Washington State Bar News
Vol. 47, No. 6, June 1993

Dancing in the Minefields:
White-collar crime in the 1990s

The WSBA Credit Union:
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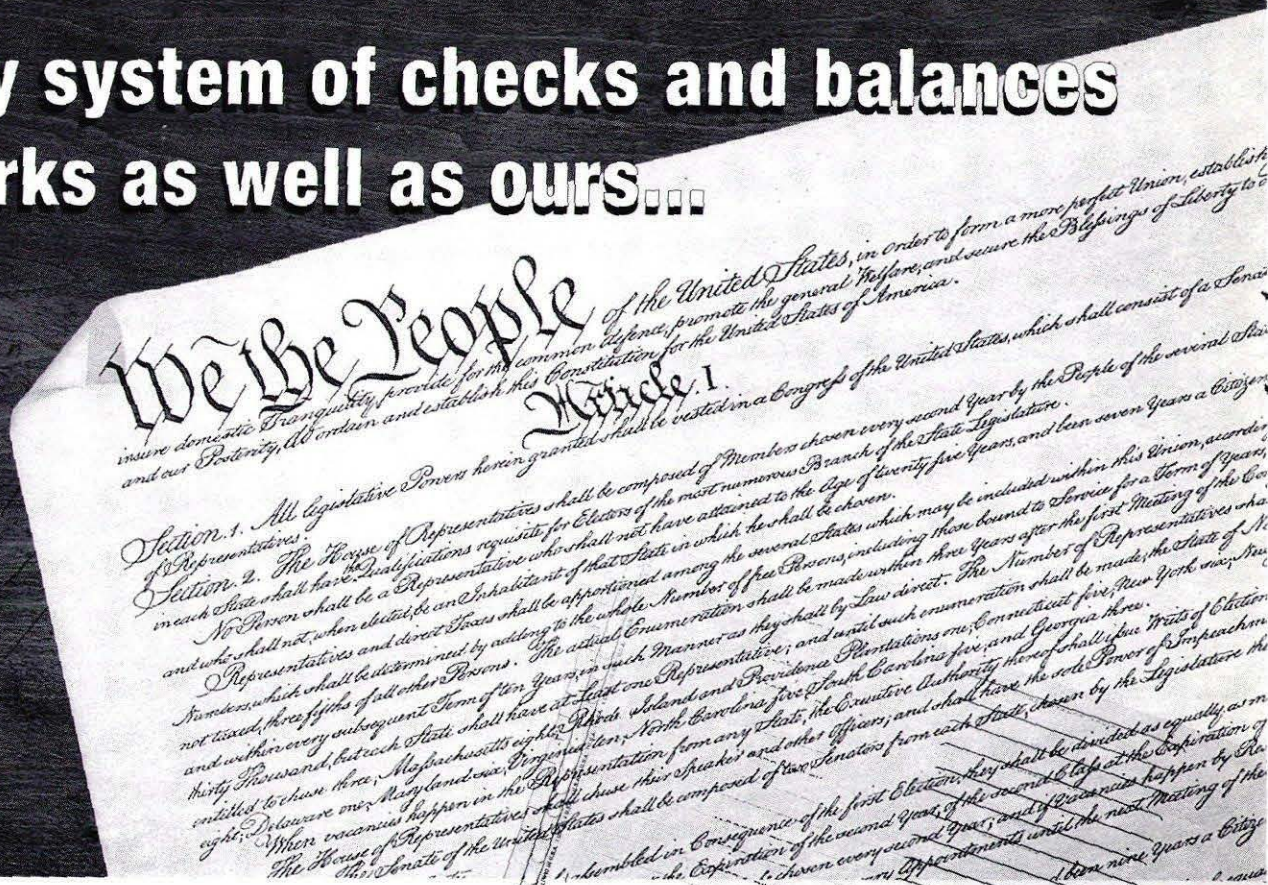

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DEPARTMENTS

ART CREDITS

Lawyers dance through the minefields of preparation and litigation over white-collar crime in the '90s. Models on a Stratego® game board. Concept and photography by Department of Public Affairs staff.

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

The Slings and Arrows of Outrageous Fortune

Editor:

I sent this by electronic mail to my home base at Camp Pendleton, to be posted from there. This should be my last report from Somalia; I am scheduled to return to my home base at Camp Pendleton about May 10, 1993.

I have organized a group of 23 military climbers from five nations to go to the summit of Mt. Kilimanjaro on April 27. I have been to the basement of Africa and hope to go to the roof before I leave.

One of the most important projects that my office participated in was the investigation into the events of 16 March 1993 in Kismayo, Somalia. On that day, forces loyal to warlord General Morgan took control of the town, defeating the forces loyal to warlord Omar Jess. There were allegations that Morgan had violated the cease-fire terms, and the Somali peace conference in Addis Ababa was suspended to determine who was responsible for the fighting. There were also allegations that women and children had been used as shields in the fighting, a possible violation of international humanitarian law.

An investigation team was dispatched by Lt. Gen. Johnston, the UNITAF commander, to conduct an inquiry into the matter, and report back to him. I led a seven-member team with Army Major Dick Gordon as my deputy, a three-person counterintelligence team, and two interpreters. We interviewed 40 witnesses and made a written report to Lt. Gen. Johnston. We concluded that it was impossible to determine who started the fighting, a unique combination of mob action and infantry tactics.

The memorable part of the Kismayo trip, for me, was a visit by Blackhawk helicopter to the hideout of "Colonel" Jess and his militia in the Juba River town of Kamsuma. As we finished our meeting, we realized that the local population was not particularly friendly toward Americans. It seems that Jess blames the U.S. for his defeat. As we departed and approached the helo through a cow pasture, we were surrounded by a hostile crowd and noticed objects sailing through the air in our direction. As the objects hit the ground, I realized that I was being stoned with, among other things, cow pies. It may have been because they had seen me on CNN the day before and heard the report that the "judge" was coming to town.

There are a number of projects underway in my final weeks in Somalia. I have been meeting regularly with the former Somali judges in an effort to assist them in obtaining office space and a basic law library. Yesterday we took an Army engineer to survey the building they selected, the abandoned Academy of Arts and Sciences. This week an attorney from the Washington, D.C. area, Martin Ganzglass, arrives for a two-week visit to assist in the reestablishment of the Somali court system. He is well-known among the older jurists here, since he helped draft the Somali Criminal and Civil Code when he was here as a Peace Corps volunteer in the 1960s. He should have some interesting insight into the Somali legal system.

I will leave Somalia with mixed feelings. I have come to respect the Somali judges and would like to help them with the challenges ahead. Still, the U.N. mission here is complete; we have provided a secure environment for the delivery of relief supplies to the starving people in the interior of Somalia. The "nation-building" will have to be left to the United Nations, and ultimately to the Somali people.

COL. F.M. LORENZ, USMC
Staff Judge Advocate General
Unified Task Force Somalia

Slanted News

Editor:

I was surprised to see that in your report on page 17 of the March, 1993 *Bar News* you used the slanted pie chart. Slanted pie charts are usually used to mislead people about the sizes of the slices of the pie. Assuming that you did

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not know the trick of the slanted pie chart, here is how the deception works:

1. Pie slices in the back (nearest edge) of the pie are wider than slices of the same size located in the back. Check it with your ruler. The CLE-14 percent slice is wider than the four slices totalling 15 percent in the back. That's not very significant. There's more.

2. Pie slices in the front of the pie are much wider than slices of the same size on the left or right. For instance, the office expense-7 percent slice is over twice as wide as the bar exam-6 percent slice on the left side.

3. Pie slices in the front show the "edge" of the slice in addition to the surface of the slice so they appear greatly larger than other slices of the same size. The 14 percent-CLE slice is *3 1/2 times larger* than the 4 percent-"other" expense, but the total area of the CLE pie is *9 times larger* than the total area of the "other" slice.

One might conclude that you wanted to minimize the size of the salary expense and focus on the CLE expense. I suspect it was staff who printed the chart without your knowledge. Just for fun, you should have the slanted pie chart redrawn putting salaries in front to see how bad it looks. For further information on misleading graphics, see the book, "How to Lie With Statistics," by Darell Huff (New York: W.W. Norton & Co.).

JOHN PANESKO
Chehalis

Dennis Harwick replies: Thank you for your interesting letter of April 6, 1993 concerning the use of a "slanted" pie chart. I presume the word can be used figuratively as well as literally.

You are correct in assuming that I did not know the trick of the slanted pie chart. Once again, it proves the maxim, "Never attribute to malice that which is adequately explained by stupidity." Actually, the pie chart was computer-generated by my Microsoft Excel program. Since receiving your letter, I have tried to run the numbers in a different sequence to see if the pie chart looked any different. As nearly as I can tell, the positioning of the wedges of the pie is built into the program.

I can assure you that, given an option, I would not have emphasized the size of the CLE portion of the pie.

Thanks again for your interesting and entertaining letter. I'll never look at a pie chart quite the same again.

But Not Lawyer Jokes, Right?

Editor:

The *Bar News* needs funnier material, such as the "Crassified Ads," an April

Fools' feature from *Wisconsin Lawyer*. As it is, the only thing we have to laugh at is John Nichols' "Clark County Report." Thanks.

DAVID DRESSEL
Olympia

More Blues

Editor:

I read with delight the "Lawyer-Bashin' Blues" published in the January 1993 *Bar News*. Whether singing the blues was a natural product of law school, or just the Puget Sound School of Law (which is not located on a delta, or in Mississippi, but which was located in South Tacoma when both Mr. Nicholson and I attended), I am not sure.

His "Blues reminded me of the "First-year Law School Blues," written, surprisingly enough, during finals week of my first year in law school. This song became popular among a small group of students at UPS, but never made it to the top 20. I have dusted it off . . .

Kudos for your continued good work. Further regarding January's issue, my sixteen year-old son *really* would like to meet Larry Feinstein.

RONALD C. HARDESTY
Bellingham

First-year Law School Blues

Sitting in the reading room, a book in my hand.
Been here for weeks, I'm a solitary man.
My head's spinning 'round, wondering whether I'll win or lose.
I've got a bad case of the First-year Law School Blues.

Chorus: From lack of sleep I look an awful fright.
I can't tie my shoes or tell my left from my right.
My eyes are puffed up and my backbone's tight.
All I want to do is sleep tonight...

But I've got a hundred pages more of Proximate Cause,
Fifty more of Contracts before I pause.
I'll be up all night, but sleep I cannot choose.
I'm stuck right here with these First-year Law School Blues.

(Break on verse)

Chorus: I turned to the bottle but I still feel the pain.
No time to take a shower, I just wait for the rain.
Like a fool I turn to Gilbert's to make the law plain.
The words are spinning 'round and I'm going insane.

Palgraf, Luten Bridge, Pennoyer & Neff,
Tulk v. Moxie, what could be left?
Just how long will I have to pay my dues,
Before I get rid of these First-year Law School Blues?

(Break on verse)

Chorus: Well, now exams are over and my whole body's numb.
It's all I can do to keep from sucking my thumb.
If I failed my tests I'll be out on the bum,
Or starting out *de novo*! So pass me the rum...

'Cause I'm sitting at the bar with my head in my hands
Feeling old at thirty, I'm a beaten man.
First year is over so I reach for that bottle of booze.
And toast to next year's First-year Law School Blues.
(Just two more years of those goddammed law school blues).

LIFE IN A SLOWER LANE

by **Steve DeForest**
WSBA President

The daily dosage of news on television, radio, and in newspapers reporting violent crimes, whether international (Bosnia), national (Waco), or state (drive- by shootings), could easily create doubt about whether a peaceful society is a utopian objective that will always elude us. There are numerous mechanisms to cushion the shock of these atrocities. I'd like to share one of my personal antidotes . . . reading the "Sheriff's Report" published from time to time in *The Leavenworth Echo*, a weekly newspaper. The residents of Leavenworth, Cashmere, Peshastin, Dryden and Lake Wenatchee have sought the assistance of local law enforcement officers in a variety of circumstances, including the following verbatim entries during the past year, along with my immediate rejoinder on the lighter side.

April 17: A Leavenworth woman reported a noisy puppy on West Whitman Street. [Hush puppy.]

April 19: A man reported five men had parked their motorcycles on 8th Street and had been walking around town wearing leather jackets and their hats on backwards. [Yeah, backwards.]

June 23: A woman was reported to have been left by her boyfriend at a Highway 2 convenience store in Leavenworth with nowhere to go. [I thought restrooms were required.]

June 25: A Cashmere woman reported teenagers had been throwing dirt and rocks at passing vehicles at a bus stop on Highway 2 in Leavenworth. When contacted, the teenagers said that they had been pulling cherries off a bush while waiting for the bus. [Life is just a bowl of . . .]

August 3: A Peshastin woman reported three teenagers had been playing on Main Street with a cigarette lighter and had been going into various yards in the area. [To smoke?]

August 7: A Leavenworth man reported another man had exposed himself at City Park on Front Street. When contacted, the man said it had not been intentional. [His belt broke.]

August 17: A Leavenworth woman reported someone had slept in her Front Street backyard. [Campgrounds fill up fast on the weekends.]

August 27: A Leavenworth woman reported she had received a threatening phone call at her Cherry Street residence, and believes it may have been from her soon to be ex-daughter-in-law's boyfriend. [How's that again?]

August 29: A Leavenworth man reported his Wilson Street neighbor had been yelling and throwing rocks at his bed-and-breakfast clients. [Did they throw back, or just yell?]

August 31: A Leavenworth man reported teenagers had been riding dirt bikes behind a Birch Street residence. [This is illegal?]

September 3: A Leavenworth woman reported she had seen people move past a lean-to and go toward the river near East Leavenworth Road. [Pretty suspicious.]

September 19: Someone from the Leavenworth ranger station reported a passing motorist had found a business card on his vehicle. Written on the card was, "Call my house to see if I am OK. I just picked someone up to give them a ride." The number was dialed, and a woman on the other end said she was fine. [Why haven't I ever thought of that?]

September 24: A Leavenworth woman reported a naked man had jumped out in front of her vehicle about a mile east of the Squirrel Tree Inn. [Did he jump back?]

October 3: A vehicle was reported to have been stopped on Highway 2 near Leavenworth for speeding and for having a defective exhaust. Inside the vehicle was found a large supply of towels which appeared to be from a motel. When questioned, the driver reported he always packs extra towels when traveling. [Sure, but whose towels?]

October 12: A woman reported a man had tried to sell her oil out of his truck at a convenience store near Peshastin. [Seems OK to me.]

November 10: A man was reported to have been standing on top of a moving van and pointing a long gun towards the hills, up Chumstick Highway. [The wild west lives on!]

January 7: A woman reported four men had used obscene language on Front Street. [Must have been tourists.]

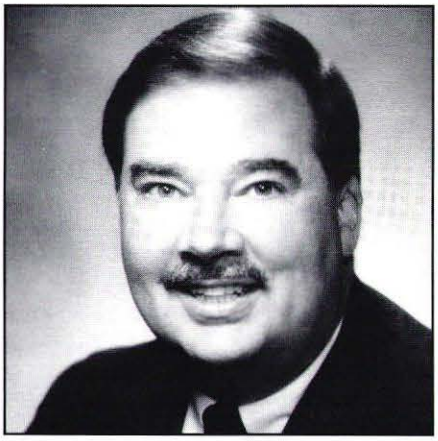
January 25: A Leavenworth woman reported she had seen suspicious footprints in the snow on Center Street. [I'll be more careful next time.]

February 20: A Leavenworth woman reported two dogs in the back of a truck parked at 9th and Commercial Streets had barked at her. She feared they may bite someone. [Their bark is worse than their bite.]

March 5: A Peshastin man requested animal control pick up his dog at his Main Street residence because it had bitten him. [Aw, give the dog another chance.]

Before you pick up the phone to call the Chelan County Sheriff about employment opportunities, you should know that Chelan County does have its share of assaults, burglaries, and car thefts.

Time to turn my cap around and cross back into the fast lane.



Dennis P. Harwick

"Disenfranchised by Choice"

That intriguing term was used by Governor Vickie Norris during the Board of Governors' recent retreat. The discussion—what did the referendum mean? Why are WSBA members so unconnected and/or alienated? Governor Norris made the point that people with busy practices and lives only have so much time to give to civic and professional organizations. Even assuming the WSBA is competing for that time with only law-related professional organizations, the competition is formidable.

As Tip O'Neill—legendary politician that he was—once said, "All politics are local." Similarly, most volunteer work is given to those organizations and issues that strike closest to home—the local bar association, the specialty bar association, the practice area. Consequently, it is both logical and understandable why lawyers gravitate to KCBA (formerly SKCBA), Spokane County Bar Association, WSTLA, Washington Women Lawyers, WSBA sections, local pro bono programs, etc. The effect is that many people are "disenfranchised by choice." They have made an intelligent and logical decision to devote their energies to an entity that is "closer to home" than the WSBA.

Is this a failure by the WSBA? Not really. By definition, the WSBA is a statewide organization dealing with broad issues: regulation of the legal profession, professionalism, legislation, etc.

Should the WSBA be threatened by this phenomenon? No. Quite the contrary. It should embrace efforts of various law-related organizations. WSBA sections are a perfect example of participation by special interests within the framework of the larger organization.

Should the WSBA remain silent on every legislative issue where a local or specialty bar has a position? No. Only the WSBA can speak for all the lawyers of the state. As a practical matter, the WSBA does not take positions on narrow issues, and when it does, it is usually operating through one of its sections with expertise in that area.

Should the WSBA retreat from every field or activity that a local or specialty bar gets into? No. Just because local and specialty bar associations put on CLE programs, the WSBA shouldn't get out of the CLE business. An extensive review of CLE programming in Washington reveals that local bar CLE programs differ significantly from the typical WSBA CLE program (generally in terms of length and subject matter). On occasion, the WSBA will compete with a local bar or specialty bar for the CLE registrant. The proverbial bottom line, however, is that competition works to the advantage of the consumer, i.e., the lawyers of Washington, and makes every CLE provider strive to present the best materials for the lowest cost.

"The More Things Change . . . "

In the "the more things change, the more they stay the same" category, I was provided recently with some information about the 1936 WSBA convention. At that meeting, Joseph A. Barto, a member of the Board of Governors, presented an article entitled, "What Good Is This Organization?" in response to letters he had received from various lawyers asking questions like "I want to know what-the-hell-good is this organization!" and "What good has it done for lawyers?"

Governor Barto responded:

> What good is this organization if its members do not meet, discuss, and solve the many interesting, if vexatious problems which confront it—discipline, fees, unauthorized practice, legislation, public relations, the economic condition of the Bar, ambulance chasing—are all living issues.

Well, we are still working on discipline (just had an ABA Evaluation Team review our system), fees (dues referendum), unauthorized practice (hampered by niceties like restraint of trade), legislation (sales tax on services), public relations (public image of lawyers), the economic condition of the Bar (downsizing, employment conditions), and ambulance chasing (balancing the right to advertise with the First Amendment).

Sales Tax on Services

Speaking of sales tax on services—even as this is being written, the legislature is still in the throes of considering such a tax. We have received letters asking why WSBA members haven't seen much in *Bar News* on this issue. The answer is simple—the sales tax issue (and most legislative issues) moves far too quickly for a monthly publication with a significant lead time to adequately cover.

WSBA efforts include:

- a special sales tax committee meeting regularly since November of 1992 to respond to the various mutations of the legislation,
- providing all WSBA members with a suggested insert for law office billings urging clients to contact their legislators on this issue,
- the Board of Governors taking a proactive position supporting an increase in the B&O tax (from 1.5 percent to 2.0 percent) instead of a sales tax on services,
- a Tax Section committee addressing technical problems with the legislation,
- President Steve DeForest making numerous trips to Olympia to testify and meet with legislators, and, most importantly,
- John Fattorini, the WSBA's legislative representative, working night and day for months on this issue.

As this is written, the outcome is still unclear, though the momentum of the state's budget woes appears to compel the Legislature towards such a tax. It is important for members of the WSBA to know, however, that this has been the WSBA's primary legislative priority this year and that a tremendous effort has been made to educate the Legislature about the negative ramifications of a sales tax on services.

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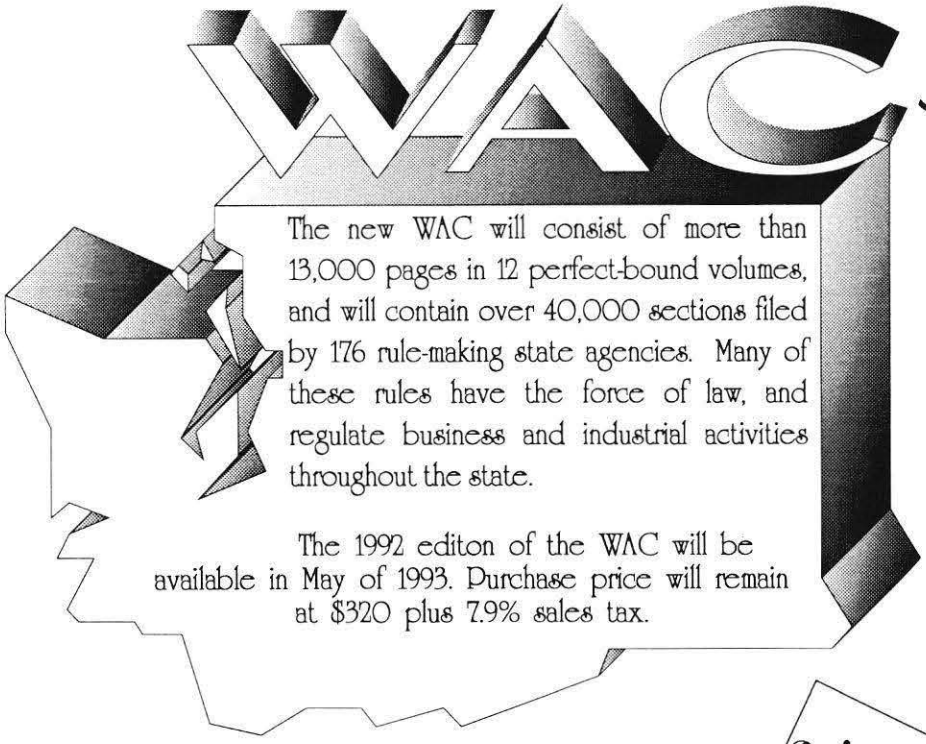

The new WAC will consist of more than 13,000 pages in 12 perfect-bound volumes, and will contain over 40,000 sections filed by 176 rule-making state agencies. Many of these rules have the force of law, and regulate business and industrial activities throughout the state.

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DANCING IN THE MINEFIELDS: WHITE-COLLAR CRIME IN THE 1990S

by **C. James Frush, Fredrick D. Huebner** *and* **Robb London**

On March 3, 1992, Department of Justice lawyers and federal regulators slapped a well-known New York law firm with a $275 million lawsuit and a court order freezing the assets of the partnership. The reason: the government claimed the firm, Kaye Scholer, Fierman, Hays & Handler, had misled investigators during its aggressive representation of savings-and-loan executive Charles H. Keating, Jr. Within hours of the asset freeze, the firm's bankers concluded that Kaye Scholer could not survive the financial hemorrhaging that would occur unless the freeze ended immediately. Despite the dubious constitutionality of the government's action, Kaye Scholer settled the lawsuit for more than $40 million six days later.

The Kaye Scholer asset freeze sent a chill through law firms from Washington, D.C. to Washington state. The narrow line between zealously defending clients accused of white-collar crimes and personally risking the wrath of the government is becoming ever more difficult to walk. The Department of Justice lawyers who brought down Kaye Scholer were blunt: Lawyers everywhere could expect more such tactics in the future.[1]

Recent developments in white-collar criminal prosecution present complex practice considerations for all lawyers handling civil, regulatory and investigative matters where financial, business and environmental crimes are involved. This article aims to provide a map through the minefield of white-collar criminal law and to highlight the principal dangers to client and lawyer.

Keeping One Step Ahead of the Law: Handling Criminal Problems Before the Authorities Find Out

Don't Do the Crime, Don't Do the Time: Avoidance, Mitigation and Internal Investigations

Avoidance and Mitigation

No one who has watched a business disappear or lose customers and share-price because of a major criminal investigation can doubt the dollars-and-cents value of corporate-crime prevention and mitigation programs.[2] Their legal importance increased dramatically with the 1991 adoption of the Organizational Sentencing Guidelines, a complex set of mandatory formulas for sentencing organizations convicted of federal crimes.[3]

Under the Guidelines, penalties for organizations are reduced or enhanced on the basis of a "culpability score." The culpability score is increased if the organization's management was involved in or tolerated the criminal conduct, violated an order or injunction, had a prior history of misconduct or obstructed justice in the investigation of the offense. The score is reduced if the organization had an "effective program to prevent and detect violations of law,"[4] promptly reported the offense, cooperated in the investigation, and accepted responsibility. The difference in culpability scores can mean the difference between paying five percent to 400 percent of the "base fine" for the offense.

Corporate executives should also have a strong interest in establishing and using, effective prevention, compliance, and audit programs in order limit damage to their companies[5] and to reduce their own personal criminal exposure. Corporate officers and agents are subject to federal criminal liability, even if their actions were undertaken solely for the benefit of the corporation, at the direction of senior officers or as part of the job description.[6] Corporate officers may also be criminally liable for failure to take action if they have a "responsible relation to the situation" and the power and authority to deal with it.[7] Deliberate avoidance of knowledge of a crime by failing to investigate when there is a high probability that an offense has occurred is not a defense.[8] Under state law, an individual can be found criminally liable for affirmative acts committed in his capacity as a corporate agent. Failure to act or discharge a duty imposed on the corporation can also expose the employee or agent, but only if that agent knows that he or she possesses primary responsibility to discharge that duty and if the failure to discharge it is reckless or negligent.[9]

Internal Investigations

Once a possible problem becomes suspected or known, management should use internal investigations (1) to determine whether wrongdoing has taken (or is taking) place; (2) to determine the extent of corporate knowledge of wrongful acts; (3) to decide whether to defend or to cooperate and seek a plea agreement or other disposition; (4) as part of an effective program, to prevent, detect and deter future crimes; and (5) to determine the extent and cost of possible civil liability, including potential liability for nondisclosure if a corporation is publicly held. An improperly conducted internal investigation, however, may worsen the situation. Inside and regular outside counsel, who may be called on to structure an investigation, should keep certain key points in mind.[10]

First, internal investigations, compliance audits, and monitoring programs are only one part of an effective program to prevent and detect violations. The organization must still set standards of conduct, communicate them to employees and enforce them on an ongoing basis.

Second, an investigation prompted by specific awareness of a potential violation should generally be conducted by special outside counsel retained directly by the corporation's board of directors. Conduct by in-house counsel or regular outside counsel may result in conflicts of interest and potential waiver of the attorney-client and work-product privileges.

Third, an early decision should also be made as to whether it is necessary to advise corporate employees who may be individual targets to obtain separate counsel.

Fourth, investigations must be structured to follow the criteria set out in *Upjohn Co. v. United States*[11] to protect the attorney-client privilege. Engagement letters and statements to employ-

ees must make clear that the investigation is for the purpose of providing legal assistance to the corporation, that discussions between counsel and employees occur at the direction of management for that purpose, and that the communications must, in fact, remain confidential. The report of special counsel must be distributed solely to the designated officer or group within the company that will be acting on the results.

Getting Hammered From All Sides: The Criminal Problem Together With The Civil Lawsuit

Parallel Civil and Criminal Lawsuits

Because many activities give rise to both criminal culpability and civil liability, counsel for clients who are potential criminal targets must minimize the risk that civil lawsuits will produce incriminating evidence that can be used against them in criminal proceedings. This problem arises frequently in many different areas, particularly those involving allegations of fraud, insider trading, antitrust, and market manipulation. In all contexts, defendants face the same vexing decision: Should they invoke the Fifth Amendment privilege against self-incrimination in the civil litigation in order to avoid making available information that the government might use to secure a criminal conviction?

There can be serious consequences for doing so. If a defendant in a civil suit refuses to answer questions in a deposition based on his Fifth Amendment privilege not to incriminate himself, he runs the risk of facing a motion for a preclusion order from the plaintiff seeking to bar him from testifying at trial. In many cases, a preclusion order will be tantamount to judgment on the pleadings or entry of summary judgment. At the very least, the continued assertion of the Fifth Amendment right creates an inference that the particular fact is true for purposes of the civil action, and the jury will be so instructed.[12] Lastly, if your client is or wants to be a plaintiff in civil litigation, the invocation of the privilege in discovery can result in dismissal of the case.

Counsel should consider seeking a stay of discovery in the civil proceedings while the threat of criminal prosecution can be assessed or until it has passed. Stays are more useful, and more likely to be granted, when a relatively short delay may enable the civil suit to proceed without further concern about prosecution. Counsel should also contemplate negotiating with prosecutors in an attempt to secure declination of criminal charges.

Civil Regulatory Proceedings

Civil regulatory proceedings present all of the problems of the civil lawsuit where criminal issues are involved, plus additional considerations. Generally, governmental regulatory authorities, such as the SEC, the Commodities Futures Trading Commission, and the Federal Trade Commission are armed with extensive civil investigative powers, including the right to subpoena witnesses and documents. Fourth and Fifth Amendment protections apply to such proceedings, but corporate records cannot generally be protected by assertion of the Fifth Amendment.[13] In addition, the Fifth Amendment generally does not apply to "required records" that must, by law, be kept by the regulated person.[14]

Counsel should investigate the facts as thoroughly as possible, including informal discovery on their own, before advising clients whether to assert the Fifth Amendment in regulatory proceedings. If the client is clearly a target and the prospects of avoiding prosecution or gaining immunity appear dim, the privilege should be asserted. On the other hand, the assertion of the Fifth Amendment right can be used to draw adverse inferences in civil or administrative proceedings.[15] The defendant must weigh potential criminal liability against substantial financial loss, or even the destruction of his or her business.

Self-regulatory organizations, such as the New York Stock Exchange and the National Association of Securities Dealers, pose special problems. These organizations lack subpoena power, but failure to respond to information requests may result in expulsion from the membership and loss of the license to sell securities.[16] Thus, the client is free to assert his constitutional privileges, but may lose his livelihood as a result. Once again, thorough investigation before advising the client to choose between the possible loss of liberty or livelihood is the best practice.

The Knock on the Door: Guiding The Client Through An Investigation and Likely Prosecution

Determining Whether The Client Is Being Investigated

It is generally not difficult to determine that your client is under investigation. The client is often approached directly by investigators. At the first whiff of trouble, and before that first knock on a door, the client should be advised as to his or her rights concerning questioning by law enforcement authorities. The only words out of the client's mouth should be, "Please talk to my lawyer," the operative word being "lawyer."

Subpoenas and inquiries may come directly to the "target," but investigators often wait until after they have done other legwork in order to know as much as possible about the case before they question their prey. Friends and business associates may call your client to indicate that they received a visit from a detective or service of a grand jury subpoena. Banks may report that their records have been subpoenaed or examined, but they may be prohibited from giving notice of such inquiries for certain drug-related and financial crimes.[17]

"Hardknocks" occur by the service of a search warrant or, occasionally, arrest. The common "street crime" techniques of search warrants, shakedown arrests, surreptitious recording by friends and associates, wiretapping, and all the other intrusive law enforcement techniques have now found their way into the executive suite. These methods are very effective, and they carry the element of intimidation. The client should be advised early in any investigation involving federal authorities that it is not only possible, but probable, that electronic surveillance will take place. On the state level, recording with the consent of only one party is still illegal without court order and, therefore, is encountered much more rarely.

Heading Off An Indictment Through Negotiation

Occasionally, the authorities can be "talked out" of their inclination or decision to bring an indictment. At the federal level, a target's attorneys can meet with Assistant United States Attorneys, who are generally amenable to at least having such discussions. For tax offenses, and occasionally for some other offenses such as money-laundering and currency-structuring, a formal "conference" procedure exists by which a conference is requested in writing and generally held at the Department of Justice facilities in Washington, D.C. In the state system, prior to charges being filed, the "filing deputies" are generally amenable to discussion. In some offices, particular deputies are assigned to confer with lawyers after charges are brought, with an eye towards disposition, possibly dismissal. Prosecutors don't want to bring cases they can't win.

Grand Jury Subpoenas and Proceedings

A client's interests can rarely be more seriously prejudiced than when his or her attorney is not familiar enough with grand jury practice to render prompt protective advice from the first minute the client learns that the client is the focus of a grand jury investigation or subpoena.

Agents may try to interview the client before serving a subpoena, and they may even attempt improperly to persuade the client to talk to them by threatening to subpoena the client before the grand jury if he or she doesn't agree to be interviewed. The client should know that anything said to *anyone* other than the lawyer about the client's appearance before the grand jury may haunt the client later. Again, all questions should be referred to the lawyer.

Unless the client has received a "forthwith" subpoena (which requires an immediate appearance in front of the grand jury), the best advice is to sit tight. In the highly unusual event that a forthwith subpoena is served, the client should not refuse to appear, but neither should he or she answer questions or produce documents. The client should claim in front of the grand jury that until there is the chance to consult with counsel, the client cannot know whether he or she can assert any relevant evidentiary or constitutional privileges.[18]

Soon after learning of a grand jury inquiry, counsel should get in touch with the prosecutor, who, though not obligated to provide any information, is

likely to discuss the inquiry. Prosecutors will often divulge whether the client is a target or potential target.

It is extremely important at this stage for counsel to assess the client's exposure to criminal liability. The targeted client must be advised to invoke the Fifth Amendment privilege against self-incrimination early and continuously, lest testimony about seemingly unimportant aspects of the case result in a claim of waiver of the privilege.

If the client is a target and not a mere witness, counsel should focus not on the client's grand jury appearance (which will be stymied successfully by a claim of privilege against self-incrimination), but on defending or resolving the case. A plea agreement may lessen the hardships for the client. So may a waiver of indictment and an early plea. Sometimes no real choice exists but to vigorously defend the client through trial. It is absolutely imperative that the lawyer possess a detailed, working knowledge of the Federal Sentencing Guidelines before starting down any path, however.

If the client is not a target, the lawyer should focus on the grand jury appearance and on minimizing the risk that the client will become a target. It is important to know who else is a target or witness, and to meet with counsel for all potential targets to consider forming a joint defense plan.

At this stage, counsel should make a second approach to the prosecutor to "pitch" the client's case. This involves pointing out any mitigating circumstances, exculpatory evidence, or the client's willingness to cooperate in return for immunity. The prosecutor may be amenable to an agreement which obviates the need for the client to appear before the grand jury. There are sometimes advantages for the government if the witness does not appear. For example, if the client testifies later at trial, the prosecutor may not want an earlier sworn statement from the grand jury appearance to complicate the client's cross-examination.[19]

At this stage counsel should also discuss with the prosecutor different forms of possible immunity. "Transactional" immunity—an outright promise not to prosecute—is obviously desirable, but it is rarely granted. "Use" immunity, under 18 U.S.C. § 6001 et seq., protects the witness from direct and derivative use of his or her testimony in a criminal prosecution. But it does not prevent the use of such testimony in a civil proceeding or its collateral use in some criminal proceeding.[20]

As indicated earlier, sometimes a deal can be made with the prosecutor to avoid the client's appearance or the delivery of documents to the grand jury. But if a deal is not possible, there are still other avenues for avoiding an appearance. A subpoenaed witness can move to quash the subpoena—or appear but refuse to testify. Either tactic will probably necessitate an argument before the judge assigned to grand jury proceedings. A motion to quash the subpoena can be filed pursuant to Fed.R.Crim.P. 17, but the chances of success are slight. The case law on quashing a subpoena heavily favors the government. Motions to quash may also be filed to raise claims of privilege.

An alternative to moving to quash is for the witness to appear before the grand jury but respectfully refuse to answer questions or produce records on the ba-

sis of an evidentiary or constitutional privilege. In this situation, the government must seek an order from the court compelling the testimony or, in the alternative, holding the witness in contempt.[21]

If the client cannot avoid a grand jury appearance, counsel must prepare him or her thoroughly for the experience. Although counsel cannot accompany the client into the grand jury room, the witness has complete freedom to consult the lawyer before answering any question. If need be, the witness can leave the stand and confer with counsel outside the grand jury room after each and every question asked by the prosecutor.[22]

Counsel should debrief the client immediately after the conclusion of the appearance. A thorough debriefing will likely reveal the government's intentions. It is also important to debrief other witnesses after their grand jury appearances, if at all possible.

After the client's appearance, counsel should again contact the prosecutor. Is an indictment expected? When? Plea negotiations can be resumed, and a decision made whether to negotiate a plea or fight the case.

Managing the Criminal Defense

Multiple Defendants

Joint defense agreements allow multiple defendants to share information and coordinate tactics—free from the fear that they have waived the attorney-client privilege[23]—enabling a collective defense strategy which is often far more effective than working alone.

Joint defense agreements give individual parties the tactical advantage of access to information in the possession of others (including corporate parties) which would not otherwise be affordable or available. The agreements expedite trial preparation, allow development of joint work product, and conserve the time, money, and resources necessary to an effective defense. The agreements often permit the sharing of expert witnesses and common investigations, avoiding the need for a host of separately retained experts. These agreements can also offer significant tactical advantage in decision-making and responding to the government's litigation tactics.

Joint defense agreements typically provide:

1. That counsel and their clients wish to avail themselves of all lawful, ethical, and proper steps to assure the sharing of information, common strategies, and legal theories for formulating common defenses, with sufficient protections to ensure that confidences are not betrayed to anyone outside the group;
2. That counsel will be permitted to divulge specified information with the consent of the client who contributed it;
3. That no party may enter into the joint defense agreement if he or she has already entered into a plea agreement with the government or some third party whose interests are adverse and must withdraw if such an event occurs;
4. That each participant must advise the others if he or she enters plea negotiations or a plea agreement;
5. That a party who withdraws from a joint litigation agreement may not disclose confidential in-

formation learned under the joint defense umbrella; and

6. That each client has reviewed and agreed to the terms of the joint defense agreement.

The provisions and terms of a joint defense agreement do not override each lawyer's primary responsibility to preserve and protect the confidences of the individual client absent the client's consent to disclose them. Lawyers who participate in joint defense agreements should be deliberate in deciding whether to disclose information to the other participants, given the possibility that one or more participants may later develop interests adverse to counsel's client. However, remember that these agreements are less effective with such an approach.

Case Management Considerations

White-collar investigations can last for many years and incur thousands, if not hundreds of thousands, of dollars of legal fees *before* any charges are ever brought. The greatest success in white-collar practice is to convince prosecutors not to bring charges. A client's business might not survive the bringing of charges, or "outlast" a trial, acquittal and exoneration. Counsel must be careful in estimating time involvements, budgeting, and obtaining an adequate retainer, since generally one does not control the pace of an investigation so much as simply respond to it.

Calling in the cavalry is occasionally necessary, even for an experienced white-collar criminal counsel. Often, experienced criminal counsel will bring in tax experts, export law experts, sentencing experts and others who have carved out a specific niche in criminal-defense practice. The general practitioner should consider seeking criminal counsel at the first indication of an investigation. Too often, criminal counsel is brought in after the door to the barn has already been open for some time.

Sorry, Officer, You've Got The Wrong Guy: Keeping Yourself Out of Trouble While Effectively Representing Your Client

In today's white-collar practice, the attorney must also be careful to ensure that his or her actions cannot be construed as improper or illegal. You are not helping yourself or your client if you find yourself under investigation or a subject of a criminal charge.

Generally, two major dangers exist to which counsel should be sensitive. First, numerous obstruction of justice statutes exist on both federal and state levels.[24] Care must be taken that evidence is preserved and produced in response to grand jury subpoenas and other proper inquiries. Similar care must also be taken in preparing witnesses to ensure that no claims of obstruction can be made by the government. One must err on the side of complying fully with subpoenas.

The subpoena problem highlights the difference between criminal and civil practice. Narrow reading and razor-fine interpretation in response to civil subpoenas may result in Rule 11 sanctions in the civil area. In the criminal area, sharp practice can result in a sharp response, possibly in an indictment against the attorney.

As discussed at the opening of this article, aggressive representation can result in "punitive" action by the government. Such has always been the case, from the days of Clarence Darrow through our own. Counsel must zealously represent clients; nothing less is demanded by our professional standards. Regrettably, as the Kaye Scholer episode shows, the government is now willing to use a much larger arsenal of weapons to harass those performing their constitutional duties. While we cannot and will not do less than all we can, counsel must ensure that "Rambo style" litigation techniques are avoided. Counsel may be compelled to prove that their own conduct was proper. Prudent counsel should ensure that conversations and agreements are documented and that witnesses are present at crucial meetings with investigators, nonparty witnesses and government lawyers.

It's Getting Ugly Out There: A Primer on Developments in Substantive Law Affecting White-collar Crime Practice

In the past decade, there have been four principal trends in substantive criminal law at both federal and state levels. First, more business-related conduct, traditionally the subject of civil law, has become criminalized. Second, civil penalties and forfeiture proceedings resulting from criminal conduct have been expanded. Third, criminal penalties for white-collar criminal offenses in banking, securities, environmental protection and tax have become much harsher. Fourth, sentencing guidelines make it more likely that white-collar offenders will do jail time. In short, the stakes are higher—and sharper—than ever.

New and Tougher Laws For Business-Related Crime

The federal criminal code has long contained highly specific provisions criminalizing a wide variety of conduct.[25] The most dramatic additions of new crimes have been in the area of banking and money laundering, but the broad sweep of the false statement, mail and wire fraud statutes and their state counterparts bring potential criminal liability to nearly every business endeavor.[26]

Banking and Financial Institutions

The Financial Institutions Reform, Recovery and Enforcement Act of 1989 ("FIRREA") and the Comprehensive Thrift and Bank Fraud Prosecution and Recovery Act of 1990 created new financial crimes and substantially stiffened the penalties for existing offenses related to financial institutions. Three new crimes were created.

- 18 U.S.C. § 1032 criminalizes knowing concealment of assets from a conservator, receiver, or liquidating agent of a financial institution.
- 18 U.S.C. § 1517 created the crime of obstructing the examination of a financial institution.
- 18 U.S.C. § 225 created the crime of organizing, managing or supervising a "continuing financial crimes enterprise," defined as a series of crimes involving financial institutions committed by at least four people acting in concert. If the enterprise receives gross receipts of $5,000,000 or more in a two-year period, the participants may be sentenced to ten years to life in prison.

The resulting panoply of financial in-

stitution crimes and sanctions is impressive. It is a major felony offense, punishable by up to 30 years in prison and a $1,000,000 fine to:

- Unlawfully receive commissions or gifts for procuring loans (18 U.S.C. § 215(a));
- Steal, embezzle or misapply financial institution funds (18 U.S.C. §§ 656, 657);
- Issue notes, drafts or other financial instruments without authority, make false book entries, or receive or benefit from proceeds of fraud involving financial institutions (18 U.S.C. §§ 1005, 1006);
- Make or invite reliance on a false, forged, or counterfeit statement or document for the purpose of influencing the FDIC (18 U.S.C. § 1007);
- Make false statements in loan applications to financial institutions (18 U.S.C. § 1014);
- Participate in a fraud or swindle involving a financial institution (18 U.S.C. § 1341);
- Commit mail or wire fraud involving a financial institution (18 U.S.C. § 1343); and
- Commit bank fraud (18 U.S.C. § 1344).

The criminal and civil statutes of limitations for these offenses were extended to ten years. Persons convicted under these statutes were made subject to the civil and criminal forfeiture provisions of 18 U.S.C. §§ 981-982.

Money-laundering

The operative definition of "money-laundering" has been greatly expanded under recent federal statutes. What once was only the movement of illicit funds in or through a legitimate entity now covers the investment or movement of *legitimate* funds in or through an illicit entity or activity. This "mirror" image of the offense that is now part of the law has a staggering potential to criminalize nearly all business-related conduct. After all, if the government alleges that your activities are illicit (i.e., a crime has been committed), then all investments or transfers of even legitimate funds are now separate crimes. Worse, the penalties for "money-laundering" are generally three to four times more severe than for the underlying offenses. Under the sentencing guidelines, the effect is enormous.

Money-laundering is now defined as the concealment of the existence or source, *or* unlawful application, of income. Generally, under 18 U.S.C. §§ 1956 and 1957, it is a 20-year felony to conduct, or attempt to conduct:

- financial transactions involving the proceeds of specified criminal activity with an intent to conceal or promote the criminal activity; or
- to transport, transmit, or transfer a monetary instrument or funds with the intent to carry on criminal activity.[27]

The criminal activity predicates go far beyond drug offenses. They include RICO predicate offenses, state offenses and at least 43 other federal offenses.[28] Money-laundering can be, and is, charged as an "add-on" offense that substantially enhances prosecutorial power and discretion. Because of its broad scope, it has been referred to as "the RICO of the Nineties."[29]

In addition, the banking laws contain criminal "antistructuring" provisions which criminalize failure to comply with the U.S. Treasury's cash transaction reporting requirements. These provisions also criminalize the structuring of transactions to evade those requirements.[30]

Despite the ease with which the money- laundering statutes are now triggered, the Annunzio-Wylie Anti-Money Laundering Act of 1992 adopted drastic new sanctions.[31] Banks, credit unions, and savings-and-loans convicted of money-laundering violations can be stripped of their federal charters or, if state-chartered, denied depository insurance. So-called "death penalty" proceedings against the institution *must* be initiated if the financial institution has violated 18 U.S.C. §§ 1956 or 1957, and they may be brought if the institution is convicted of a currency offense under 31 U.S.C. § 5322 The relevant federal regulator determines whether to apply the "death penalty" after a hearing considering the extent of senior officer knowledge or culpability, the existence of policies designed to deter money-laundering, the degree of cooperation in the criminal investigation, any efforts to implement additional safeguards, and the adequacy of deposit and credit services

in the community.

Securities and Pension Plans

The Insider Trading and Securities Fraud Enforcement Act of 1988[32] significantly enhanced the penalties for all criminal violations of the 1934 Securities Exchange Act, not just the insider trading prohibitions. Section 32(a) of the act also criminalizes the making of knowingly false and misleading statements in registration statements, and in reports and applications for membership in (or association with) the securities self-regulatory organizations such as the New York Stock Exchange and the NASD. The penalties imposed by the 1988 act are ten years' imprisonment and fines of up to $1,000,000 for natural persons and $2,500,000 for legal entities.[33] The 1988 act also imposed civil treble damage penalties for insider trading in suits brought by the government, and authorized the SEC to pay bounties of ten percent of such recoveries to informants.[34]

Although not new, many practitioners are surprised to find federal criminal sanctions associated with ERISA pension matters. 18 U.S.C. § 664 makes theft from an ERISA plan or fund a federal felony. 18 U.S.C. § 1954 criminalizes payment of kickbacks in connection with an ERISA plan. 18 U.S.C. § 1027 prohibits false statements and concealments in ERISA required documents. All are punishable by up to five years' imprisonment and $10,000 in fines. The Department of Labor is now taking a much more active role in investigating and enforcing these provisions.

Environmental Laws

Enforcement of federal and state environmental laws has also been stepped up in recent years, and penalties have been made stiffer. Federal criminal enforcement of environmental laws occurs principally under eight statutes.[35] Most of these statutes contain a dual penalty structure providing for both civil and criminal liabilities and penalties.[36] In the last several years, Congress significantly enhanced the criminal penalties, elevating many statutory offenses from misdemeanors to felonies and increasing the maximum levels of incarceration and monetary fines. Federal prosecutors have stepped up enforcement, and the EPA has increasingly pursued criminal prosecution in high-profile cases for their deterrent value. The EPA has also hired large numbers of ex-Drug Enforcement Administration special agents to investigate these offenses. These agents have brought their techniques and style of proceeding with them from the brutal world of narcotics. In addition, in 1991, the EPA signed a "memorandum of understanding" with the Federal Bureau of Investigation to coordinate investigations of environmental offenses.[37] The EPA has reportedly also been strengthening its cooperative agreements with the IRS, the Securities and Exchange Commission, and the Occupational and Health Administration ("OSHA").

Since July 1991, the Justice Department has encouraged voluntary compliance efforts by giving favorable treatment to companies who have undertaken their own environmental audits.[38] Counsel for companies contemplating the use of voluntary compliance audits should be aware that the audits may themselves uncover information which leads to prosecution of their clients. Great care should be taken in designing audit programs.[39]

The state of Washington has also been more vigorous in the prosecution of environmental crimes in recent years. State prosecutions most often involve six principal statutes: the Model Toxics Control Act; the Hazardous Waste Disposal Act; the Water Pollution Control Act; the Washington Clean Air Act; the Shoreline Management Act; and the Solid Waste Management Act.[40] As at the federal level, state prosecutions frequently target responsible executives as well as corporations. In addition, state authorities are coordinating their cases with federal authorities, who can charge more severe violations for the same conduct.

Broader Use of Old Crimes: False Statement, Wire and Mail Fraud, and RICO

One of the more skeptical authors of this article once wrote in another context that "the basic principle of federal criminal law is that it's not what you've done, it's what it can be made to look like." That cynical thought should guide careful counsel in considering the false-statement, fraud and RICO offenses.

The false-statement offense, 18 U.S.C. § 1001 is deceptively simple. The power it gives to the prosecution lies in its breadth and in its use as an easy to prove add-on offense. The statute criminalizes even unsworn, oral statements.[41] The range of possible business situations in which false statements may be made regarding matters "within the jurisdiction of any department or agency of the United States" is almost endless in a modern regulated economy. The false-statement offense does not merge with other criminal failure to report offenses, which means that two crimes can be charged for the same act.[42]

The mail and wire fraud statutes, 18 U.S.C. §§ 1341 and 1343, are equally flexible. They encompass almost any type of fraudulent scheme that employs the jurisdictional requisite of mails, wires, television, or radio. One of the few, and mainly theoretical, limits on the reach of the statutes is that the fraudulent scheme must deprive someone of tangible or intangible property rights.[43] Like the false-statement offense, the mail and wire fraud charges can be add-ons to charges under more specific statutes.

The mail and wire fraud statutes are remarkably expansive in their approach. All that is necessary is that there be a scheme to defraud and that the mails or a wire be used to help carry out the fraudulent scheme. For example, a short letter from your client to a "co-conspirator" confirming a meeting at which the government claims evil occurred, while in itself innocent enough, will constitute the requisite mailing—and a separate criminal count. The wire fraud statute prohibits fraudulent schemes that make use of interstate television, radio, or wire communications. The statute requires that the communication cross state lines. It also applies to telephone lines, including facsimile communications.[44] Each separate use of the mail or the wire constitutes a separate criminal offense.

RICO—so named for the Racketeering Influenced and Corrupt Organizations Act[45]—is best understood as a status offense: "the crime of being a criminal." Although the RICO offense is complex, at its heart is the relationship between "racketeering activity"— two or more predicate violations specified in 18 U.S.C. 1961(1)—and the "RICO enterprise." The enterprise, essentially an association in fact, can be the perpetrator of the racketeering activity, the victim of racketeering, or simply a vehicle in which money from racketeering activity is invested. A RICO conspiracy offense, under 18 U.S.C. § 1962(d), requires proof of three elements: the existence of an enterprise, an agreement to directly or indirectly participate in the enterprise's affairs, and an agreement to participate in a pattern of racketeering activity.[46] Like false statement and fraud offenses, the RICO charge can be used to increase the potential punishment. RICO also contains forfeiture provisions. RICO charges can and have been brought against legitimate business organizations. The resulting public approbation can severely disrupt regular business activities.

Civil and Criminal Forfeitures

A detailed discussion of complex civil and criminal forfeiture statutes would need to be longer than this entire article.

Briefly, there are four principal types of forfeiture situations. First, the Comprehensive Drug Abuse Prevention and Control Act, 21 U.S.C. § 801 *et seq.*, enacted the well known drug-related forfeiture rules, which extend to vehicles, instrumentalities, and real property used to commit or facilitate drug offenses.

Second, the RICO statute authorizes criminal forfeiture of real and personal property interests acquired, maintained, relating to, constituting, or derived from proceeds of racketeering enterprises and activities.18 U.S.C. § 1963. Washington's Criminal Profiteering Act provides parallel forfeiture and lien provisions at RCW 9A.82.100-160.

Third, 18 U.S.C. §§ 981 and 982 broadly authorize civil and criminal forfeitures of property involved in, or constituting proceeds derived from, federal program fraud, fraud involving financial institutions and fraud involving the Resolution Trust Corporation and other federal financial agencies.

Fourth, 18 U.S.C. § 981 authorizes civil and criminal forfeitures of property involved in money-laundering. As the discussion above reveals, money-laundering is perhaps the most expansive of the weapons in the federal prosecutor's arsenal and can result in attempts to forfeit legitimate funds and entire legitimate businesses.

In any of these four settings, counsel must be cognizant not only of the client's rights, but of potential forfeiture of sums received as attorneys' fees and property in the possession of third parties.

The Stuff of Legal Nightmares: Secondary Liability and Conspiracy

Theories of criminal liability have evolved to cast the widest possible net. Not only can one be found guilty as a principal, but also as an aider and abettor or accomplice,[47] sometimes for behavior occurring after the "fact" of criminal incident. In addition, conspiracy law can capture the unsuspecting and, at times, the undeserving participant.[48]

The old adage "bad company is bad luck"—coined in the wild West during the days when anyone found with a horse thief could be hanged—has great application in modern white-collar criminal law. Modern conspiracy theories make it very important to know the people with whom you do business.

In conspiracy law, the offense is the agreement with another to violate a separate statute. Generally, an overt act is required, although that act itself may be innocent, such as the purchase of a car which will be used in a bank robbery or the mailing of a letter to set up a meeting to discuss a business proposition that is determined by the authorities to be illegal. The agreement may be express or implied and is generally found circumstantially in the actions of the parties.

Under federal conspiracy law, a second prong exists on which defendants may be found liable: Not only is it an offense to conspire to violate a separate federal criminal statute, it is also an offense for two or more persons to conspire to defraud the United States or any agency of the United States in any manner or for any purpose.[49] This "conspiracy to defraud" found its best statement in the tax case *United States v. Klein*,[50] hence the name under which it is often used, a *Klein* conspiracy. The government need not allege that the defendant(s) intended to violate particular federal statutes; rather, defendants can be held liable for conspiracies to "defraud" the United States in the exercise of any of its official functions. *Klein* conspiracies are not limited to the tax area, but can be charged in nearly any area of federal law: conspiracies to defraud the United States in the exercise of its export functions, its customs functions, its agricultural inspection functions, its regulation of industries under its labor law functions, and so on. The list is endless.

Conspiracy theory reaches its broadest expanse when the *Pinkerton* doctrine is employed. Under *Pinkerton*,[51] a defendant is liable, once he or she joins a conspiracy, for any actions that are foreseeable, regardless of whether the defendant is aware of the actions or even the people who engage in the action. The accused is guilty not only of the conspiracy charge under *Pinkerton* but can also be found guilty as a *principal* of the substantive crimes committed by others in the conspiracy.

The requirement of an overt act is not a restraint on *Pinkerton*'s reach. Prosecutors will simply allege as overt acts separate substantive violations. Charging documents frequently open with a long conspiracy count which "tells a story," followed by dozens of separate substantive counts incorporated into the conspiracy count as overt acts. When coupled with the new money laundering and structuring laws, with their attendant forfeiture provisions, *Pinkerton* has devastating force.

Conclusion

A recent case illustrates the dangers that now face white-collar defendants. In Washington's Western District, a conspiracy case was brought alleging that

certain individuals attempted to defraud the United States in its export functions by falsely labeling documents relating to the export of computers.[52] Legitimate money had been transferred from London to Kirkland to pay for these computers. Thus, money-laundering charges were brought, along with their 20-year penalties and forfeiture provisions. A broad conspiracy was alleged. Many of the defendants found themselves charged for events they had no idea had occurred. One defendant, a Toronto computer salesman, was totally unaware of several of the transactions, had no idea funds had been transferred from London to Kirkland, and had no knowledge of the computers for which those funds were paid. But he found himself charged as a principal, under *Pinkerton*, with money-laundering offenses about which he knew nothing, because the government believed they were "foreseeable." Instead of the five-year penalty for the export offense, the salesman faced 20 years' imprisonment for money laundering, and the end of life as he knew it.

Endnotes

[1] "Law Firm Will Pay a $41 Million Fine in Savings Lawsuit," *New York Times*, March 9, 1992, p. A-1; "U.S. Moves to Freeze Assets of Law Firm for S&L Role," *New York Times*, March 3, 1992, p. A-1.

[2] When E.F. Hutton pleaded guilty to 2,000 counts of mail and wire fraud resulting from its check-kiting practices, people listened—and within three years the brokerage firm had been sold to avoid its collapse. Carpenter and Feloni, *The Fall of the House of Hutton* (Henry Holt & Co., 1989).

[3] The Guidelines apply to corporations, partnerships, associations, joint stock companies, unions, trusts, pension funds, nonprofit and unincorporated associations, and government entities.

[4] The key elements of an "effective program to prevent and detect violations of law" are:

1. A code of conduct, including compliance standards and procedures reasonably capable of reducing criminal conduct;
2. Compliance oversight by specific, high level individuals;
3. Use of due care not to delegate discretionary authority to individuals with a propensity to commit illegal activities;
4. Communication of standards and procedures to all corporate employees and agents;
5. Use of monitoring and auditing systems to detect crime, including a whistleblower program;
6. Consistent enforcement of standards; and
7. An appropriate response to violations and modification of the program on the basis of experience to prevent and detect future violations.

Large corporations must have formal, ongoing programs appropriate to their size. Such programs must also take into account both the likelihood that violations will occur due to the nature of the business and the organization's prior history of offenses. United States Sentencing Commission, *Guidelines Manual*, § 8A1.2, Commentary 3(k).

[5] Under federal law, a corporation is held criminally liable for illegal acts of its agents committed within the scope of the agents' employment. The acts must also have been committed "for the benefit of" the corporation. Manual of Model Jury Instructions of the Ninth Circuit, § 5.10 (1985). Some helpful primers on corporate liability include: *Business Crime: Criminal Liability of the Business Community* (1986); and First, "General Principles Governing the Criminal Liability of Corporations, Their Employees and Officers," in Obermaier, ed., *Corporate Criminal Liability*, Vol. 19 (1986).

Under both state and federal law, a corporation can be found criminally liable not just for affirmative acts but also for omissions or failures to discharge specific duties imposed by statute or by common law. An agent's acts need not have been specifically authorized from above. No one else in the corporation need even have been aware of the agent's actions. It is sufficient for corporate criminal culpability if the agent's actions were consistent with his job description—even if the acts were contrary to express instructions in the particular instance. *See, for example, United States v. Hilton Hotels Corp.*, 467 F.2d 1000 (9th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973). And the element that the agent's acts be "for the benefit of the corporation" will be deemed satisfied so long as the agent was "actuated, at least in part, by a purpose to serve the master." *United States v. Beusch*, 596 F.2d 871, 877 (9th Cir. 1979). It does not matter that the agent's actions did not in fact benefit the corporation. *United States v. Hilton Hotels Corp.*, 467 F.2d 1000, 1004 (9th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973).

Can a corporation be held criminally liable for an offense which contains a *scienter* or knowledge requirement? Yes—and the knowledge requirement for crimes with a *scienter* element can be satisfied even where the knowledge of various employees, summed together, yields a guilty state of mind. *United States v. Bank of New England, N.A.*, 821 F.2d 844 (1st Cir. 1987). Prosecutors have used this "collective knowledge" doctrine to make the corporate entity liable for the summed knowledge of various corporate employees or officers.

A corporation may be able to defend itself when the employee acted totally for his own benefit, with no intention of benefiting the corporation. *See, for example, Standard Oil Corp. of Texas*, 307 F.2d 120 (5th Cir. 1962). But if at least some part of the agent's motivation was to benefit the corporation, this defense will not be available. *United States v. Hilton Hotels Corp.*, 467 F.2d 1000, 1004 (9th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973). Corporations have also been permitted to defend on the grounds that their agents acted outside the scope of employment when the agents' crimes violated clearly pronounced and diligently enforced corporate policies. *United States v. Beusch*, 596 F.2d 871, 878 (9th Cir. 1979); *United States v. Basic Construction Co.*, 711 F.2d 560 (4th Cir. 1983). The law is less developed as to a corporation's criminal liability for the acts of independent contractors and other nonemployee agents. Courts generally look to the degree of control that the independent contractor possesses over the contract-related work. The more control he or she has, the less likely it is that the contractor is an "agent" who can render the corporation liable for his crimes. *United States v. Georgetown University*, 331 F. Supp. 69 (D.C. Cir. 1971).

Under Washington statutory law, the corporate entity will be found guilty of any crime based on an activity undertaken or authorized by any managerial officer or managerial agent. RCW 9A.08.030. Acts of lower-echelon employees make the corporation liable if the acts are within the scope of their employment and committed on behalf of the corporation. But under the Washington statute, it is more difficult than under federal law to convict a corporation of a felony based on the acts of lower-echelon employees.

[6] *United States v. Wise*, 370 U.S. 405, 410 (1962). Even a corporate officer who has not personally committed the offense can be held liable through principles of accomplice liability if that officer willfully causes another to commit a crime or aids and abets another in the commission of a crime. 18 U.S.C.§ 2(b), and § 2(a). *See also* Ninth Circuit Instruction § 5.10 (1985). And, under the "responsible corporate officer" doctrine, managers and higher-echelon officers have been successfully prosecuted individually for acts which they did not themselves commit. Jury instructions interpreting the doctrine have varied widely, and courts have not always been consistent in determining the circumstances under which a corporate officer will be deemed to have been responsible, for purposes of criminal liability, for an offense committed by inferiors in the chain of command.

[7] *United States v. Park*, 421 U.S. 658 (1975).

[8] *Turner v. United States*, 396 U.S. 398, 416 n.29; *United States v. Jewell*, 532 F.2d 697 (9th Cir. 1976).

[9] RCW 9A.08.030.

[10] An excellent guide, written by inside corporate counsel, is James Shaughnessy's "Dealing with Corporate Employees When Conducting Internal Investigations," *1992 Complex Crimes Journal*, 225 (ABA Section of Litigation, July 1992).

[11] 449 U.S. 383 (1981).

[12] *Baxter v. Palmigiano*, 425 U.S. 308 (1976).

[13] *Hale v. Henkel*, 201 U.S. 43 (1906). *Cf.* the "act of production" doctrine as a means to protect corporate documents. *United States v. Doe*, 465 U.S. 605 (1984); *Fisher v. U.S.*, 425 U.S. 391 (1976).

[14] *SEC v. Olsen, d/b/a Fitch Investors' Service*, 354 F.2d 166 (2d Cir. 1965); *United States v. Kaufman*, 429 F.2d 240,247 (2d Cir. 1970) *cert. denied* 400 U.S. 925 (1970).

[15] 5 Bromberg & Lowenfels, *Securities Fraud and Commodities Fraud* § 13.2(1310) (1991).

[16] NASD Rules of Fair Practice, Art. IV, § 5; NYSE Rule 476(a).

[17] *See, e.g.*, 12 U.S.C. §§ 420(b)(1)(2) (civil penalties for disclosure) and 18 U.S.C. § 1510(b)(1) and (2) (criminal penalties for disclosure).

[18] Prosecutors then allow an opportunity to consult with counsel. Or, they may ask the United States District Court to compel the witness to answer the questions—something the court is not likely to do.

[19] This is also an appropriate opportunity to discuss document production with the prosecutor. Counsel may wish to negotiate an arrangement for documents to be provided to government investigators instead

of the grand jury. It can be extremely difficult to get original documents returned once the grand jury has them.

[20] "Informal" immunity is granted via a letter from the United States Attorney or a Department of Justice attorney. It can generally be relied upon in the federal system. "Formal" immunity involves an elaborate application via the Department of Justice to the District Court, which enters an order conferring immunity. For nearly all purposes, informal use immunity from the prosecutor is protection enough. If the client is neither a target nor likely to become one, obtaining an informal grant of immunity should not be difficult.

[21] A tricky aspect of a motion to quash is that the moving papers may admit the existence of certain documents, authenticate documents, or be construed as a waiver of a privilege. Forcing the government to be the moving party lessens this risk somewhat.

[22] The client should write down the questions asked by the government. A transcript of the proceedings will probably not be available until after the client or someone else has been indicted.

[23] *Continental Oil Co. v. United States*, 330 F.2d 347, 350 (9th Cir. 1964); *see also* Note, "Separating the Joint-Defense Doctrine From The Attorney-Client Privilege, 68 Tex. L. Rev. 1273 (1990).

[24] *See, e.g.*, RCW 9A.76.020; 18 U.S.C. §§ 1501-1515.

[25] Huebner and London's personal favorites are 18 U.S.C. § 707, which criminalizes the fraudulent use of the 4-H Club emblem, and its companion statute, 18 U.S.C. § 916, which prohibits the act of impersonating a 4-H Club member or agent. Frush, dissenting as always, thinks that 18 U.S.C. §§ 711 and 711a, which criminalize misappropriation and impersonation of Smokey the Bear and Woodsy Owl, are the most sublime provisions of the Code.

[26] We do not cover here, but practitioners should be aware of, the criminal provisions of the antitrust laws, 15 U.S.C. § 1, and the criminal provisions associated with government payments for fraudulent claims, 18 U.S.C. § 287.

[27] 9A *Department of Justice Manual* § 9-105.100 at 9-2121-2123.

[28] Harmon, "Federal Anti-Money Laundering Statutes," commentary reprinted in 9A *Department of Justice Manual* § 9-105.100A.

[29] Abramowitz, "Money Laundering: The New RICO?" N.Y.L.J. September 1, 1992, pp. 3,5. *United States v. Montoya*, 945 F.2d 1068 (9th Cir. 1991) is a good example of the flexible application of the anti-money-laundering statutes. Montoya, a California state senator, was convicted of violating 18 U.S.C. § 1956 for openly depositing a check which was a payment of a bribe from an FBI front company. The court held that it was sufficient that the deposit of the check, though unconcealed, "promote[d] the carrying on of a specified unlawful activity" under 18 U.S.C. 1956(a)(1)(A)(i). *Id.* at 1076.

[30] 31 U.S.C. 5312, 5313, 5322. The anti-structuring provisions can be easily violated simply by breaking apart cash deposits to evade the $10,000 reporting requirements. It is not necessary to know such action constituted a crime to be convicted. *See United States v. Hoyland*, 914 F.2d 1125 (9th Cir. 1991).

[31] P.L. 102-550, §§ 1500-1565.

[32] 15 U.S.C. § 78a.

[33] 15 U.S.C. § 78ff(a).

[34] 15 U.S.C. § 78u-1.

[35] The Clean Air Act (42 U.S.C. §§ 7401-7642) imposes penalties on those who knowingly violate federal or state regulations designed to foster air quality standards established by the Environmental Protection Agency. The Federal Water Pollution Control Act (33 U.S.C. §§ 1251-1387), the Rivers and Harbors Act of 1899 (33 U.S.C.§ 407), and the Safe Drinking Water Act (42 U.S.C. §§ 30(f) to 300(j)-(ee)) together form the scheme for protecting the quality of surface and ground water. The Comprehensive Environmental Response, Compensation and Liabilities Act ("CERCLA," also known as "Superfund") (42 U.S.C.§§ 9601-9675) provides for mandatory cleanup of hazardous substances at contaminated sites. The Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA") (7 U.S.C. § 136) regulates the manufacture, registration, transportation, sale and use of toxic pesticides. The Resource Conservation and Recovery Act 42 (U.S.C. §§ 6901-6992) sets forth criminal penalties for those who improperly transport, store or treat hazardous wastes. Finally, the Toxic Substances Control Act (42 U.S.C. §§ 9601-9675) provides a scheme regulating the manufacturing, processing and distribution or disposal of dangerous chemicals.

[36] In RCRA, for example, civil penalties for the improper handling of hazardous waste are established in 42 U.S.C. § 6928(g), while criminal penalties for the same conduct are set forth at § 6928(d). An extremely helpful primer on recent trends in environmental prosecution is Desser, *et al.*, "Environmental Crimes," in 29 *American Criminal Law Review* 265 (Winter 1992).

[37] "EPA, FBI Pledge To Coordinate Investigations..." *Toxics Law Rep.* (BNA) 709, (Nov. 6, 1991).

[38] U.S. Dept. of Justice Publication, "Factors In Decisions On Criminal Prosecutions For Environmental Violations In The Context Of Significant Voluntary Compliance . . . ," July 1, 1991.

[39] Excellent advice is provided in Richenderfer and Bigoni, "Going Naked Into The Thorns: Consequences of Conducting An Environmental Audit Program" 1992 *Complex Crimes Journal*, ABA Section of Litigation (July 1, 1992).

[40] RCW 70.105.085; RCW 70.105.090; RCW 90.48.140; RCW 70.94.030; RCW 90.58.220; and RCW 70.95.240.

[41] The Ninth Circuit pattern jury instruction on false statements to government agencies is found at Jury Instruction 8.20, "False Statement To Government Agency (18 U.S.C. § 1001)": "The defendant is charged . . . with knowingly and wilfully [making a false statement] [or] [using a document con-

taining a false statement] in a matter within the jurisdiction of a government agency or department in violation of § 1001 of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant [made a false statement] [used a writing which contained a false statement] . . . ;

Second, the defendant knew that the statement was untrue; and

Third, the statement was material to the agency's activities or decisions.

A statement is material if it could have influenced the [agency]'s decisions or activities.

[42] *United States v. Woodward*, 469 U.S. 105 (1985).

[43] *United States v. McNally*, 483 U.S. 350 (1987). In *McNally*, the Supreme Court reversed the conviction of a Kentucky insurance official who received kickbacks from the state's workers' compensation insurance provider. The deprivation of the citizen's right to have the affairs of the state conducted honestly was not deemed to be a property right. However, the right of an employer to an employee's honest performance was held to be a sufficient property right to support a mail fraud conviction in *United States v. Richardson*, 833 F.2d 1147 (5th Cir. 1987). The next year, Congress amended the federal code to place back into it the specific conduct that the *McNally* case had carved out. 18 U.S.C. § 1346.

[44] *United States v. Miller*, 904 F.2d 65 (D.C. Cir. 1990); *United States v. Taylor*, 648 F.2d 565 (9th Cir. 1981), *cert. denied*, 454 U.S. 866 (1981).

[45] 18 U.S.C. §§ 1961-1968.

[46] A defendant acquitted of the substantive RICO offense may still be convicted of RICO conspiracy so long as there is proof of an agreement to commit the substantive crime. *United States v. Alonso*, 740 F.2d 862, 871-72 (11th Cir. 1984), *cert. denied*, 469 U.S. 1166 (1985); *see also Onesti v. Thomson McKinnon Securities, Inc.*, 619 F. Supp. 1262, 1266 (N.D. Ill. 1985) (failure of § 1962(c) allegations not fatal to conspiracy claim under § 1962(d)).

[47] 18 U.S.C. § 2 and RCW 9A.08.020.

[48] *For example, see* Title 31, U.S.C. § 5324, for the currency-structuring statutes. *See also* 18 U.S.C. §§ 922 *et seq.*, for the felon in possession statute and additional statutes. Obviously, one can be responsible as a "principal" or violator of the terms of a statute. But new developments in the 1980s and 1990s make this liability possible without the presence of criminal intent or *mens rea*. Many of the new statutes do not have a criminal-intent provision, requiring instead that the defendant merely intended to act as he she did. The defendant need not have intended that the act violate the law.

[49] 18 U.S.C. § 371.

[50] *United States v. Klein*, 247 F.2d 908 (2nd Cir. 1957), *cert. denied*, 355 U.S. 924 (1958).

[51] *Pinkerton v. United States*, 328 U.S. 640 was decided by the Supreme Court in 1946, with Justice Douglas authoring the opinion. It is ironic that one of our greatest civil libertarians should have penned an opinion that is so anti-individualistic and so frequently employed by federal prosecutors.

[52] *United States v. Whyte, et al.* (W.D. Wash. No. CR 89-247 WD).

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THE WSBA CREDIT UNION: A LITTLE-KNOWN FINANCIAL RESOURCE

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

The wail of lawyers, especially young ones, about financial hard times and the trouble with dealing with banks these credit-tight days, is well known in Washington. But it leaves the directors of the Washington State Bar Association Credit Union scratching their heads a bit, wondering why more lawyers don't come to an institution uniquely capable of understanding what it's like being a lawyer these days.

With offices in Seattle and Redmond, and part-time offices in West Seattle, downtown Seattle, and Lynnwood, the WSBA Credit Union offers membership to Washington State Bar members and staff, members of student bar associations in Washington's law schools, legal messengers and their families, court employees, court reporters, and family members of prior groups.

Independent of the Washington State Bar Association and owned by its members—who, so far, have not been approached by the WSBA Board of Governors for a loan—the Credit Union seeks to provide credit to, and promote thrift among, its members.

The Credit Union's existence goes back to 1975, when the idea of having one was first floated by Bar members. It germinated until 1977, when members of the then-named Young Lawyers Section of the Bar formed an ad hoc committee to look into the idea. The committee, whose members included Margaret McKeown, Kenneth Rice, Charles Goldmark and Robert Phillips, concluded the time was right and obtained approval of the WSBA Board of Governors for the idea.

To define membership more broadly, and to maintain the greatest flexibility in offering programs, the Credit Union was chartered as a state credit union and bypassed the federal act. The separation of the Credit Union from the Bar Association was important from the beginning. As one committee member put it,

> We felt it was important for the credit union to be a separate entity from the WSBA. The financial records of credit union members could not be subject to disclosure to any individual associated with the bar association. We believe that many attorneys would be reluctant to join the credit union if there was any possibility that their financial affairs could be known to other members of the bar.

The Credit Union opened in February 1978 and was able to begin making loans early on with the help of a $25,000 deposit by the Washington State Bar Association. A number of law firms also helped the fledgling institution by setting up payroll deduction plans by which employees could regularly and easily transfer funds into the Credit Union. Savings are insured for up to $100,000 by the National Credit Union Administration.

A volunteer board of directors and supervisory committee run the affairs of the Credit Union, which offers a new, no annual fee Mastercard with 14.4% APR interest. A variety of other services are also available, including cash machine cards and over the phone transaction capability, so that members need not be near a branch to do business with the Credit Union. A toll-free telephone number is also available.

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At A Glance

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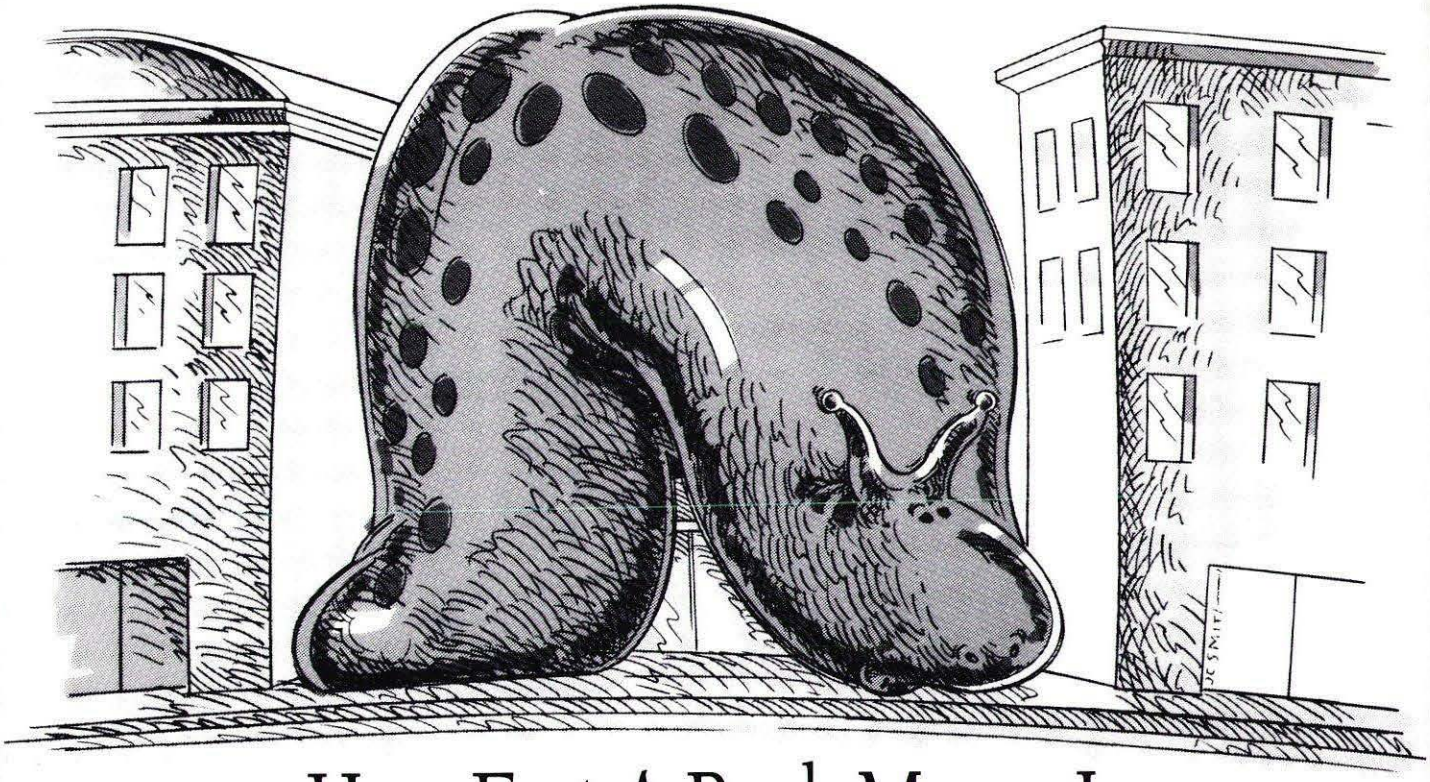

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by **Lindsay Thompson**, *Editor*, Bar News

Spokane, May 7/8, 1993

Present: The president, president-elect Paul Stritmatter, and the governors, save only Governor Jim Handmacher, who was absent on other business. Also present: Judge Ted Armbruster, Administrative Law Judges' Association; Barbara Clark, Legal Foundation of Washington; Harold Clarke, Young Lawyers Division; Judge David Frazier, District & Municipal Court Judges' Association; Jim Kaufman, Prosecuting Attorneys' Association; Sylvia Glover, Washington Women Lawyers; Dennis P. Harwick, WSBA executive director; Judge Kathleen O'Connor, Superior Court Judges' Association; Sheryl Phillabaum, Washington Women Lawyers; Bill Phillips, Washington Defense Trial Lawyers; Narda Pierce, Solicitor General, State of Washington; Scott Smith, King County Bar Trustees; Lindsay Thompson, *Bar News* editor; Greg Tripp, General Practice Section; and Robert Welden, WSBA General Counsel.

Preliminaries: The Board met in executive session to administer a reprimand and review the disciplinary docket, among other matters. In open session, the Board reviewed the text of the new policy on committee appointments, under which each governor will have one appointment whose travel expenses will be paid, but otherwise, any member who wants to join a committee can. Governor Joe Nappi worried aloud that the new policy will cost his district appointments, since they had sometimes managed to hold several seats and now would just get one. Governor Blair said committee chairs would just have to work harder to encourage new ways of participation, like encouraging carpooling and conference calls.

The Board passed a resolution calling on Congress to make a supplemental appropriation for public defender funds in the federal courts.

Suddenly, We All Have A New Appreciation of Smoke-filled Rooms: The president reported that the much-hated tax on professional services, which would have whacked lawyers with taxes on clients' bills that they'd have to pay regardless of whether the client had paid them, went into an end-of-session conference committee having cleared both houses by tiny margins, and, hey, presto! came out as a one percent increase in the Business & Occupations tax instead. Exactly how it happened is unclear.

The president also reported he'd met with King County Prosecutor Norm Maleng to discuss how to bring prosecutors more into the fold of WSBA doings. "We need to bring them into the mainstream," he said.

May I Have the Envelope, Please?: Dennis Harwick said deadlines for Board of Governors candidates to file petitions had passed. In the Third Congressional District, Olympia-based assistant attorney general Mary Fairhurst was declared elected, no one having filed to oppose her. In the Sixth District, Daniel Hannula of Tacoma and Michael Riggio, also from Tacoma, will face off. In the Eighth District, Sheryl

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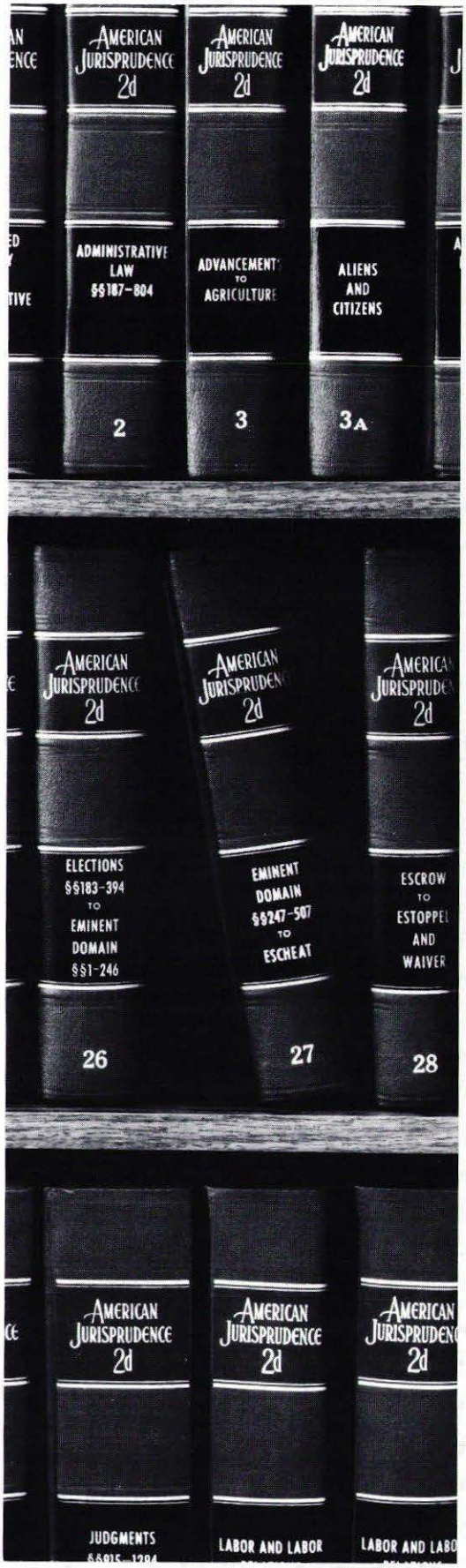

Garland and Steven Toole are the contenders. In the King County at-large seat, Roderick Dimoff and Linda Dunn are running. The Board set June 25 as the return date for ballots, which will be mailed to voters in those districts.

ABA State Delegation Candidates Sought: Two-year terms on Washington's delegation to the American Bar Association are coming up for filling. One must be filled by a young lawyer; the other two from the general membership. Persons interested in being considered need to send a letter saying so, and some biographical/professional information, to their WSBA governors. The positions will be filled at the Board's June meeting.

IOU, IOLTA: The interest rate crash, however beneficial to other forms of economic activity, has been bad for the Legal Foundation of Washington, which collects interest on lawyer trust accounts and directs it to fund legal services for the poor. IOLTA advocates approached the Board a few months ago about expanding the IOLTA net to include Limited Practice Officers—persons licensed to practice law to the extent necessary to do real estate closings and maintain escrow accounts. The Board unanimously approved the proposed court rule and referred it to the Supreme Court with a request that it be handled on a fast-track basis.

We Are, Too, Our Brothers' and Sisters' Keepers: The Board took up a proposal, under study for some months, to do something about the Client Security Program. Created 30 years ago, it's a fund appropriated annually in the WSBA budget. People who've had money stolen by their lawyers, and who haven't been able to recover it any other way, can apply to the fund for an award of some or all of the monies lost. As the bar grows, the number of lawyers who steal does, too. The amounts of claims on the fund have been outstripping the funds available in recent years. The defeat of the dues increase raised doubt the program could be funded at all in coming years.

The Board therefore took up a proposed amendment to APR 15. It would ask the Supreme Court to create a fund to be paid into by all WSBA members by annual assessment. Current thinking is $10 to $25 a year. That'll be settled at the Board's June meeting.

The main objection to such a fund is that lawyers say they don't contribute to the problem, and so they shouldn't have to pay for it. Government lawyers say they don't have trust accounts at all, and shouldn't have to pay at all. Leaving aside for the moment the destructive long-term effects of the bar becoming a tribe of resource-driven, warring camps, the problem is that while the only people who really contribute to the problem are those who do steal, the results have to be spread around somewhere, just as they do in business.

Mary Beth Nethercutt, the chair of the Client Security Program Committee, and Assistant King County Prosecutor Pat Sainsbury pitched the program. The alternatives to lawyers shouldering the burden and retaining the right to be a self-regulating profession, they said, are (1) state regulation; and (2) and bonding requirement. Look at RCW chapters 18 and 19, Sainsbury said. Practically every other line of work has a bond requirement *Janitors* have to have a bond. It costs them $313 a year. Based on discussions with insurance companies who write bonds, Sainsbury said, a lawyer bond for $100,000 could cost $2,000 to $5,000 per year.

Governor Joe Nappi moved to limit the assessment to $10. He thought that would be more palatable to members. Governor Alva Long made a ringing denunciation of sin by saying we should devote our efforts to trying to find out who's going to steal and preventing them from doing it, thus eliminating the need for such a fund. He said most of the money stolen is by lawyers who have access to personal-injury awards, escrow funds and estates. They should be required to be licensed specially to be able to handle such funds. "You say, 'It'll limit who can practice that kind of law.' Too bad."

Governor Mike Larson said he hadn't had time to develop a plan to express what he had in mind, but nevertheless would oppose the whole proposal until the Board went through WSBA programs and made a list of all the ones that were mandatory, assigned a dollar value to them, and asked the Supreme Court to make an assessment for all of them. Governor Jan Peterson thought that was cutting off one's nose to spite one's face. There was discussion of rules for the administration of the program (already in place, but will be amended for consideration in June), and a variety of other elements of the plan. In the end, the rule proposal was passed, 8-2, Larson and Long opposed.

Gonzaga Law: The Statistical Abstract: Gonzaga's Law School Dean, John Clute, reported on doings there. He said the 548 students (36 percent women, 7 percent minority, average age 28, 28 percent Washington residents but 40 percent take the Washington bar and hang out in Spokane, depressing the wage scale through oversupply) and 43 faculty (30 full-time, 12 adjunct) make a $5.5 million annual contribution to the regional economy. Tuition is $385 per credit hour, or $11,550 a year; the total law student budget for living and going to school a year is $20,000, and the average student graduates $50,000 in debt. Gonzaga alumni are about 1/8 of the bar's membership, and 87 percent live in the Spokane area. Three-quarters of the class of '92 had a job within six months of graduation. They're getting more heavily into computer work stations, have a very active law school clinic, and plan a new $13 million building to replace the four buildings they are currently scattered through.

Wrap-Up in Spokane: In other action, the Board:

- received the results of the 1992 demographic survey of WSBA members, showing, to no one's real surprise, that the majority of bar members are white guys, but that numbers of women and minorities are increasing. A fuller report will appear in a future *Bar News*.
- approved an amendment to the Young Lawyers Division bylaws that eliminated a requirement that the YLD president had to live and work in the same county; and a change in the name of the Law Office Economics and Management Section to the Law Practice Management Section.
- appointed Mary Gallagher Dilley of Vashon, and John Schultz of Pasco, to six-year terms on the Washington Statute Law Committee (RCW Chapter 1.08).
- heard a report from the Communications Committee of the Board (final report in June) and the Bylaws Committee, which presented a new draft and will have a final report in June, too.

• approved a proposal by Prof. John Strait of the UPS School of Law to set up a pilot clinical education program in legal ethics and discipline, in which he would act as a special district counsel for lawyer discipline matters and supervise six law students in the investigation of those matters, with appropriate safeguards of confidentiality and no cost to the WSBA built in.

• heard an annual report from Evergreen Legal Services, Puget Sound Legal Assistance Foundation, and Spokane Legal Services on the state of legal services in Washington and a final legislative report from WSBA lobbyist John Fattorini, by telephone from Olympia.

• received the text of a revised publication for lawyers on trust account guidelines, a report from Frank Harris of Minnesota State Bar's CLE program on the state of the WSBA CLE program; and a report on tentative 1994 WSBA CLE programs from CLE director Diane de Ryss.

Next meeting: June 18/19 in Leavenworth.

Oh, by the way—358 people passed the February bar exam. They'll be on the street soon.

Notices of Interest to Bar Members

WSBA Nondisciplinary Notices:

Interim Suspension: Seattle lawyer **William K. Angle** (WSBA #10861, admitted 1980) has been ordered suspended, pending the disposition of disciplinary proceedings pursuant to RLD 3.1, by order of the Washington State Supreme Court dated March 15, 1993.

Angle pleaded guilty to violating 31 U.S.C. sec. 5324(3) and 31 U.S.C. sec. 5322, structuring currency transactions for the purposes of evading reporting requirements, and one count of violating 18 U.S.C. sec. 2, aiding and abetting the structuring of currency transactions for the purposes of evading reporting requirements. These offenses are felonies.

Interim suspension is pursuant to RLD Title 3 and is not a disciplinary sanction. [March 29, 1993]

Resigned: **Stephen Patrick Aird** (WSBA #9041, admitted 1979) was permitted to resign as a member of the Washington State Bar Association with discipline pending, effective March 29, 1993. [March 29, 1993]

WSBA Disciplinary Notices:

Reprimanded: Olympia lawyer **Dianna Lobrie** (a.k.a. **Carlson**) (WSBA #13271, admitted 1983) has been ordered reprimanded pursuant to a stipulation for discipline, based upon neglecting to assure that her statements under penalty of perjury were true and accurate and failing to inform an ex parte tribunal of all relevant facts known to the lawyer that should be disclosed to the tribunal in order to make an informed decision. [April 6, 1993]

Reprimanded and Censured: Omak lawyer **Sonja I. McLaughlin** (admitted 1976, WSBA #7192) has been ordered reprimanded and censured after a hearing, based on statements made by her in the course of an Okanogan County Superior Court judicial campaign. McLaughlin was ordered to receive a reprimand for knowingly making false statements related to the qualifications, integrity or record of the incumbent judge in violation of RLD 1.1(I) and RPC 8.2(a), and making false statements implying that an Okanogan County Bar

Association poll had been staged, manipulated or falsified by lawyers associated with the incumbent judge's campaign, and that the incumbent judges did not treat litigants fairly and favored certain attorneys in court, in violation of RLD 1.1(i), RPC 8.2(b) (because it violated CJC 7(B)(1)(a)), and RLD 1.1(k) (because it violated CJC 7(B)(1)(a)). McLaughlin was ordered to receive a censure for making other campaign statements which constituted pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the judicial office, in violation of RLD 1.1(i), RPC 8.2(b) (because it violated CJC 7(B)(1)(c)), and RLD 1.1(k) (because it violated CJC 7(B)(1)(c)). [April 12, 1993]

Censured: Port Orchard lawyer **Herbert D. Austad** (WSBA #4629, admitted 1972), was ordered to receive a censure, pursuant to a stipulation for discipline, based upon his representation of the husband and wife, who had adverse interests in a dissolution, without fully disclosing the conflict of interest and without obtaining their written consent, and for failing to keep his client the wife, informed about the dissolution proceedings. [April 20, 1993]

Censured: Bellingham lawyer **George Livesey** (WSBA #2492, admitted 1949) has been ordered censured, pursuant to stipulation to discipline approved March 19, 1993. The discipline is based upon Livesey's neglect of a client's case in failing to timely serve the summons and complaint in a Breach of Contract claim. Also, Livesey misrepresented the status of the lawsuit to his clients by falsely advising them the defendant had been served with the summons and complaint and had appeared in the litigation. [March 29, 1993]

Censured: After a hearing, Kennewick lawyer **Michael R. Pickett** (WSBA #4125, admitted 1970) was ordered censured, based on his violation of RPC 1.1, requiring competent representation of a client, RPC 1.3, requiring reasonable diligence and promptness in representing a client, and RPC 8.4(d), prohibiting conduct prejudicial to the administration of justice.

In 1980, Pickett represented a co-administratrix of an estate who was the mother of a minor beneficiary of the estate. Without filing the Petition for Appointment of a Guardian, the Order Appointing Guardian, or the Oath of Guardian with the Superior Court as required by RCW Chapter 11.88, he presented an order to a judge appointing Pickett's client, the mother, guardian for the minor and setting restrictions on the guardian's handling of the ward's assets. While the judge signed the order, Pickett never opened a guardianship file with the court. He sent copies of the signed, but undated, order to the deceased's insurance company and helped the guardian collect the insurance proceeds and other estate funds for the minor. The guardian never established a guardianship account, and in 1988 a dispute arose between the guardian and the ward regarding her handling of the guardianship funds. [April 23, 1993]

Suspended: Tacoma lawyer **Daniel B. Havirco** (WSBA #19922, admitted 1990) has been ordered suspended for one year pursuant to a March 3, 1993 order of the Supreme Court. Havirco stipulated to this suspension based upon his conviction in King County Superior Court for fraud in obtaining telecommunication services, a Class C felony. Havirco stipulated that prior to his admission to the Washington State Bar Association he made $4,561.75 worth of unauthorized long distance calls on King County's SCAN network while working for King County and later after he left their employ, by making unauthorized use of the remote access codes to the SCAN system. A number of mitigating factors under the American Bar Association's *Standards for Imposing Lawyer Sanctions* resulted in his suspension rather than disbarment. Havirco's reinstatement will be conditioned upon his showing psychological fitness to resume active practice. When reinstated, he will be on probation for two years. [April 6, 1993]

Suspended: Spokane lawyer **John O. McLendon** (WSBA #1187, admitted 1964), was ordered suspended for a period of two years, with credit from the date of his suspension on February 27, 1990, by a 4-3 decision of the Supreme Court entered February 18, 1993. McLendon was found to have committed serious ethical violations including conversion of client funds. The Court's majority departed from the recommendation of the hearing officer and the Disciplinary Board that McLendon be disbarred, holding that (1) the existence of bipolar disorder at all relevant times the misconduct was occurring, and (2) the abatement of symptoms and misconduct following proper diagnosis and treatment constitute an extraordinary mitigating circumstance warranting a sanction less than disbarment. McLendon was also ordered to pay restitution and costs. *In re Discipline of McLendon*, 120 Wn.2d 761, filed February 18, 1993. [March 29, 1993]

Disbarred: Former Vancouver lawyer **Richard A. Petersen** (WSBA #10313, admitted 1978), has been or-

dered disbarred by the Supreme Court, effective February 25, 1993. The disbarment was based on Petersen's conversion of a county warrant ($6,827.25) tendered to him to pay criminal expert witnesses following a murder trial. The Supreme Court held that the lawyer's psychiatric illness did not constitute an extraordinary mitigating circumstance warranting departure from the presumptive sanction of disbarment.

The Court further determined that Petersen's additional misconduct of failure to promptly pay restitution on behalf of a criminal defendant, his failure to properly prosecute an appeal and his filing a false declaration of trust account compliance did not merit the sanction of disbarment, but were merged into the more serious sanction of disbarment, which was imposed due to his conversion of the county's funds. *In re Discipline of Petersen*, 120 Wn.2d 833, filed February 25, 1993. [April 7, 1993]

Commission on Judicial Conduct Notices:

Reprimanded: *In re the Matter of Hon.* ***Larry W. Larson****, Judge, Grant County Superior Court*, Case No. 92-1340-F-37, a Stipulation dated March 1 and 2, 1993 and Order of Reprimand was filed by the Commission on April 2, 1993. The parties stipulated that at all relevant times through the end of his term, November 25, 1992, Larson was a judge of the Grant County Superior Court, and continues to serve in a pro tem capacity. On or about July 25, 1992, in Kootenai County, Idaho, he was a passenger in a boat being operated on Lake Coeur d'Alene when the boat was stopped by marine officers of the Kootenai County Sheriff's Department. During the contact, Larson became very argumentative with the officers and was nonresponsive to reasonable requests for information made by the officers throughout the course of the inspection. He used abusive language to the officers and attempted to pick a fight with them. He sat in the driver's seat of the boat while the motor was running even though warned by the officers that his actions would be considered boating under the influence.

Larson was arrested for being in physical control of a boat while under the influence of alcohol, and when asked to cooperate with sobriety evaluations, refused to exhale into the Alco Senser III. He eventually did exhale into the machine, registering .20 blood alcohol on his third attempt.

Larson was eventually charged with obstructing an officer in the performance of his duties, and being in control of a boat while under the influence of intoxicants by the Kootenai County Prosecuting Attorney's office.

Larson's actions became public knowledge and widely disseminated by news media, both in Kootenai County, and in Grant County, where he served as superior court judge until defeated at the election.

A certified alcohol agency has evaluated Larson and recommended that he attend alcohol information school, followed for six months of monthly counseling at an approved alcohol treatment agency.

The stipulation further noted that Larson has never before been sanctioned for any violations of the Rules of Judicial Conduct by the Commission, and that he was forthright and immediately reported his conduct to the Commission; he cooperated by providing information requested by the Commission. The Commission and Larson stipulated that his conduct was a violation of Canons 1, 2, and 5 of the Code of Judicial Conduct. He agreed to accept a reprimand by the Commission, which also ordered that he complete the recommended alcohol counseling and provide proof of such to the Commission within one year of the date below. The Commission was represented by Curtis W. Janhunen, Aberdeen, Washington. Larson represented himself.

Admonished: *In the Matter of Hon.* ***William J. O'Roarty****, King County District Court, Northeast Division*, Case No. 92-1244F-38, a Stipulation dated March 22, 1993 and Order of Admonishment was filed April 3, 1993 by the Washington Commission on Judicial Conduct.

The parties stipulated that at all relevant times O'Roarty was a judge of the King County District Court, Northeast Division, sitting at Redmond. On or about February 7, 1992, O'Roarty conducted an arraignment hearing concerning a charge of no valid operator's license in *State v. Chester E. Van Antwerp*, Cause No. 139030. During the proceeding, O'Roarty directed sensitive questions and comments to the defendant related to AIDS. At the time, the courtroom was crowded with spectators and others waiting their turn to address the court.

O'Roarty's comments and questions appeared to others to be demeaning and to violate the defendant's basic expectation of privacy, the Stipulation continued. The parties stipulated that in his

capacity as a judge, O'Roarty acted contrary to Canons 1, 2(A), and 3(A)(3) of the Code of Judicial Conduct. He accepted the Commission's determination that his described conduct constituted a violation of the Code of Judicial Conduct and agrees not to engage in such conduct in the future. David Akana, Commission Counsel, represented the Commission. O'Roarty represented himself.

Public Notices

Harrison Tweed Award Nominations Sought:

The American Bar Association's Standing Committee on Legal Aid and Indigent Defendants and the National Legal Aid and Defender Association are co-sponsoring the Harrison Tweed Award for extraordinary achievements of state and local bar associations in service to the poor.

Projects are eligible if they were started or provided substantial services during the year starting May 1, 1992. Any person or organization may nominate a bar association. Details on the nomination procedure are available from Dorothy Jackson, assistant staff director for the ABA Committee, at 541 N. Fairbanks Court, Chicago, IL 60611-3314, (312) 988-5766. Nominations must be postmarked June 4 or earlier

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In re RCW 19.52.120(1): Legal Interest Rate ("Usury Rate"): The Average coupon equivalent yield from the first auction of 26-week treasury bills in May, 1993 is 3.07%. The maximum allowable interest permissible for **June** 1993 is therefore **12%**.

Compilations of the average coupon equivalent yields from past auctions of 26-week treasury bills, and past maximum interest rates, appear in the *Bar News* on page 49 of this issue, on page 39 in October, 1987 for 1982-1984; page 37 in June 1989 for 1984-1985; and on page 47 in June 1992 for 1986-1992.

* * * * *

Notice of Deadline for Filing WSBA Resolutions:

Pursuant to Article VII, Section F—"Resolutions" 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 WSBA's Annual Business Meeting. ***Note:*** **Even though the WSBA convention was cancelled, *there will be an Annual Business Meeting.*** The 1993 WSBA Annual Business Meeting will be held on Friday, September 10, 1993, beginning at 2:00 p.m. at the Seattle Sheraton in Seattle, Washington.

Resolutions must be filed with the executive director at least twenty (20) days before the Annual Meeting (by 5 p.m. on Friday, August 20, 1993) 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. The executive director's office is at 500 Westin Building, 2001 Sixth Avenue, Seattle, WA 98121-2599.

The Board of Governors will refer any resolution addressing issues within the purposes of the WSBA to the WSBA Resolutions Committee. Those purposes are set forth in Article I of the WSBA Bylaws and/or General Rule 12 of the Washington Court Rules.

The Resolutions Committee will hold a public hearing to consider the views of the proponents and opponents of resolutions on *Thursday, September 2, 1993*, beginning at 9:30 a.m. at the offices of the WSBA (500 Westin Building, 2001 Sixth Avenue, Seattle). Proponents and opponents of resolutions are urged to attend the hearing or to present their views in written form for consideration by the Committee.

If you want a proposed resolution published in *Bar News*, it must be received by the Executive Director at least sixty (60) days prior to the Annual Business Meeting (by 5 p.m. on Monday, July 12, 1993).

The members of the WSBA Resolutions Committee are: David D. Hoff—Chair, Gary D. Gayton, Jon C. Iverson, James T. Johnson, Edward N. Lange, Teresa M. Morris, Mark W. Muenster, Gregory H. Pratt, John M. Riley, III, John G. Schultz, Stanley D. Tate, Phillip L. Thom, and Ted D. Zylstra.

Review of Judicial and Nonjudicial Foreclosure/Forfeiture Procedures:

The Washington Law Revision Commission is beginning a review of Washington law on judicial and nonjudicial foreclosure/forfeiture procedures for mortgages, trust deeds and real estate contracts to determine whether it is practicable to draft a single, uniform procedure for nonjudicial foreclosure for all three forms of security and to improve sale-related procedures for judicial foreclosures. Two significant reasons for the project are that (1) adoption of all or some portion of the Uniform Land Security Interest Act is being considered in several states and (2) historical distinction between real estate contracts and other forms of security interests. Interested persons are encouraged to submit comments to Robert P. Beschel, Commissioner, Washington Law Revision Commission, c/o Winston and Cashatt, Attorneys at Law, 19th Floor, Seafirst Financial Center, Spokane, WA 99201.

Certification of Legal Secretaries:

The Certified Professional Legal Secretary Examination has licensed more than 3,400 legal secretaries since it was first administered in 1960. It consists of seven parts: written communication skills and knowledge; ethics; legal secretarial procedures; legal secretarial accounting; legal terminology, techniques and procedures; exercise of judgment; and legal secretarial skills.

Peggy Flynn, Jean Martinson, Cindy Manson and Deborah Wollin have recently been certified.

For further information, contact Diane Ives, Chair, Washington Association of Legal Secretaries, Bullivant Houser, (206) 292-8930.

WSBA
Annual Meeting
September 10, 1993
Afternoon
Seattle
Sheraton Hotel

CALENDAR

Note: Telephone numbers for regular CLE providers and other groups presenting listed events are listed on page 39. Contact them for further information

June 1993

2 Seattle: Nuts and Bolts of Privilege and confidentiality *Sponsored by* KCBA.

4 Portland: Monte Carlo Night. *Sponsored by* Northwestern School of Law.

4 Seattle: 10th Annual Pacific Rim Computer Law Institute. *Sponsored by* WSBA CLE, et al.

4-6 Vancouver, WA: Real Property, Probate & Trust Midyear Meeting. *Sponsored by* WSBA.

5 Seattle: Evidence and the Art of Trial Advocacy: Making and Meeting Objections. *Sponsored by* UW School of Law.

10 Seattle: Emerging Trends in Chapter 11 Reorganizations. *Sponsored by* KCBA/KCBA Creditor-Debtor Section.

10 Seattle: Business Transition Strategies: Planning & Tax Considerations. *Sponsored by* WSBA CLE.

10-12 Jackson, Wyoming: Family Restructuring at the End of the 20th Century. *Sponsored by* the North American Conference of the International Society of Family Law. Contact (801) 378-2617.

11 Olympia: Adoption Law (moderated video replay). *Sponsored by* WSBA.

11 Seattle: Indian Natural Resource Law. *Sponsored by* UW School of Law.

11 Seattle: Northwest Employee Benefits Conference. *Sponsored by* WSBA.

15 Deadline for copy for August 1993 *Bar News*.

17 Seattle: Mini Series: School & Recreation Law, Bankruptcy for P.I., Business Torts, Construction Law. *Sponsored by* WSTLA.

18 Seattle: Law Firm Management Series '93. *Sponsored by* ALA Region 5. *For information:* (908) 725-1600.

18 Tacoma: Protecting Your Practice from Malpractice Claims, Discipline and Litigation: Letters, Agreements and Practical Advice. *Sponsored by* WSBA CLE.

18-19 Leavenworth: WSBA Board of Governors meeting.

Also: WSBA Young Lawyers Division Board meeting.

18-19 Boise: Fundamentals of Estate Planning. *Sponsored by* Idaho Bar Foundation.

19 Seattle: Insurance Law Institute. *Sponsored by* UW School of Law

22 Seattle: Hazardous Waste. *Sponsored by* KCBA.

22 Seattle: Forming and Maintaining a Tax-exempt Corporation. *Sponsored by* Washington Lawyers for the Arts. *For information:* (206) 292-9171.

23-25 Chelan: Summer Training Program. *Sponsored by* WAPA.

24 Seattle: Charitable Gift Planning: Charting the Course. *Sponsored by* Washington Planned Giving Council. *For information*: Carolyn Black, (206) 632-6881.

25-26 Chelan: 1993 Litigation Section Midyear meeting and seminar: Strategies for Winning at Trial. *Sponsored by* the section/WSBA CLE.

25-27 Yakima: 1993 Family Law Section Midyear meeting and seminar. *Sponsored by* the section/WSBA CLE.

Business Advisory Services, Inc. (206) 223-5400
CLE International (206) 621-1938
Idaho Bar Foundation (208) 342-8958
National Business Institute, Inc. (715) 835-7909
King County Bar Association (KCBA) (206) 624-9365
Lewis & Clark Law School/Northwest School of Law (503) 768-6642
Spokane County Bar Association (Spokane BA) (509) 623-2665
Tacoma-Pierce County Bar Association (TPCBA) (206) 383-3432
University of Washington School of Law (UW CLE) (206) 543-0059
Washington Assn of Prosecuting Attorneys (WAPA) (206) 753-2175
Washington State Bar Association (WSBA CLE) (206) 727-8202
Washington State Trial Lawyers Assn (WSTLA) (206) 464-1011, (800) 732-9251

July 1993

7 Seattle: Complex Property Division. *Sponsored by* WSBA.

15 Deadline for copy for September 1993 *Bar News*.

15 Seattle: Effectively Taking and Using Depositions. *Sponsored by* WSBA.

21-23 Sun Valley: Idaho State Bar Annual Meeting, including nine CLE programs.

22-25 Coeur d'Alene, ID: WSTLA 1993 Annual Meeting & Convention.

29 Seattle: Washington Wills in the 1990s. *Sponsored by* WSBA.

27 Seattle: Environmental Law Series: Water Resources. *Sponsored by* KCBA.

29 DWIs After the Trial: Your Duty to Defend. *Sponsored by* KCBA.

30-31 Winthrop: WSBA Board of Governors meeting.

August 1993

6 Seattle: Selections from the WSBA Civil Procedure Deskbook. *Sponsored by* WSBA.

6-7 Stevenson: WSBA Young Lawyers Division Board meeting. *For information*: Sheri Borgford, (206) 727-8200.

13 Seattle: Guardians Ad Litem. *Sponsored by* WSBA.

15 Deadline for copy for October 1993 *Bar News*.

20 Seattle: Criminal Law in Courts of Limited Jurisdiction. *Sponsored by* WSBA.

20 Seattle: International Trade Law. *Sponsored by* UW School of Law.

20 Seattle: Third Annual Attorney Paralegal Team. *Sponsored by* WSTLA.

21-28 King Salmon, Alaska: Chiropractic/Legal Seminar, Katmai Lodge. *Sponsored by* Margullis, Luedtke & Ray, attorneys, Tacoma. *For information:* Sherilee M. Luedtke, (206) 627-7222.

22-24 Leavenworth: Juvenile Training Program. *Sponsored by* WAPA.

September 1993

9-10 Seattle: WSBA Board of Governors meeting.

10 Seattle: WSBA Annual Meeting. NOTE: WSBA convention in Victoria has been canceled.

10-11 Sun Valley: Advanced Estate Planning. *Sponsored by* Idaho Bar Foundation.

15 Deadline for copy for November 1993 *Bar News*.

17 Tacoma: Effective Discovery—Planning/Implementation. *Sponsored by* TPCBA.

17-18 Coeur d'Alene: Northwest Bankruptcy Conference. *For information:* Idaho Bar Foundation.

October 1993

1 Boise: Litigation CLE. Also presented 10/8 in Coeur d'Alene and 10/15 in Twin Falls. *Sponsored by* Idaho Bar Foundation.

7 Coeur d'Alene: How to Handle Basic Copyright and Trademark Problems (video). Also presented 10/14 in Twin Falls. *Sponsored by* Idaho Bar Foundation.

8-9 Pocatello: ISU Tax Institute. *For information:* Idaho Bar Foundation.

15 Deadline for copy for December 1993 *Bar News*.

15 Tacoma: Estate Planning. *Sponsored by* TPCBA

21 Lewiston: Appellate Advocacy (video). Also presented 10/28 in Idaho Falls. *Sponsored by* Idaho Bar Foundation.

22 Lewiston: Trends in Real Estate. Also presented 10/29 in Idaho Falls and 11/5 in Boise. *Sponsored by* Idaho Bar Foundation.

November 1993

12 Boise, Idaho: Criminal Jury Instructions. Also presented 11/19 in Moscow. *Sponsored by* Idaho Bar Foundation.

15 Deadline for copy for January 1994 *Bar News*.

19 Tacoma: Appellate Practice. *Sponsored by* TPCBA.

Drafting a Multilateral International Recognition and

by **Gregory S. Paley**

At present, the United States is not a signatory to a convention governing the recognition and enforcement of foreign money judgments.[1] And while the United States is a party to the widely accepted New York Convention providing for the recognition and enforcement of foreign arbitration awards,[2] holders of U.S. court judgments are currently unable to avail themselves of a multilateral treaty which would facilitate the recognition and enforcement of those judgments abroad. The absence of such an international treaty framework has often resulted in confusion, delay and financial hardship for holders of U.S. judgments who may find it necessary to seek recognition and enforcement of such judgments abroad if no assets of the judgment debtor can be found in the United States.

In contrast, holders of foreign money judgments against U.S. debtors encounter minimal difficulty when seeking to enforce those judgments in the United States. Although not entitled to protection under the full faith and credit clause of the U.S. Constitution, foreign judgments which otherwise meet U.S. Constitutional requirements have long been recognized and enforced under principles of comity.[3] In addition, many jurisdictions in the United States have legislation to facilitate the enforcement procedure for holders of "inbound" foreign money judgments.[4] The result is that the holder of a foreign money judgment typically encounters few procedural obstacles when seeking to have that judgment recognized and enforced by U.S. courts, while holders of American money judgments may face uncertainties and complex issues when seeking judicial enforcement in a foreign country.[5]

From the American perspective, the absence of a multilateral convention places U.S. litigants (especially smaller businesses and individuals) at a competitive disadvantage when considering litigation which may require recognition or enforcement of an ensuing judgment abroad. With an ever-increasing interdependent global economy, the need to place such U.S. judgment holders on a "level playing field" requires the United States to explore the feasibility of negotiating a multilateral convention on the recognition and enforcement of money judgments. Such a convention, if properly drafted, could be structured to provide a systematic and predictable mechanism for recognizing and enforcing money judgments in foreign jurisdictions.

Procedural Background

In June 1992, the Office of the Legal Advisor for the United States Department of State attended a meeting of The Special Commission on General Affairs and Policy at The Hague with a proposal that the Hague Conference on Private International Law ("Hague Conference") seek to prepare a convention on the recognition and enforcement of court judgments.[6] Members of the U.S. delegation requested that the Permanent Bureau of the Hague Conference resume efforts in the field of recognition and enforcement of judgments in the hope of bringing together member states of the European Free Trade Area ("EFTA"), the European Community ("EC") and the other members of the Hague Conference to consider preparing and adopting a multilateral convention governing the recognition and enforcement of judgments.

The United States delegation proposed that the Hague Conference build on the Brussels and the Lugano conventions (discussed below) with a view towards formulating a new treaty which would have broad appeal to the international community beyond Western Europe. After considering the United States initiative, the Permanent Bureau agreed to convene a special meeting of experts at The Hague in October 1992 to discuss further the U.S. proposal and to determine whether a Hague Conference judgment convention should become a priority item for consideration during the 17th session of the Hague Conference scheduled for May 1993.

Issues

In considering the merits of the treaty initiative being advanced by the U.S. Government, the following questions arise:

(1) Are there any existing multilateral treaty regimes that the United States could currently join, thereby avoiding the need to negotiate a new treaty?

(2) Is a broad-based multilateral convention preferable to multiple bilateral conventions?

(3) Assuming a multilateral approach is to be preferred, is the Hague Conference the best forum in which to seek the preparation of such a convention?

1. Existing Multilateral "Money Judgment" Treaties

In addition to the Inter-American Convention referred to earlier,[7] there are currently three other multilateral conventions concerning the recognition and enforcement of money judgments—the Hague Convention, the Brussels Convention and the Lugano Convention. While a detailed examination of each convention is beyond the scope of this report, there are a number of generally perceived shortcomings of each convention which should be briefly mentioned for a fuller understanding of some of the reasons and motivations behind the current U.S. proposal.[8]

A. The Hague Convention. The first multilateral convention, the 1971

CONVENTION ON THE ENFORCEMENT OF JUDGMENTS

Hague Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters (the "Hague Convention") is not worthy of consideration. Only three countries have become parties to that convention, which is generally perceived as being too complex and has been largely superseded by the Lugano Convention.[9]

B. The Brussels Convention. In 1973, the EC ratified the first of two treaties governing the recognition and enforcement of judgments. The first agreement was the 1968 Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, commonly referred to as the Brussels Convention.[10] It was first adopted by the original six EC member states; each new EC member state is required to be a party and has subsequently acceded to the convention.

The Brussels Convention is only open to member states of the EC. It has long been subject to criticism because of its discrimination between EC and non-EC countries in the area of jurisdiction. It is a "*convention double*" (or *traite double*), meaning it provides directly for the grounds of judicial jurisdiction which constitute the sole bases for recognition and enforcement of subsequent judgments.[11] As between member states, the Brussels Convention then goes on to eliminate grounds of so-called "exorbitant jurisdiction" found in the domestic laws of the member states, but allows for those states to make use of such bases of jurisdiction in the adjudication of actions against nonmember-state domiciliaries and does not prohibit the recognition and enforcement of a judgment based on such grounds.[12] Although there apparently have been no cases brought under one of these bases of jurisdiction since the Brussels Convention came into force, the troublesome potential, for discrimination against non-EC domiciliaries remains, and it is likely someday to become a reality.

C. The Lugano Convention. In 1988, member states of the EC and the member states of EFTA adopted the Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters ("Lugano Convention").[13]

The Lugano Convention extends the jurisdictional concepts of the Brussels Convention to EFTA member states. Thus, while EFTA countries and member states of the European Community agree not to recognize and enforce judgments based on grounds of exorbitant jurisdiction in each other's domestic laws, those jurisdictional bases still apply to non-domiciliaries of the EC and EFTA countries.[14]

Unlike Brussels, the Lugano Convention is technically open to third-party signatories provided that (1) the prospective member be invited by a Contracting State to participate, and (2) all member states unanimously approve the applicant's accession. Even if invited, however, the United States would likely have difficulty acceding to the Lugano Convention. First, the jurisdictional bases prescribed therein as permissible, which are drawn from the civil-law regimes of the participating countries, would most likely require substantial changes to U.S. law. Second, Brussels/Lugano countries would probably seek to have certain bases of jurisdiction under U.S. law, most notably long-arm jurisdiction, declared exorbitant. This would be a very high, and likely unacceptable, price of admission.

In short, existing multilateral treaties are not viable options for the United States.

2. Why a Multilateral Convention?

A multilateral judgment convention, by its very definition, represents a single document with identical terms that would be in force in all states party thereto. Such a convention, if ratified by the United States, could facilitate recognition and enforcement proceedings in multiple jurisdictions and, if properly structured, could remove many of the perceived inequities of the present system.

On the other hand, there are some valid objections should the U.S. commit to the negotiating a multilateral judgment convention. One objection to a multilateral convention, asserted by some, is its "least common denominator" tendency. Rather than permitting market forces to define the relative negotiating power among foreign states vis-a-vis their actual or perceived political or economic strength, a multilateral treaty is based upon principles of disproportionate representation (i.e., one country one vote). The result is that the bargaining power of traditionally dominant interests may be diffused in a multilateral-negotiation setting.

Another objection to the multilateral approach is that the contracting states cannot be as selective in countries participating in such a regime as is possible with a bilateral convention. For example, if a country with a comparatively undeveloped and unpredictable legal system decides to join the multilateral regime, there may be no effective way to preclude it from doing so.[15]

Although there are shortcomings in the multilateral-convention approach, the deficiencies are negligible when analyzed in the context of the benefits that could accrue to U.S. litigants and their legal counsel from such a convention. With the internationalization of global commercial interests, there is a very real and immediate need for a new multilateral convention which will appeal to a wider audience than the present system. Thus, a multilateral treaty could (1) establish a new regime for enforcing U.S.

money judgments abroad, (2) reduce current barriers facing U.S. judgment creditors, and (3) remove the problematic patchwork of rules and procedures inherent in a bilateral convention approach.[16]

In short, the arguments for a multilateral approach are ultimately most convincing.

3. Why the Hague Conference?

Would the Hague Conference provide a better negotiating forum than other possible organizations such as the United Nations International Law Commission? Certainly the Hague Conference is not the most representative existing international organization. Nor does the Hague Conference, viewed from the U.S. perspective, consistently produce successful international agreements.[17]

Notwithstanding such concerns, there are good reasons why the Hague Conference may be the best organization to receive the U.S. proposal. The Conference includes among its members the EC and EFTA member states, thereby allowing the U.S. to negotiate with them to eliminate the potential discrimination discussed above with respect to the Brussels and Lugano conventions. The Hague Conference also includes many significant U.S. trading partners outside western Europe such as Canada, Mexico and Japan.

The member states of the Hague Conference additionally include many of the countries with the most substantial investments in the United States at present. Thus, to the extent disputes follow business activity, a convention with the members of the Hague Conference would likely cover a substantial percentage of U.S. commercial disputes with foreign parties.

Elements of the Current U.S. Proposal [18]

What is the American proposal, and how will it differ from the current Conventions?

In late October 1992, the United States delegation met with the Permanent Bureau of the Hague Conference and experts from selected Hague Conference member states to discuss the American proposal.[19] The goal of that meeting is to explore the feasibility of preparing a new international judgments treaty which would be open to the member states of the Hague Conference, including member states of the EC and EFTA.

In its simplest form, the American approach offers an attractive solution to the limited membership and the "exorbitant" jurisdiction provisions of Brussels and Lugano. While still in its preliminary form, the American proposal suggests that The Hague prepare a "mixed" convention rather than follow the *convention double* format of Lugano and Brussels.

The American delegation will propose that any judgments convention combine elements of a *traite simple* with a *traite double*.[20] Like the *convention double*, the mixed convention would deal directly with both grounds of judicial jurisdiction and grounds for recognition and enforcement of judgments. Judgments rendered or based on one of the enumerated (i.e., permissible) jurisdictional grounds (the "white list") would be entitled to recognition and enforcement absent other grounds for nonrecognition. Likewise, the mixed convention would enumerate grounds of exorbitant jurisdiction which could not alone be grounds upon which litigation is based (the "black list"). Unlike the *convention double*, however, the white list grounds would not be the exclusive basis on which a state party could recognize and enforce a foreign judgment. Rather, as with a *convention simple*, a state party would be free to recognize and enforce judgments based on other jurisdictional grounds permitted under their domestic laws.

There is considerable debate over the merits of such an approach. Some contend the U.S. should take the *convention double* approach; others argue that a *convention simple* is the only realistic way to proceed. Yet, in spite of such debate and without delving into all the detail on those issues, this much can be said about the chosen approach: while ambitious, it is closer to the approach of existing regimes (Brussels/Lugano) than a *convention simple* would be, and therefore possibly more palatable to potential treaty partners. It is also an approach that could be modified if negotiations over jurisdictional bases prove too difficult. Furthermore, a treaty embodying the "mixed" convention approach would likely benefit U.S. litigants. Having a white list would enable them to predict whether a potential judgment could be recognized and to plan their cases *ab initio* with greater certainty.[21] At the same time, the mixed-convention approach offers the U.S. possible means of avoiding lengthy discussions over whether U.S. "long-arm" statutes are exorbitant or not.

When the U.S. proposal was scheduled for initial discussion at the Hague

Conference in late October 1992, it was too early for the ABA to endorse the merits of any particular approach at this time. Neither, however, did we suggest that the ABA should oppose the U.S. proposal. Rather, the merits of a mixed-convention approach can be best debated as the details of such an approach emerge. The Section of International Law and Practice is committed to monitoring these negotiations and reporting back to the Association on the progress of the U.S. initiative.

Benefits of a Judgments Treaty to American Lawyers and Their Clients

A multilateral judgments treaty, whether grounded in the mixed-convention form discussed herein or taking the form of a *convention simple*, could be of tremendous benefit to U.S. lawyers and their clients. Some of those benefits could include:

(1) facilitating the subsequent enforcement of "outbound" judgments rendered in American courts against judgment debtors with assets located abroad;

(2) enhancing the ability of U.S. litigants to plan and execute strategy in transnational litigation, thereby reducing the uncertainty and cost, with particular benefit to small businesses and individuals;

(3) lessening the perceived unfairness imposed by the current EC-Brussels Convention system, which permits exorbitant bases of jurisdiction to be invoked against U.S. parties both in the adjudication and enforcement stages;

(4) establishing a more-level playing field in the international judgments arena; and

(5) avoiding the duplication of effort inherent in a series of bilateral treaty negotiations.

Conclusion

The time has arrived to commence negotiations and to formulate proposals for a multilateral convention addressing the recognition and enforcement of court judgments. The American proposal is a creative initiative designed to reduce the difficulties inherent in the present international system, while at the same time creating a uniform and predicable set of transnational litigation rules.

Endnotes

[1] The United States participated in the negotiation of a treaty known as the Inter-American Convention on Jurisdiction in the International Sphere for the Extraterritorial Validity of Foreign Judgments, OAS Treaty Ser. No. A/39 ("Inter-American Convention on Foreign Judgments") finalized in 1984 but neither signed nor ratified that treaty.

[2] United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, June 10, 1958, came into force for the U.S. on June 7, 1959, 21 U.S.T. 2517, T.I.A.S. 6997, 330 U.N.T.S. 38.

[3] *See* e.g., *Hilton v. Guyot*, 159 U.S. 113 (1895).

[4] The primary sources of state law governing the recognition and enforcement

of foreign judgments in U.S. courts are the Uniform Foreign Money-Judgments Recognition Act ("UFMJRA") and the Uniform Enforcement of Foreign Judgments Act ("UEFJA"). Twenty-two states have enacted UFMJRA, and 42 states have enacted UEFJA. States adopting neither uniform law apply common-law rules to the recognition and enforcement of foreign judgments. *See*, Restatement (Third) Foreign Relations Law §§ 481 et seq. and Restatement (Second) Conflicts of Law § 92.

[5] In the absence of a multilateral treaty governing the recognition and enforcement of money judgments, a current holder of a U.S. money judgment is confronted with ascertaining the domestic-law requirements of each target jurisdiction to insure that the U.S. judgment can, in fact, be enforced in that particular country. Those requirements are typically difficult to ascertain without the advice of local counsel, and differ from jurisdiction to jurisdiction.

[6] The United States, together with approximately 37 other countries, is a member of the Hague Conference on International Law. Edwin D. Williamson, Esq. of the U.S. Department of State outlined the proposal presented in this Report in a letter dated May 5, 1992 to George Droz, Esq., Secretary General to the Hague. See, L.c. No. 15 dated May 6, 1992 and L.c. No 14, dated April 29, 1992.

[7] *See* footnote 1 *infra*.

[8] *See* Minor, "The Lugano Convention: Some Problems of Interpretation," 27 *Common Market Law Review* 507-519 (1990).

[9] See 35 N.I.L.R. 196, 214 (1988). The only contracting states to the 1971 Hague Convention are the Netherlands, Portugal and Cyprus.

[10] A consolidated and updated version of the Brussels Convention, including a 1971 Protocol (following the accession of Spain and Portugal), is published at 29 I.L.M. 1413 (1990).

[11] This is in contrast to a *convention simple* (or *traite simple*), which deals with jurisdictional principles only indirectly by specifying the bases that qualify a judgment for recognition in the other contracting states.

[12] Brussels Convention, Article 4. "Exorbitant jurisdiction" is a term of convenience generally used to describe "unreasonable" bases of jurisdiction not recognized as adhering to due process notions of fair play as described in the fifth and fourteenth amendments to the U.S. Constitution.

[13] *See* 28 I.L.M. 620 (1989). Only Switzerland has ratified the Lugano Convention.

[14] Lugano Convention, Articles 3, 4.

[15] With respect to the participation of "undesirable" countries in a multilateral convention to which the U.S. may become a contracting state, the problem is probably more apparent than real. As discussed earlier, a number of U.S. states already have laws which permit judgment holders from such countries to seek recognition and enforcement of their judgments in U.S. courts. The kinds of defenses which enable U.S. courts currently to decline to recognize and enforce such judgments—fraud, improper procedure or a discriminatory tribunal—will almost certainly be available under a convention. Thus, it seems unlikely that the U.S. will be worse off in this regard with a convention than without.

[16] If the United States were to now pursue bilateral treaty negotiations with selected trading partners, those efforts would most likely require a negotiation and ratification timetable which could last decades. Furthermore, there is no guarantee that bilateral negotiations would be any more successful than multilateral ones. The only example of a recent U.S. attempt to negotiate a purely bilateral "money judgments" convention was in the 1970s with the United Kingdom. One would expect, given the common legal system of the two countries, that agreement on a treaty regime would be attainable. Yet after years of planning and effort, those negotiations produced no agreement. *See* Hay & Walker, *The Proposed Recognition of Judgments Convention Between the United States and the United Kingdom*, 11 Tex. Int'l L.J. 421 (1976), and 18 Va. J. Int'l L. 753 (1978).

[17] The U.S. is a party to the following conventions prepared and adopted by the Hague Conference: the 1961 Convention on Abolishing the Requirement of Legalization for Foreign Public Documents; the 1965 Convention on the Ser-

vice Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters; the 1970 Convention on the Taking of Evidence Abroad; and the 1980 Convention on the Civil Aspects of International Child Abduction. Of these four conventions, the last two have been the least controversial. The first two have been the subject of extensive litigation in the U.S., often spurred by U.S. litigants searching for ways to avoid using the procedures they prescribe.

[18] The brief summary of the current U.S. proposal described herein is an outgrowth of an article prepared by Professor Arthur von Mehren of Harvard University. He is the author of the current U.S. proposal distributed and discussed at a State Department Study Group meeting conducted in Washington, D.C. on September 2, 1992 which was attended by the author of this report. He is also a member of the U.S. delegation to the Hague Conference.

[19] The study group scheduled to attend the October 1992 meeting consisted of experts from Argentina/Venezuela, China, Egypt, France, Finland, Hungary, the United Kingdom and the United States.

[20] Traditionally, conventions governing the recognition and enforcement of judgments have been classified in two categories: a *convention simple* (*traite simple*), and a *convention double* (*traite double*). A *convention simple* addresses only issues of recognizing and enforcing a judgment, while a *convention double* regulates both the assumption of jurisdiction to prescribe and the recognition and enforcement of the resulting judgment.

[21] Obviously, the degree of benefit which would accrue depends on the scope of the white list, and conversely, that of the black list. It would be hoped that the white list could be sufficiently broad to provide a basis for securing jurisdiction in a substantial number of cases, and that the black list would not include jurisdictional bases which are important to a substantial number of U.S. litigants. The residual bases, the so called "grey area" (which would not actually be a list but a residual category) would presumably encompass bases of jurisdiction which are important to individual countries, but likely to be controversial internationally.

*Seattle attorney **Gregory S. Paley** is chair of the ABA Section of International Law and Practice Subcommittee on the International Recognition and Enforcement of Judgments.*

Depression, Anger and the Heart

The December 1992 issue of the *Harvard Heart Letter* described studies in which social isolation and psychological stress were linked to an increased risk of heart disease. Recent research suggests that depression and anger may also have a negative effect on the heart. At an American Heart Association meeting in March 1992, investigators from the California Department of Health Services described a large study of the impact of depression on the development of atherosclerosis. The researchers performed personality tests on 1,100 men between the ages of 42 and 60 years and, using ultrasound techniques, assessed the severity of atherosclerosis in the major vessels in the neck (the carotid arteries), which carry blood to the head. Results indicate that the impact of risk factors for the development of atherosclerosis may be more potent in depressed people.

For example, the effect of smoking on the amount of atherosclerosis was 3.4 times greater in depressed individuals than in those without depression. Low density lipoprotein cholesterol—sometimes called "bad" cholesterol because it is strongly associated with the development of coronary disease—was nearly twice as powerful a risk factor in depressed patients.

Decreased Pumping Ability

A second study from California recently described sudden worsening of the heart's function when people with heart disease become angry. Researchers from Stanford University and the University of California, San Francisco, tested the heart's pumping ability under a variety of conditions in 18 people with know coronary disease and nine healthy people. They measured the percentage of blood squeezed out of the left ventricle with each contraction (the *ejection fraction*) during physical exertion and three types of psychological stress:

- *Mental arithmetic* The participants were told to perform "serial 7s, " in which they repeatedly subtract 7 from 3,505 (3,505... 3,498... 3,491.. 3,484...) for 6 minutes. They were tape-recorded and told that they would be rated on the basis of speed and accuracy.
- *Speech* They were asked to imagine they were in a department store, where they had been accused of stealing the belts they were wearing. They had three minutes to prepare and then gave a three-minute speech in their own defense.
- *Anger recall* They were asked to recall an incident during the last six months that still made them frustrated, angry, or upset. They tried to recreate the incident as fully as possible, including such details as what they said and did and what they were feeling.

The average initial ejection fractions were 53 percent in the people with coronary disease and 66 percent in the control subjects. Physical exercise caused the ejection fractions to rise in both groups: healthy participants had a 12 percent increase, and the patients with coronary disease had a more modest 2 percent rise.

In contrast, anger caused a 5 percent *drop* in ejection fraction in the people with coronary disease and did not lead to any change for the others. Anger recall was also associated with a 23 mm Hg rise in the systolic blood pressure and 11 mm Hg increase in diastolic blood pressure in those with coronary disease. Neither the speech nor the arithmetic exercise caused changes in cardiac function.

Unresolved Grievances

The patients told the investigators that they were only about half as angry during the study as they had been during the actual episodes they were recalling. Most of the incidents concerned unresolved grievances or perceived injustices. For example, one patient described how someone had backed into his car several years before, leading to a tortuous series of interactions with insurance companies and auto body shops and, ultimately, an $800 bill.

This study does not show that anger causes heart disease, but it does suggest that for someone with atherosclerosis, anger may be enough to cause angina or more severe complications. Some investigators have also speculated that episodes of rage might cause surges in blood pressure that damage arteries and lead to the formation of atherosclerotic plaques.

The lesson from these studies is not that depression or anger should be suppressed. Instead, people should recognize these emotions and the stress that they cause. Memories that cause anger should not be allowed to lie untouched. These issues should be aired and if possible resolved, so that over time the powerful emotions provoked by these memories can subside.*

* Article reproduced with permission from *Harvard Heart Letter*, Volume 3 Number 6 February 1993.

Nota Bene

LAP is a confidential service providing assessment and referral for a broad range of problems confronting lawyers. These include stress, burnout, depression, career dissatisfaction, alcohol and drug abuse. Contact the Lawyers' Assistance Program at (206) 727-8268.

Hedonic Damages... How Far Can Economics Go?

by **Robert W. Moss**

In a March 1993 article in this journal, Wolfgang Franz described a proposed method for calculating the "percent of enjoyment of life that has been lost as a result of injury."

My reaction on reading his article was comparable to the young boy's first experience at a new summer camp. "It's horrible," he wrote home to his mother. "The food is terrible and there's no seconds."

The theory of "hedonic damages" espoused by Franz evokes a similar combination of disappointment and gluttony among many economists. It would be wonderful (for us economists, at least) if we had the tools to value life itself. However, most economists who have examined the hedonic-damage theory conclude that it is currently neither a very useful nor reliable tool for economic analysis in the courtroom. Economics at this time simply cannot value life to the same degree it can measure wages, medical expenses or interest rates.

Economists have long wrestled with the question of the value of life. Early theories that happiness could be defined and quantified in units called "utils" foundered on economists' inability to identify or measure this elusive item. Some 200 years ago, economics abandoned the search for absolute valuations of happiness in exchange for relative rankings. It was certainly possible to determine that one choice was preferred over another, even if the absolute happiness to be derived from either remained undetermined.

Still, the desire to quantify the value of life did not die. In the 1930s, the preparation of cost-benefit studies to analyze the value of proposed government projects became common practice. The items considered in such analyses came to include both financial and human factors.

For example, the benefits of a dam would include the value of the electric power to be generated, the injuries prevented by not mining and burning coal to generate the same amount of power, the additional crops to be grown on the acres to be irrigated, the lives to be saved and the property damage to be avoided by reducing flooding.

The costs of dam construction and operation would likewise include financial and human elements: the cost of materials, the loss of arable land in the river valley, the injuries and lives lost in construction of the dam.

Following the early work by the U.S. Army Corps of Engineers on dam construction, cost-benefit studies became standard procedure in evaluating transportation alternatives, public-health plans and other social policies. Over the years, we have opened both sides of the equation to include additional factors: air pollution avoided vs. historic sites buried; transportation routes improved vs. salmon runs destroyed. As society identifies more to value, so it seeks to quantify those values.

Valuing human life for cost-benefit studies or for the litigation of personal-injury claims requires the use of a generally accepted methodology with appropriate data. The willingness-to-pay methodologies cited by Franz have been used in cost-benefit analysis, but not without serious criticism as to their accuracy and applicability. Before applying the methodology to litigation, these objections should be thoroughly reviewed.

For example, studies of pay rate differentials among occupations attempt to isolate the "risk premium" attached to jobs for which there is an increased risk of death. However, such jobs are often dirtier, noisier, more physically strenuous, and more prone to injury than the average. It is difficult to segregate the risk of death from the other negative factors in these jobs.

Many dangerous jobs are also highly concentrated geographically; traditionally high-risk jobs in extractive occupations, such as logging and mining, are often located in rural areas with few other job opportunities. Workers in these areas have a limited market from which to demand a "risk premium" for the traditional employment of their fathers and grandfathers.

Surveys of willingness-to-pay to avoid or reduce risk can be flawed in different ways. Often, the necessary information is lacking to support an informed decision. Some studies have shown that persons tend to overestimate the risk of low-probability events (death from earthquake), while underestimating the risk of high-probability events (lung cancer among smokers).

Surveyed willingness-to-pay also often fails a basic aggregation test. If I assume there is a very small probability of a specific bad event occurring to me, I will be willing to pay very little to reduce this probability even further. However, if the probability becomes great, my willingness to pay may grow exponentially.

Absent government mandates, for example, I may not be willing to pay more than $100 for air bags in my new car. But six months later, as my car begins to skid on a rain-slicked road, the amount I would be willing to pay would be much higher. Even this amount will seriously underrepresent my ex post willingness to have purchased the air bag once I have suffered multiple injuries in the resulting crash.

And what would my ex post willingness-to-pay have been if I had died in the crash? A good guess would be my net worth plus all I could borrow. High-income and high-net-worth individuals would presumably be able to conceptualize a higher realistic (to them) value at this point than would persons of more modest means.

Is the quality of life or the value of life then a function of personal income or wealth? Is the proper measure of will-

ingness-to-pay the amount that my family would have paid to prevent my death? Or is it the amount independent observers would pay to prevent a similar occurrence from happening to them?

Attempts to date to develop hedonic-damage theory have focused on the loss of positive values, such as the ability to enjoy life, or even the loss of life itself. But of even greater practical importance for many injured persons are the negative costs imposed by their injuries. By ignoring these costs, hedonic-damage theory seriously undervalues the qualitative loss of persons with lifelong disabilities.

How can we value the loss of family relationships brought on by behavioral changes following a head injury? How can we value the embarrassment of incontinence brought on by spinal-cord injury? How can we objectively value the cost of on-going pain?

Are there any outer financial bounds to these costs? Do we get used to pain over time, or is the prospect of pain tomorrow, and the days after, an additional damage for today?

A Modest Proposal . . .

As an alternative to waiting for the evolution of hedonic-damage theory and practice, a reasonable body of data does exist concerning society's valuation of the effect of injuries on a person's ability to enjoy life or need to endure pain. These data are generated every time a jury awards an injured person a sum of money for "pain and suffering," "loss of ability to enjoy life" or other quality-of-life issues.

In the aggregate, the deliberations leading up to a jury award for quality-of-life losses probably represent the largest reasoned consensus in our society of the socially acceptable value of life and happiness, and of pain.

Prior jury verdicts, properly interpreted and adjusted for severity of injury, age of the injured party, and perhaps regional differences, could become a valuable guide to a jury attempting to quantify its compassion for the injuries of the plaintiff. The legal system, for reasons that have long baffled me, has resisted the use of these most pertinent, internally derived data.

Hedonic-damage theory and practice may someday evolve to provide tools accepted by both economists and the law. The theory excites our appetite for the quantification of social costs and benefits that to date continue to resist rigorous valuation. Juries can certainly benefit from guidance from economists and others concerning the social calculus they are mandated to perform. While waiting for a grand theory to develop, we should at least consider making use of pertinent data that are close at hand.

Robert W. Moss *is a consulting economist and founder of the firm Moss Oesting & Associates in Seattle. He has testified in numerous personal injury cases.*

Average Coupon Equivalent Yields from the Auction of 26-week Treasury Bills: 1987 to Date

These are the average coupon equivalent yields from the auction of 26-week treasury bills from January 1987 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.

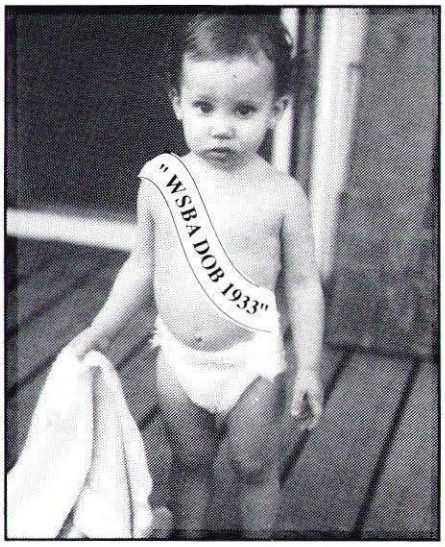
These limits apply to loans which are made during the designated month. Note: Any loan made pursuant to a commitment to lend at an interest rate permitted when the commitment is made is lawful.

The average coupon equivalent yield from the first May 1993 auction of 26-week treasury bills applicable to the computation of the maximum allowable interest rate for June 1993 is 3.07%. According to the state treasurer's office, the maximum allowable interest rate for June 1993 is 12%. Note that when the equivalent bond yield is below 8%, the maximum rate allowable remains at 12%.

January	1987	5.69%	12.00%	July	1989	8.44%	12.44%	January	1992	4.56%	12.00%
February	1987	5.79%	12.00%	August	1989	8.05%	12.05%	February	1992	4.00%	12.00%
March	1987	5.83%	12.00%	September	1989	8.12%	12.12%	March	1992	4.08%	12.00%
April	1987	5.76%	12.00%	October	1989	8.31%	12.31%	April	1992	4.28%	12.00%
May	1987	6.07%	12.00%	November	1989	8.36%	12.36%	May	1992	4.16%	12.00%
June	1987	6.46%	12.00%	December	1989	7.89%	12.00%	June	1992	3.91%	12.00%
July	1987	6.40%	12.00%					July	1992	3.84%	12.00%
August	1987	5.95%	12.00%	January	1990	7.69%	12.00%	August	1992	3.42%	12.00%
September	1987	6.45%	12.00%	February	1990	7.93%	12.00%	September	1992	3.40%	12.00%
October	1987	6.66%	12.00%	March	1990	8.15%	12.15%	October	1992	3.04%	12.00%
November	1987	7.33%	12.00%	April	1990	8.22%	12.22%	November	1992	2.86%	12.00%
December	1987	6.55%	12.00%	May	1990	8.24%	12.24%	December	1992	3.37%	12.00%
				June	1990	8.28%	12.28%				
January	1988	6.42%	12.00%	July	1990	8.03%	12.03%	January	1993	3.57%	12.00%
February	1988	6.67%	12.00%	August	1990	8.01%	12.01%	February	1993	3.38%	12.00%
March	1988	6.41%	12.00%	September	1990	7.56%	12.00%	March	1993	3.19%	12.00%
April	1988	6.20%	12.00%	October	1990	7.75%	12.00%	April	1993	3.14%	12.00%
May	1988	6.21%	12.00%	November	1990	7.59%	12.00%	May	1993	3.13%	12.00%
June	1988	6.41%	12.00%	December	1990	7.41%	12.00%	June	1993	3.07%	12.00%
July	1988	7.05%	12.00%								
August	1988	7.04%	12.00%	January	1991	7.31%	12.00%				
September	1988	7.52%	12.00%	February	1991	6.82%	12.99%				
October	1988	7.79%	12.00%	March	1991	6.91%	12.00%				
November	1988	7.86%	12.00%	April	1991	6.36%	12.00%				
December	1988	8.13%	12.83%	May	1991	6 06%	12.00%				
				June	1991	5.87%	12.00%				
January	1989	8.73%	12.73%	July	1991	5.98%	12.00%				
February	1989	8.86%	12.86%	August	1991	5.98%	12.00%				
March	1989	9.04%	13.04%	September	1991	5.85%	12.00%				
April	1989	9.18%	13.18%	October	1991	5.63%	12.00%				
May	1989	9.38%	13.38%	November	1991	5.30%	12.00%				
June	1989	9.16%	13.96%	December	1991	5.00%	12.00%				

FOR GAWDS SAKES PAY ATTENTION

No one will change me
unless you do.



AND HERE'S HOW!

RESOLUTION

Effective October 1, 1994, the Washington State Bar Association shall use the revenue it derives from mandatory dues assessments for no purpose other than administering and carrying out functions necessary to regulate the practice of law in Washington State, to-wit, admissions (including administering the bar examination), licensing, discipline, monitoring compliance with continuing legal education and trust account regulations, and administering the lawyers' assistance program.

The Washington State Bar Association reflects a conflict of interests, none of which is being served well. The state bar has taken on the responsibilities of a regulatory agency, a trade union, a professional society, and defender of the courts as if there were no significant differences among these various legitimate interests, and as if it need not answer for its performance in any one respect because its general intentions are good.

The resolution would limit the use of mandatory fees to regulatory purposes. The objective is to meet the bar's public responsibilities from governmentally mandated fees, while encouraging the development of an independent bar, privately financed, which would represent the state's lawyers vigorously and without apologies.

WE CAN PASS THIS AT OUR SEPTEMBER BUSINESS MEETING - FIRST WE MUST SHOW UP!

SHOW UP & VOTE!!

We can do what will otherwise never be done.

Please mail this ad to an Out of County Lawyer who might support us. Let our people know.

"Sponsored by Alva Long individually, not paid for or endorsed by SKCBA or WSBA obviously."

NEWS FROM HOME

Fillmore Buckner, M.D. has been elected to a three-year term on the Board of Governors of the American College of Legal Medicine. Buckner is a 1952 graduate of the University of Washington School of Medicine and a 1984 graduate of the University of Puget Sound School of Law. Retired from the practice of medicine, he works full-time as a medicolegal consultant.

Williams, Kastner & Gibbs, the Seattle-based regional law firm, has announced several changes and additions to its roster. **Ronald J. Knox**, **Mark M. Myers**, **Stephen G. Leatham**, and **Mark F. Stoker** have been named partners in the firm. Knox and Myers are in the Seattle office; Leatham and Stoker are located in Vancouver. In addition, **Lisa T. Oratz** has joined the firm as an associate in intellectual property law. Oratz is in the firm's Bellevue office.

Michael K. Vaska and **Steven H. Winterbauer** have been named partners of Foster Pepper & Shefelman. Both practice in the firm's Seattle office.

Robert N. Tullock, formerly a partner with Ellis, Li & McKinstry, has become vice president and general counsel to Business Computer Training Institute. The company operates career training schools in eight cities in Oregon and Washington and is headquartered in Gig Harbor.

James N. Westwood of Portland, head of the appellate department of Miller, Nash, Wiener, Hager & Carlsen, has been elected to membership in the American Academy of Appellate Lawyers, one of 14 American lawyers invited to membership this year. The Academy is open to Martindale-Hubbell-rated "av" lawyers with at least 15 years' practice experience. **Francis L. Van Dusen, Jr.** has become a partner in the firm's Seattle office.

Graham & Dunn, Seattle, has announced that **Mark A. Finkelstein**, **James C. Fowler** and **Michael V. Riggio** have become members of the firm.

Diane Kownacki has joined the Seattle office of Ater Wynne Hewitt Dodson & Skerritt as an associate. She was formerly with Heller Ehrman's Anchorage office.

Perkins Coie has announced a number of new partners. **Thomas E. McLain**, formerly with Alfred Checchi Associates, is a Los Angeles-based partner. **Michael E. McGowen** has joined the firm as a partner in Hong Kong. **Michael E. Kreger** (Anchorage), **Craig E. Shank** (Bellevue), **Brentley M. Bullock** (Portland), **Donald C. Baur** (Washington, D.C.) and **Bruce M. Brooks**, **Gregory Gorder**, **David R. Walton**, and **Colleen S. Yamaguchi** (Seattle) are also new partners. **Deborah J. Phillips** (Seattle) and **Edward G. Johnson** (Spokane) have become of counsel to the firm.

Christine M. Weaver is an associate with Chase, Haskell, Hayes & Kalamon in Spokane.

Short Cressman & Burgess in Seattle has named **David E. Breskin**, **Susan Thorbrogger**, **Margaret Easton** and **Lisa Wolfard** as partners, effective January 1, 1993.

Lane Powell Spears Lubersky has

named a number of new associates in the Seattle office. They are **Stephania Camp**, **John B. Chaffee, Jr.**, **Arthur R. Chapman**, **John R. Dawson**, **J.C. Ditzler**, **Katie Smith-Matison**, **Jodie A. McDougall**, **Jennifer Milestone**, **James D. Mitchell**, **Charles W. Riley, Jr.**, **Shannon Sedlacek** and **N. Claire Stack**.

Marcia J.M. Cavens has been appointed vice president for human resources at Esterline Technologies, located in Bellevue. She is a former partner at Bogle & Gates, and succeeds **N. Huntley Holland**, who resigned her position to pursue personal interests.

In Seattle, Karr Tuttle Campbell has elected **Diana K. Carey** a shareholder. She has been with the firm since 1986 and practices in business and real estate law.

Rich Wallis has been named managing partner at Bogle & Gates, effective April 1, 1993.

At Preston Thorgrimson Shidler Gates & Ellis, **G. Scott Greenburg** has been named chair of the Business Department, and **Scott R. Vokey** is the new chair of the Environmental/Land Use Department.

Tom Fitzpatrick, managing partner of Stafford Frey Cooper & Stewart in Seattle, has been elected Washington State Delegate to the American Bar Association. The position is the highest for the state in the ABA. He was elected in a recent statewide ballot of ABA members. Fitzpatrick is a long-time ABA activist for former president of the WSBA Young Lawyers Division.

Inslee, Best, Doezie & Ryder in Bellevue has added several lawyers to the letterhead. **David J. Lawyer**, **Douglas L. Phillips** and **Andrew L. Symons** are the new arrivals.

J. Alan Jensen and **Charles P. Starkey**, partners in Weiss, Jensen, Ellis & Botteri, traveled to South Korea in March. They were invited by the Korea Foreign Trade Association, which plays a leading role in shaping Korean foreign-trade decisions, and the *Korea Herald-Naeway Economic Daily*, to present a seminar on trade issues involving the Pacific Coast region of the U.S. and Canada, and Korea.

CLARK COUNTY REPORT

by **JOHN F. NICHOLS**

RUMOR CONTROL

1. SUPPLEMENTS: The CCBA is proud to announce a new service for those subscribers to this reporting service, "*Bar News* Pocket Parts." For a nominal service fee, you will be able to update your monthly reports with a monthly pocket part. This temporary issue will conveniently fit right behind wherever you put the last official edition. As a complimentary example of this service, we provide the following supplement to last month's report on attorneys/relatives.

2. *HOMONYMS*: Those attorneys who have come out of the closet and have come to grips with their names: **James Gregg**, **Robert Gregg** and **Don Greig**. Not related but sound alike, especially when arguing for reconsideration.

3. *LEISURE TIME:* Some CCBAers have found the solution to combining business with pleasure for fun and profit. The answer: endorsements. Now we are not talking Nikes here or even bowling shoes, but rather an interesting array of variant activities.

Don Russo/Diane Woolard: Said attorneys were found blatantly endorsing the Oxford Athletic Club, a local health

activities establishment. This unlikely duo was selected as "members of the month." What are the odds of that? Highlights of the bios:

Don: Into musicals; playing the "cordovox" (?) and 6 A.M. aerobics. Look out **Richard Simmons**!

Diane: Broken: arm, leg, knees and numerous city ordinances. Torn: calf and hamstring. Car accidents: three (all settled at pre-trial). Retired from soccer and morning dockets now taking up inline roller skating.

Ben Shafton/Bob Yoseph: Talk about unlikely couples! These two appeared in local newspapers endorsing similar service at widely different establishments.

Ben: Promotes in his ad a physical therapeutic masseuse. Ben's slogan "I went in feeling bad and came out feeling good." I guess that's okay Ben, as long as they don't rub you the wrong way.

Bob: Prefers the more direct approach in his therapy. Bob endorses that fine old establishment, "The New Sleeze." As reported in the *Willamette Week*, while Bob was attending a bachelor party at said club, he realized he had a duty that serviced the legal needs of the patrons and employees. Thus he has published an ad in that journalistic icon, the *Oregon T & A Times*, featuring his slogan "Have Law Degree, Will Travel." It is unknown whether it features his 900 number or the nature of his vocabulary.

4. POLICE BLOTTER

Missing in action from the parking lot was Judge **Edwin Poyfair**'s non-American, non-European automobile (allegedly some type of Honda). Said vehicle was subsequently found following a high-speed chase in Roseburg, Oregon, the victim of some joyriding juveniles. While the damage was extensive, the judge was very philosophical in his reaction: "There is no such thing as a bad boy. We need more jobs and education, unless these little deviants get extradited to my court; then I'll show them what justice is in my hood." Thank you, Father Flannagan.

EAST KING COUNTY REPORT

by MARIANNE MOSCHETTO

Well, the image of the East King County bar is certainly changing. Someone opened the glove boxes of the Volvos and BMWs, loosened the ties and kicked off the high heels. March's meeting was to feature a professional palm reader, but she was unable to foresee her own illness, which prevented her from attending. Our own **Ted** "Merlin" **Watts** substituted and read the tea leaves. Now we know the why of Ted's win/loss average. May will present Dr. **Jeff Alexander**, martial arts expert and sparring partner to **Sylvester Stallone** in "Rocky III," to speak on personal empowerment. I can't report on what happened (as these columns are written two months before they go to print) but I certainly plan to be there at the Bellevue Inn on the fourth Wednesday of each month.

There will be no meetings during the summer, but events coming up include the 30th anniversary celebration in the fall of the founding of the East King County Bar Association, and the holiday party held every year during the Christmas season. Featured this year at the holiday party will be the "Eastside Barristers Blues Band." Interested? Watch your EKCBA newsletter for further announcements.

The big news this month is the first-ever Suburban King County Bar Association Golf Challenge between the East King County Bar Association and the South King County Bar Association. Players from each association will compete in both golf tournaments sponsored by their local association and the other's, and the best total scores will win the trophy. The most imaginative legal minds are competing in the design of the trophy. Suggestions have included the Flying Fickle Finger of Fate for the nostalgia buffs, The Silver Keg propounded by the party hounds, and the Golden Raspberry which is my personal favorite. South's tournament will be held July 30 at the Enumclaw Golf Course, and East's will be at the Carnation Golf Course on August 19. To register, contact **Rod Stephens** for South and **Chris Frost** for East.

PIERCE COUNTY REPORT

by GEORGE S. KELLEY

It's Spring, and this would normally be the baseball edition of this report where pennant predictions for the "Young Lawyers" softball team would be made and off-season player acquisitions noted. This team was first orga-

nized in 1969 and has played each season ever since. A few of the present members played with the original team, and others weren't even old enough for T-ball back then. Most thought that the team might last long enough to see its silver anniversary in 1994.

As long as anyone can remember, **Larry Couture** has been the team manager, coach and utility player—a sort of real life **Charlie Brown** with a little of **George Steinbrenner** thrown in. This year Larry forgot to send in the team entry form to the Park Department, so that while there is a team, there is no league for it to play in. Larry hopes that an opening will develop in mid-season, and if not, there is always winter ball in Mexico.

In a triumph of hope over experience, **Carson Eller** is getting remarried.

In other domestic news, **Craig Adams** and **Sandy Kindig** announce the birth of their son. Mother and baby are doing well while the jury's still out on Craig's condition.

J.M.B. Crawford passed away. In a time when the law is increasingly turning the bar into faceless time-billing drones, J.M.B. was a refreshing change. He was a graduate of the University of Saint Andrews in Scotland and a member of an English Inn of the Court. He was also the author of a book on criminal law entitled *Christian Foundations of Criminal Responsibility*. He was almost elected to the superior court, which all of us would have found interesting.

SKAGIT COUNTY REPORT

by **KEN EVANS**

The Skagit County Bar Association's 53rd annual Valentine's Dance (formerly the Christmas Party) was canceled this year for lack of interest. Everyone claimed to be working too hard to attend any social functions this year.

Paul Luvera made a sizeable contribution to the Skagit County Pro Bono Legal Clinic. His contribution and those from other attorneys kept the clinic solvent for another year. The financial crisis was caused by reduction in interest rates paid on IOLTA accounts.

Ron Wolff was spotted in the Skagit County Courthouse last month. Ron recently returned from practice in Europe. It is not known whether his office still exists in his houseboat on the Skagit River, or if he has relocated to another tributary in Skagit County.

Dave Needy has commenced his term as Skagit County Prosecutor. In the last month there have been four murders in Skagit County, which equal the total number of homicides during the terms of the last three prosecutors. Needy is hiring a new criminal deputy from Los Angeles now that thee I-5 corridor problems nave hit Mount Vernon.

Skagit County continues to condemn local law offices to meet parking needs. **Don Bisagna**'s office could be the next to go. This should serve as a warning to all attorneys in Whatcom County, where part of the price of taking a case is an acknowledgment that you are going to receive and pay a parking ticket in order to appear in court.

Dionne Clasen has returned to the prosecutor's office after the birth of her daughter, **Katie**, on November 17, 1992. **Marilyn Nitteberg** gave birth to her daughter, **Julie**, on October 17, 1992. **Rebecca Clark** gave birth to her daughter, **Ellis**, on September 20, 1992. **Morgan Witt**'s wife, **Kay**, gave birth to a daughter, **Mary Esther**, on December 18, 1992, and **Tom Verge**'s wife, **Cindy**, gave birth to a daughter, **Emma**, on September 1, 1992. That's right, girls 5, boys 0!

Superior court judges **Richard Pitt, Alan Hancock, Stan Bruhn** and **Mike Rickert** joined the festivities at the retirement party of **Gil Mullen**. Superior court judge **George McIntosh** produced an "on target" skit reviewing Gil's career as an attorney and a judge. Donations acknowledging Mullen's retirement can be sent to the local chapter of the NRA. Don't try to reach Gil by phone. Follow the aroma of barbecued game to his campfire somewhere between Sitka, Alaska, and Great Falls, Montana. Have fun, Gil.

WASHINGTON STATE TRIAL LAWYERS ASSOCIATION REPORT

by **LETHA J. OWENS**
and **LORI D. HANSEN**

WSTLA president **Halleck Hodgins** wishes to take this opportunity to share with members and the bar in general some disturbing news. It has recently come to our attention that there appear to be organized insurance fraud crime rings operating in Seattle and in other parts of Washington. WSTLA has acted on its concerns by turning over information gathered from the insurance industry and other sources to the King County Prosecutor's Fraud Division and Insurance Commissioner **Deborah Senn**.

According to information provided to us, certain individuals are actively involved in staging accidents, falsifying medical reports and filing fraudulent claims. It is believed "runners" are being employed by organized-crime figures to hire participants in these staged accidents. Many, but not all, of the

claims are filed on behalf of non-English-speaking minorities for whom the "runner" acts as an interpreter and community liaison.

WSTLA hopes to make all attorneys aware of this problem so they may take appropriate actions. Many of these fraudulent claims involve multiple "passengers" who have all allegedly suffered similar injuries. If anyone has information on suspicious persons or circumstances, please contact the authorities immediately.

In a lighter vein, it's not too late to make your reservations for the WSTLA convention in Coeur d'Alene on July 22 - 25. There are six CLEs to be earned for informative courses by the legendary **Jerry Spence** and **Paul Luvera**. There is a cruise and barbecue, a dinner dance and enough different sporting events to appease even the most competitive. Contact WSTLA for More details.

WSTLA seminars bring back the popular CLE Mini-series on June 17 at the Washington Convention Center. There will be four half-day seminars. Construction Law and Employment Law, from 9 a.m. to 12 noon, and Bankruptcy in the P.I. Practice and School & Recreation Law from 1 to 4 p.m. Each session is approved for 3.0 credits. Participants can mix and match. Call **Claire Zeran** at WSTLA for more information at (206) 464-1011 or (800) 732-9251.

If you have any items you wish to appear in this column, or have any comments, please contact **Letha J. Owens** at (206) 542-3138 or **Lori D. Hansen** at (206) 637-3067.

WASHINGTON WOMEN LAWYERS REPORT

by JOANNA C. ALLEN

The January 20 Inaugural Reception—for **Jeanne Verville**, King County Chapter president, that is—triumphs over wind, power losses, and crashing trees, an auspicious beginning for Verville, in-house counsel at Simpson Investment Co., Seattle, and her board. *The 16th Women's Legislative Reception* on February 1 in Olympia, with WWL as the prime sponsor and **Dina Yunker** of Vortman & Feinstein, Seattle, coordinating all logistics, assembles a record audience. *Record membership increases* fill the rolls for the Capitol Chapter under President **Kristal Knutson**, Olympia, and the Skagit Chapter under **Claire Reiner,** Mt. Vernon. Justice **Barbara Madsen** joins local judges and the Whatcom Chapter, led by Everson's **Patricia Woodall**, Shepherd, Abbott & Woodall, at dinner February 1. In the *Chief Justice's Conference Room*, Temple of Justice, WWL salutes Justice Madsen at a February 11 reception coordinated by **Mary Sue Wilson**, Olympia. State Board president **Linda Moran**, Olympia, welcomes invited guests from the Loren Miller Bar Association, the Asian Bar Association, the Hispanic Bar Association, and Justice Madsen's colleagues from the superior court. *Pierce County Chapter's* **Susan Schreurs**, Tacoma, cheers WWL members on to a record attendance at the Tacoma Lin-

coln Day Dinner. *Admiration and congratulations to* **Mary Fairhurst**, Olympia, nominated for WSBA president. WWL appreciates the esteem expressed by the Board of Governors for Fairhurst's leadership and contributions to the Bar. *Felicitations to* **Karen Sayre**, State Board representative from Spokane, partner in charge of the newly formed Sayre & Sayre. *Stay tuned* for announcement of the guest speaker for the Annual Dinner on October 8. Hint: *He Said, She Said*, or *You Just Don't Understand.*

IN MEMORIAM

Gus Moen

The following reminiscence is contributed by Edward W. Pettigrew of Seattle. "Although Gus Moen retired eleven years ago, I am sure some will remember him. In any event, our younger bar (let's say 45 and younger) might find a little history about one of Seattle's best lawyers interesting."

Gus Moen was a partner in the law firm known as Graham & Dunn for almost forty years. Gus was a lawyer's lawyer. He loved practicing law, and he excelled at it.

I first met Gus in 1970. He hired me then. I was a young man fresh out of law school and knew nothing about practicing law. Gus Moen taught me an immense amount and engendered within me the love of the profession we shared.

Born in Bellingham in 1911, he was christened Reuban A. Moen by his minister father. However, some people intuitively learned he preferred "Gus." He once dealt with an New York attorney, whose first letter was addressed to "Mr. Moen." Gus wrote back, signing "R.A. Moen," his normal signature. Although they never spoke on the phone, the return letter was addressed, "Dear Gus."

Gus always worked on Saturday morning, and I soon learned he enjoyed spending a few minutes around the noon hour telling "war stories" about the law, our firm, and—most enjoyable—himself.

Gus told me that during Prohibition he smuggled booze to Bellingham from Point Roberts in a small motor boat. Thus he obtained enough money to attend the University of Washington, and obtained his law degree in 1938. Gus joined the Washington Attorney General's Office, where he rose to the position of Acting Attorney General for the State of Washington.

In 1945 he joined the Seattle law firm of Kerr, McCord & Ivey, which was the predecessor firm to McCord, Moen, Sayre, Hall & Rolfe. In 1970 the firm merged with Graham, Dunn, Johnston & Rosenquist. Gus was a name partner in the new firm.

Gus was a renaissance lawyer, but he especially loved trial work. He prepared and argued his own appeals, winning 21 of 23 before the Washington Supreme Court.

Probably Gus's best-known case was *United States v Marine Bancorporation, Inc.*, 418 U.S. 602 (1974), where the government challenged the legality of the proposed merger between The National Bank of Commerce of Seattle (the predecessor of Rainier Bank) with Washington Trust Bank of Spokane. After a full trial, during which Gus was assisted by Bill Johnston and Clem Barnes, Judge William Goodwin ruled against the government on all aspects of the case. The government appealed directly to the Supreme Court of the United States, which historically had rubber-stamped the government's position in such appeals.

Gus argued the case in April, 1974. In a landmark decision, the Supreme Court affirmed Judge Goodwin. Yet after years of hard work and the final stamp of approval by the Supreme Court, the two banks changed their minds and did not merge. Gus understood and accepted the irony of the business decision not to consummate the merger.

I guess Gus was perceived as a curmudgeon of sorts. He certainly was hardheaded at times, and maybe some thought he was crusty. But Gus was a caring man with a heart of gold. He understood the human aspects of practicing law and cherished the good deeds he accomplished as an attorney. Gus practiced law with a passion, he loved helping people, and he was a damned fine lawyer. I was lucky to know him and to benefit from his wisdom.

Gus and his wife Doris had three sons, Bruce and Richard in Washington and Guy in Maui, all of whom practice law. His partners, colleagues and friends admired, respected and will miss Reuban A. Moen, who we all knew as "Gus."

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Bankruptcy attorney: Mid-sized Seattle firm seeks an associate attorney with a minimum of four years' experience in creditor/debtor and bankruptcy work. Successful candidate will have excellent academic credentials, communication skills and be a self-motivator. Submit resumé, references and writing sample. Reply to Box 390, WSBA.

Established, busy and growing Seattle business and litigation firm seeks litigation associate for environmental, real property, contract and construction matters; two years' plus experience required; excellent salary, bonus and benefit plan; all inquiries will be kept confidential. Please send resumé and writing sample. Reply to Box 389, WSBA.

Twenty-five attorney Tacoma law firm seeking associate with probate and/or tax background for general business and probate practice. Please direct resumé to Recruiting Attorney, P.O. Box 1315, Tacoma, WA 98402-1315.

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WILL SEARCH

Per A. Gustavsson: Seeking information on estate planning for Per A. Gustavsson, a Swedish immigrant who died in late December 1992, at the age of 87, who lived at 13909 42nd Ave. S., Seattle. No copy of any will or other estate planning document has been located by the administratrix of his estate, Sandra Finley. Anyone having knowledge of any estate planning having been done for Per A. Gustavvson is asked to contact the attorney for the estate, Brian J. Linn, at (206) 242-9876.

Clayton Duane Roth, a resident of King County, died on March 12, 1993 while employed as captain of a processing ship in Alaska. Anyone having knowledge of a will, please contact James Doherty at (206) 623-8835.

Agnes L. Kienbaum of Spokane died 3/13/93. Anyone with a copy or knowledge of will, please contact James E. Reed of Backman, Blumel & Reed at (509) 487-1651.

Joseph Thomas Pomije: Born May 4, 1916. Anyone with knowledge of a will, please contact Sheriff Denise Green, Carson City, Nevada, (702) 887-2267.

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Missing persons, death or whereabouts: Missing or unknown heirs (per stirpes/per capita), USA and foreign service for lawyers, banks, courts. Write: Statistics & Investigative Data, P.O. Box 2055, Kenner, LA 70063; (504) 469-2676.

Registered professional land surveyor with J.D. and extensive experience as a consultant and 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 Surveying, Inc. (206) 840-5680.

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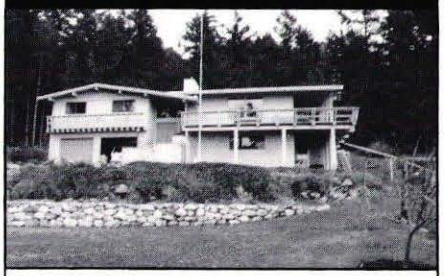

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