE

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The well-written brief: Attorney concentrates on legal research and writing on contract basis. Former judicial law clerk in King County Superior Court, United States Bankruptcy Court. Admitted to Washington Bar in 1981. Short- or long-term projects, including appellate and trial briefs, jury instructions, briefing for office use. Elizabeth Dash Bottman, 6031 50th N.E., Seattle, WA 98115. (206) 526-5777.

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L.A. services: WSBA member (since '77) relocated in Los Angeles. Depositions, witnesses interviewed, meetings attended, research. References. (213) 461-4967/(213) 461-0448 (fax).

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Ten years' environmental experience and working knowledge of state and federal environmental statutes and regulations. Ridolfi Engineers and Associates, Inc., 1001 Fourth Avenue, Suite 3200, Seattle, WA 98104. (206) 684-9352.

Legal research and writing: UW Law graduate and Bar member. Thorough researcher. Effective writer. Strong references. Phone Donald W. Scott at (206) 526-9985.

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Seeking contract work: Experienced attorney in commercial, real estate and bankruptcy litigation seeking 10-15 hours of contract work a week while pursuing a Master's degree in tax at Golden Gate University, Seattle. Rates negotiable. References. Robert Millsap, (206) 525-5289, 4721 - 36th Ave. N.E., Seattle, WA 98105.

Registered professional land surveyor with J.D. and extensive experience as an expert witness in boundary disputes. Author of articles and regular columns in recognized journals and instructor for land surveyors' seminars; active in professional societies. Jerry R. Broadus, Geometrix Inc., (206) 840-5680.

WILL SEARCH

Ronald L. Monpas: Seeking last will, probably executed after 1984, of Ronald L. Monpas. Please contact Brian J. Linn, (206) 242-9876.

Verna Adelston of Seattle (died Dec. 1990): If you have information on her last will, please call Thomas Blake, Attorney; (206) 772-2880.

MISCELLANEOUS

Kaanapali Plantation, Maui: three-bedroom, two-and-a-half bath; 1,800 square-foot; off beach end unit townhouse. Available to those who appreciate the opportunity to enjoy a tastefully decorated home away from home. Sweeping ocean views from two lanais. Complete kitchen with microwave oven. Full laundry. Tennis court and pool; $150/175 per day. Call Frank Dean during East Coast office hours at (203) 328-3770.

Sunriver, Oregon: lovely, custom-built and furnished executive home. Three-bedroom; two-bath; sleeps 10. Large sundecks, BBQ, bicycles, microwave, washer/dryer; all amenities. Rental includes health/racquetclub privileges. (206) 588-4876.

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Vol. 45, No. 6, June 1991

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Ideal for small judgements and non-evasive subjects. Discovery fees.

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Determine if a debtor is financially worth pursuing.

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For larger claims - includes a spouse & choice of a supplemental service, and more.

EXPANDED QUEST II .... 369. MIN.
For more problematic cases. May include a subject's DBA.

MAJOR QUEST .... 439. MIN.
A Hidden Asset Investigation. Effectively structured for the more evasive.

★ **BARON'S QUEST** .... 319.
An over & above policy limit Asset Investigation
EXTENDED SEARCH ADD $110.

FAMILATERAL SUPPORT QUEST.... 399.
Assess an errant parent's ability to pay or determine the validity of a recipient's demands.

COMMUNITY PROPERTY REPORT........................... 479.
Discover the undisclosed assets of a spouse.

BENEFICIARY'S QUEST .... 469.
Determine the undisclosed assets of a deceased.

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Subject information old, unconfirmed, or limited? The Extended Skip Trace is made to order.

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SKIP DEBTOR QUEST II .... 329. MIN.
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Combo Skip Trace & Service of Process.

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Annual Report 1990

Legal Foundation of Washington

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An Overview

The Legal Foundation of Washington was established in 1984 to receive the interest on lawyers' trust accounts ("IOLTA"). The interest is transmitted by more than 116 participating financial institutions from over 4,600 trust accounts. The Foundation's primary focus is award of the funds to organizations throughout Washington for law-related charitable and educational purposes.

A nine member Board of Trustees governs Foundation operations, three each of whom are appointed by the Supreme Court, the Governor, and the Washington State Bar Association. Trustees serve a two year term, with opportunity for reappointment to an additional term.

Mission Statement

The Legal Foundation is dedicated to the provision of equal access to the justice system by funding legal and educational programs for low-income persons through the fair and efficient administration of IOLTA and other available funds.

President's Report

Dear Friends and Colleagues:

The Legal Foundation began the year with our fifth birthday celebration at the Goldmark Luncheon by presenting the Charles A. Goldmark Distinguished Service Award to Rami Arditi and to the Preston Thorgrimson firm for their good works over the last several years.

It was my personal goal for the year to consolidate the Foundation's relationships with its various constituencies.

The Foundation Board met twice with the Board of Governors of the Washington State Bar Association to review the activities of the Foundation and to coordinate areas of mutual endeavors and concerns. I had the opportunity to make two extensive reports to the Board of Governors, as well as the Foundation's annual report at the Washington State Bar Convention.

We worked closely with the Washington Bankers Association on matters of mutual concern. We met with local bar associations and bar leaders, and with our grantees and potential grantees, generally spreading the word about the Foundation to the broad corners of the state.

The Foundation moved this year to larger quarters to provide meeting facilities for the Board and grantees. In a further positive aspect, our income in 1990 grew approximately ten percent. We were able to increase our awards to grantees nearly ten percent over 1989, and continue to keep our administrative expenses under six percent.

Our continuing hope is that through the Foundation's encouragement, our limited grants will be multiplied many times over in the benefits gained, and that with the help of the Foundation, our grantees can obtain additional resources and develop new methods to enhance the good work accomplished by their programs. In those efforts we enhance equal access to justice for all people, but especially those of limited means.

Sincerely,

Paul A. Bastine
President

1990 Grant Awards

In November 1990, the Board of Trustees announced the award of $3,448,700 in IOLTA funds. The following 48 programs will utilize these funds during 1991.

LEGAL SERVICES

Centro Campesino Immigration Project, Granger — **$72,500**
Immigration services for migrant workers in the Central Valley.

Education Law Project, Seattle — **$50,000**
Statewide legal assistance to obtain legal rights for educationally handicapped children.

Evergreen Legal Services, Seattle — **$1,700,000**
Civil legal services to low-income persons in 31 of 39 Washington counties.

Fremont Public Association, Seattle — **$40,000**
Information and advocacy in public entitlement cases for low-income King and Snohomish County residents.

Legal Action Center, Seattle — **$50,000**
Advice, consultation and representation for low-income persons in landlord/tenant cases in Seattle and King County.

Northwest Immigrant Legal Services, Seattle — **$200,000**
Legal information, advocacy and referral in immigration cases for low-income persons statewide.

Puget Sound Legal Assistance Foundation, Tacoma — **$360,000**
Civil legal services for low-income persons in Pierce, Thurston and Mason Counties.

South Sound Advocates, Olympia — **$14,000**
Legal assistance for low-income developmentally disabled persons in Thurston, Mason and Grays Harbor Counties.

Spokane Legal Services Center, Spokane — **$265,000**
Civil legal services for low-income persons in Spokane, Lincoln, Ferry, Stevens, and Pend Oreille Counties.

Unemployment Law Project, Seattle — $75,000
Representation in unemployment hearings, statewide, for low-income persons.

United Indians of All Tribes, Seattle — $18,500
Legal support for the Ina Maka Family Healing Program.

University Legal Assistance, Spokane — $30,000
Legal assistance in family law cases for low-income persons.

VOLUNTEER LEGAL SERVICES

Benton-Franklin Legal Aid Society, Kennewick — $31,000
Volunteer attorney services for low-income people in a joint program with the county bar and the Volunteer Center.

Chelan-Douglas County Legal Aid, Wenatchee — $9,000
Volunteer attorney services for low-income people in a joint program with the Community Action Agency.

Clallam Co. Pro Bono Legal Services, Port Angeles — $6,000
Volunteer attorney services for low-income people, in a joint program with Umbrella Community Services.

Clark County Bar Association, Vancouver — $13,000
Volunteer attorney advice and legal representation for low-income people.

Eastside Legal Assistance Program, Bellevue — $18,000
Volunteer attorney advice and representation for low-income persons in east King County.

Grant County Community Action Council, Moses Lake — $15,000
Advice and representation by volunteer attorneys without cost to low-income persons in Grant and Adams Counties, in conjunction with the local bar.

Grays Harbor County Bar Association, Aberdeen — $11,000
Legal advice and representation to low-income persons by volunteer attorneys, with the Coastal Community Action Council.

Kitsap County Bar Association, Bremerton — $15,000
The YWCA of Kitsap County administers a volunteer attorney program for low-income persons with support of the local bar.

Lewis County Bar Association, Chehalis — $14,000
Volunteer attorney advice and representation for low-income persons.

NE Washington Rural Resources Development Association, Colfax — $12,500
Volunteer attorney advice for low-income persons in Ferry, Stevens, and Pend Oreille Counties, in a joint program with the local bar associations.

Okanogan County Bar Association, Okanogan — $3,000
Volunteer attorney advice for low-income persons, in a joint program with the Okanogan Community Action Agency.

Seattle-King County Bar Association Family Law Clinic, Seattle — $40,000
Volunteer attorney representation in family law matters to low-income persons.

Seattle-King County Bar Association Volunteer Legal Services, Seattle — $42,000
Volunteer attorney representation for low-income persons in civil cases.

Seattle-King County Bar Association Young Lawyers Division Neighborhood Legal Clinics, Seattle — $13,000
Volunteer attorneys provide 30 minutes of legal consultation in 11 clinics throughout Seattle and King County.

Skagit County Bar Association, Mt. Vernon — $20,500
Legal advice and representation for low-income persons by volunteer attorneys, with the assistance of the Community Action Council.

Snohomish County Legal Services, Everett — $40,000
Advice, family law self-help classes, and legal representation by volunteer attorneys for low-income persons.

Spokane Bar Association
Family Law Clinic, Spokane — **$11,000**
Volunteer attorneys, with support from Spokane Legal Services, provide family law self-help classes and advice to low-income persons.

Spokane Bar Association Volunteer
Attorney Program, Spokane — **$38,000**
Civil legal representation for low-income persons by volunteer attorneys.

Tacoma-Pierce County Bar Association
Pro Bono Program, Tacoma — **$9,000**
Self-help classes for low-income persons seeking dissolutions, in a joint program with the Puget Sound Legal Assistance Foundation, and legal advice through a neighborhood legal clinic.

Thurston County Bar Association, Olympia — **$5,000**
A family law self-help clinic for low-income persons, in conjunction with the Puget Sound Legal Assistance Foundation.

Washington State Bar Association, Seattle — **$20,200**
Coordination of technical assistance and training to volunteer attorney programs throughout Washington.

Whatcom County Bar Association, Bellingham — **$29,000**
Volunteer attorneys, in a joint program with the Opportunity Council and Evergreen Legal Services, provide legal assistance and self-help classes for low-income persons.

Whitman County Bar Association, Pullman — **$8,000**
Volunteer attorney advice and representation by the local bar, with the Community Action Agency.

Yakima County Bar Association
Pro Bono Project, Yakima — **$25,000**
YWCA, in conjunction with the local bar, provides assistance without cost to low-income persons in family law matters and protection orders against domestic violence.

LAW-RELATED EDUCATION

Community Service Center for the Deaf and Hard of Hearing, Seattle — **$20,000**
Legal advocacy, clinic, and workshops for the deaf and deaf-blind in Seattle, Yakima, Vancouver and Tacoma.

Housing Trust Fund Coalition, Seattle — **$5,000**
Legal research to develop strategies for preserving federally subsidized housing for the indigent.

Northwest Women's Law Center, Seattle — **$30,000**
Family law information and referrals and family law workshops for King, Pierce and Snohomish County residents.

Seattle-King County Bar Association Youth and Law Committee, Seattle — **$5,000**
Statewide distribution of a law-related handbook for high school seniors and the public.

Tenants Union, Seattle — **$15,000**
Statewide toll-free "hotline" for landlord/tenant information.

University of Puget Sound Law School, Tacoma — **$12,500**
Publication of a directory of law-related education materials in a computer accessible format.

Washington Center for Law-Related Education, Seattle — **$5,000**
Support for a conference to encourage law-related education within the K-12 school curriculum.

YMCA/Youth and Government, Olympia — **$4,000**
Support to increase minority participation in the 1991 statewide Mock Trial Competition for high school students.

ALTERNATIVE DISPUTE RESOLUTION

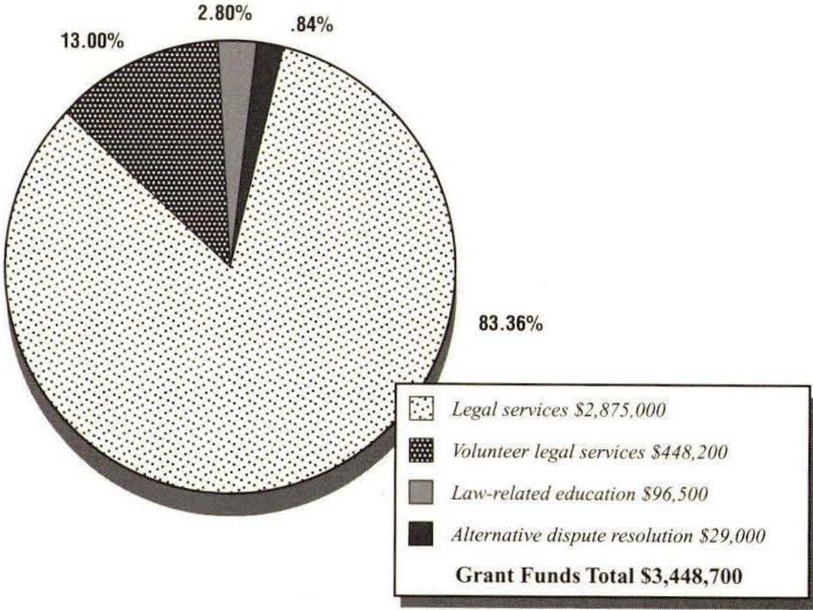
Chrestos Counseling Center, Tacoma — **$5,000**
Development of a parenting plan mediation program.

Dispute Resolution Center of Kitsap County, Bremerton — **$2,000**
Initiation of a county-sanctioned dispute resolution center.

Dispute Resolution Center of Snohomish Co., Everett — **$20,000**
Training and development to encourage creation of dispute resolution programs throughout Washington.

Dispute Resolution Center of Thurston Co., Olympia — **$2,000**
Initiation of a county-sanctioned dispute resolution center.

Distribution of 1990 Grant Funds



The distribution of grant funds among the program areas reflects the Board's emphasis on civil legal services for the low-income as the Foundation's highest priority for funding.

Balance Sheets
As of December 31, 1990 and 1989*

ASSETS	1990	1989
Current Assets		
Cash and cash equivalents	$ 81,774	$ 126,016
Investments	3,613,546	3,141,110
Interest receivable	25,146	74,878
Prepaids	5,178	8,103
Total current assets	3,725,644	3,350,107
Property and Equipment		
Furniture and equipment	77,789	59,217
Less - accumulated depreciation	(48,028)	(35,379)
	29,761	23,838
Designated Assets		
Interest receivable	35,873	30,762
Investments, less allowance for excess of cost over market value of $28,419 in 1990 and $10,523 in 1989	2,140,923	1,604,447
Total designated assets	2,176,796	1,635,209
	$5,932,201	$5,009,154

LIABILITIES AND FUND BALANCE	1990	1989
Current Liabilities		
Liability for grants awarded	$3,459,617	$3,068,533
Accounts payable	1,922	1,517
Accrued expenses	12,907	8,082
Total current liabilities	3,474,446	3,078,132
Fund Balance		
Designated	2,176,796	1,635,209
Undesignated	280,959	295,813
	2,457,755	1,931,022
	$5,932,201	$5,009,154

*The accompanying notes to this financial statement are not included in this report, but may be obtained directly from the Legal Foundation of Washington.

Statements of Operations and Changes in Fund Balance For the Years Ended December 31, 1990 and 1989*

Support and Revenue	1990	1989
Interest on lawyer trust account receipts	$3,929,659	$3,570,585
Interest	402,961	351,616
Unrealized gain (loss) on valuation of marketable equity securities	(17,896)	30,387
	4,314,724	3,952,588
Expenses		
Grants awarded	3,543,812	3,050,253
Support services		
Salaries	111,631	99,872
Payroll taxes	9,863	8,682
Employee benefits	13,498	9,551
Travel	7,918	5,903
Secretarial services	1,753	1,885
Consulting fees	1,057	3,665
Printing	7,937	3,922
Rent	20,416	13,586
Telephone	4,010	3,749
Professional fees	9,397	9,140
Office supplies	3,261	2,539
Postage	2,844	3,119
Bank charges	1,210	1,287
Depreciation	12,649	11,067
Insurance	4,508	5,155
Repairs and maintenance	4,193	3,292
Board meetings and seminars	16,934	20,845
Awards	7,324	2,861
Other, net	3,776	3,375
Total support expenses	244,179	213,495
Realized loss on sale of marketable equity securities	-	16,224
Total expenses	3,787,991	3,279,972
Excess of support and revenue over expenses	526,733	672,616
Fund Balance, beginning of year	1,931,022	1,258,406
Fund Balance, end of year	$2,457,755	$1,931,022

*The accompanying notes to this financial statement are not included in this report, but may be obtained directly from the Legal Foundation of Washington.

Grant Application Process

Applications for annual grant funds to be disbursed in 1992 may be obtained from the Foundation. Completed applications must be returned by August 31, 1991. Grant awards will be announced in December.

Applications for small innovative grants are also available from the Foundation. These grants provide up to $2,000 in one-time funds for new approaches to legal services, law-related education or alternative dispute resolution for low-income persons. Application may be made to the Foundation at any time for these funds.

Applicants may contact Foundation staff for assistance in completing applications.

Goldmark Award

The Charles A. Goldmark Award for Distinguished Service is presented annually to an individual or organization in recognition of exceptional efforts to provide equal access to justice. The award honors Chuck Goldmark who served as president of the Foundation at his untimely death in 1986.

Nominations for the award may be made by letter to the Foundation. Letters of nomination should be received by November 15, 1991.

Staff

Barbara C. Clark, *Executive Director*
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Genevieve McCullum, *Administrative Assistant*
Margaret Welch, *Data Base Manager*
Martha Bradshaw, *Special Projects*

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