Washington State Bar News
Vol. 47, No. 7, July 1993

HISTORIC PRESERVATION LAW IN WASHINGTON
THE MEANING OF "PRODUCT SELLER" OF REAL PROPERTY AS USED IN THE WASHINGTON PRODUCT LIABILITY ACT
THE DOUGLAS-FORTAS CONNECTION
COORDINATED FAMILY LAW PROGRAM SUCCEEDS IN SPOKANE

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Washington State Bar News
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Features

Lawyers In Action

Art Credits

Interior view of the Old City Hall Building (1912) in Spokane. Photo by Jim Van Gundy Photography, Spokane, courtesy of Hillman Properties Northwest, Spokane.

WSBA Phone Numbers

General Information	**(206) 727-8200**	**Fax**	**(206) 727-8320**
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DEPARTMENTS

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.

Dept. of Customer Relations

Editor:

By separate cover I am just now [April 19, 1993-Editor] sending my yearly dues. Through some mail error at WSBA, I and my associate did not receive any bill, invoice or notice to pay our yearly dues. My normal practice has been to have my bookkeeper pay them on the next time bills are paid. But since I received no notice, invoice or such until this "last" notice—my first, I had nothing to give the bookkeeper. I spent considerable time looking through my office for some type of bill. I even went back through the last four months of my check register, thinking I must have already paid it. Altogether, I spent over three hours looking for WSBA's "lost" bill.

When I could find nothing here, and since my associate, who is alphabetically remote, had likewise received nothing, I called the WSBA to inquire if others were similarly threatened with 50% penalties for late payment. I asked how many others had also not received their bills. Uh, gee—she'd let me talk to Mr. Welden. Mr. Welden then proceeded to ask me a number of questions, such as, had I moved? No—same office for seven years. Not being able to place the blame there and agreeing to forego the penalties, he got rude when I began to express my displeasure for wasting three hours on their error. While he did not admit the WSBA was responsible, another WSBA staff member did to my associate during a different call.

One error such as the above is not enough to generate this letter. But remember the recent referendum? A number of us received faulty envelopes, which potentially invalidated our votes. But WSBA refused to correct that error.

I guess it's the "new" WSBAttitude. And I find it offensive.

BARTON LOWELL JONES
Walla Walla

(Robert Welden replies: I spoke with Mr. Jones regarding the fact that he did not receive his 1993 annual WSBA License Fee form, nor did his associate. I was as puzzled by that as he was upset. As I told Mr. Jones, both he and his associate's mailing addresses in our computer are the same as shown on his letterhead. However, I agreed to waive the late payment penalties established by the WSBA bylaws.

In further checking, I discovered that his associate's form, correctly addressed, was returned to the WSBA stamped, "Return to Sender-Attempted, Not Known." Mr. Jones' form was not returned to us.

Without attempting to offer excuses, we annually relicense more than 20,000 lawyers, and it is unfortunate but inevitable that mistakes will be made, and that mail will go astray. We attempt to rectify those mistakes when they occur at no fault of the lawyer, as we have done for Mr. Jones.)

Hey, Dude, Another Excellent Idea

Editor:

Could you please alert your members, perhaps through your journal, to the fact that the National Association of Surfing Attorneys (NASA) has been formed.

This organization is dedicated to legal issues surrounding the coastal zone and is open to lawyers and activists who work on development, public access, pollution and accident issues in the coastal zone environment.

Anyone who is interested in joining should contact NASA at 1642 Great Highway, San Francisco, California 94122, phone (415) 664-6272, or, on the East Coast, Stephen M. McCabe, 114 Old Country Road, P.O. Box 855, Mineola, New York 11501, phone (516) 741-6266.

STEPHEN M. McCABE
Mineola, New York

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Upcoming Seminars

JULY

- ☐ **Complex Property Division: Effective Means and Methods**
  Seattle – Sheraton Hotel – 7/9/93
  6.0 CLE Credits $135
- ☐ **Effectively Taking and Using Depositions**
  Seattle – Sheraton Hotel – 7/15/93
  5.75 CLE Credits $130
- ☐ **Washington Wills in the 1990's – Current Drafting Issues**
  Seattle – Washington Athletic Club – 7/30/93
  4.25 CLE Credits $95
  Moderated Video Replay:
  Olympia – Hanemann, Bateman & Jones – call WSBA for date
  $85 video replay tuition

AUGUST

- ☐ **Playing by the Rules – Highlights from the New Civil Procedure Deskbook**
  Seattle – Washington Athletic Club – 8/6/93
  6.5 CLE Credits $125
- ☐ **Complex Guardianship Issues**
  Seattle – Washington Athletic Club – 8/13/93
  6.5 CLE Credits (estimated) $135
- ☐ **Criminal Law Practice in District and Municipal Court**
  Seattle – Washington Athletic Club – 8/20/93
  6.5 CLE Credits $125
- ☐ **Probating an Estate**
  Olympia – Tyee Hotel – 8/20/93
  6.75 CLE Credits $135

SEPTEMBER

- ☐ **Protecting Your Practice Against Malpractice Claims, Discipline and Litigation**
  Seattle – Sheraton Seattle Hotel & Towers – 9/10
  4.0 CLE Credits Free Tuition - Limited Enrollment
- ☐ **Water Law in Transition**
  Seattle – WA State Convention & Trade Center – 9/17
  6.5 CLE Credits $150
- ☐ **Advising the Small Business**
  Seattle – WA State Convention & Trade Center – 9/17
  Spokane – Ridpath – 9/24
  6.0 CLE Credits $135
  Moderated Video Replays:
  Bellingham – Simarson, Visser, Zender & Thurston – 10/5
  Walla Walla – Lohrmann Law Office – 10/22
  Vancouver – Horenstein & Duggan, P.S. – 11/11
  $120 video replay tuition ($15 off full fee)
- ☐ **Washington Wills in the 1990s**
  A Half-Day Institute on Current Drafting Issues
  Moderated Video Replay:
  Vancouver – Horenstein & Duggan, P.S. – 9/22
  4.25 CLE Credits $85 video replay tuition
- ☐ **Environmental Law**
  Seattle – Sheraton Seattle Hotel & Towers – 9/24
  6.5 CLE Credits $135
- ☐ **Advising the Injured Worker**
  Seattle – WA State Convention & Trade Center – 9/30?
  6.0 CLE Credits $135
  Moderated Video Replay:
  Olympia – Hanemann, Bateman & Jones – 10/29
  $120 video replay tuition ($15 off full fee)

More on Anti-Harassment Rules

Editor:

Enclosed please find one Governor's reply to the Letter to the Editor of Mr. Husemoen and Mr. Weston (*Bar News*, April, 1993) . . . Please consider my response a public reply . . .

STEVEN B. TUBBS
Vancouver

Dear Odine and Craig:

I read your letter to the editor concerning the proposed anti-harassment rule with interest, and thought that I would share my own thoughts, as I deliberated upon the subject, with you.

First, I do not draw the same fine line as you concerning morality. I am not sure about the latter; it is perhaps a mistake to admit to moral uncertainty, but I did not consider morality as relevant to my decision on how to vote on this issue in any event. I am satisfied that the Bar has the authority and obligation to define professional conduct as a part of its role as a regulator of the profession. For example, we also regulate attorney-client relations in many respects, and attempt to regulate lawyers in their "entrepreneurial" pursuits of new clients, with middling success. Accordingly, I did not consider the proposed rule as one which was "morally" mandated.

The issue about First Amendment rights was a difficult one, and well-articulated by Peter Greenfield, then-President of the Seattle King County Bar Association (now simply the King County Bar). I was fortunate enough to locate a copy of his analysis for your review I assure you that I read it thoroughly. However, I had no problems with any of the hypotheticals which you posed, and felt that, in all respects, human conduct is measured in the law according to the standard of the reasonable person. Some ambiguity inheres in that standard, but no more so than that encountered by anyone in their pursuits of life, liberty and financial success in the practice of law. I do not believe that anyone has the right, under the guise of the First Amendment, to professionally harass someone on the basis of their sex, race, or religion.

The primary consideration for me was not whether the decision was "politically correct." In fact, I have likely suffered for my failure, on occasion, to recognize political reality, favoring instead what I believed to be the proper course. Rather, first and foremost in my mind was a definition of "the problem." If a problem does exist, then we have enough to do without coming up with

unnecessary solutions.

The problem is well-stated in the *Final Report of the Washington State Task Force on Gender and Justice in the Courts* (1989). The Task Force found racial and gender bias in the administration of justice. The material presence of such bias in our justice system is wrong. I believe that you would agree, and do not read your letter as suggesting to the contrary. However, it is incumbent upon those in leadership roles to correct a situation which is intolerable. If the problem is ignored, then the respect which our judicial branch and our profession, as its defender, has earned will be swiftly lost.

Having found that a problem exists, for which a remedy must be devised, the question is, then, whether the ill in question is alleviated by the cure, and whether that cure is worse for the patient than that which ails her. Clearly, the proposed rule is designed to chill undesirable behavior. We thus return to the concerns noted in your letter for inequality in the administration of the rule.

Many would doubtless find irony in the fears of middle-aged white males about unequal treatment before the Disciplinary Board in light of the needs found by the Task Force. (Author's note: The Disciplinary Board, not the Board of Governors, handles disciplinary review of lawyers before it. Nonetheless, membership on the Disciplinary Board does turn over, just as membership on the Supreme Court turns over, and different decisions, sometimes seemingly inconsistent, are rendered.) I do not treat these fears lightly, any more than I do the fears expressed by minorities who are presently involved in the judicial system.

However, I am persuaded that justice will prevail in the administration of this rule, as it is with other rules. Substantial due process is afforded an aggrieved attorney in the disciplinary system. The opportunity to be heard will permit a fair and reasoned decision.

One of the Governors expressed some concern at the time about older members of the Bar who, in contemporary terms, "just don't get it." Those are precisely the ones that need to be reached. The worst kind of discrimination may be that which is inflicted with good and honorable intentions. We must all be educated, and this is one means of accomplishing that goal.

I may well be "hoisted by my own petard." You will certainly enjoy the last laugh should that occur. I felt, in conclusion, that approval of the proposed rule was the right thing to do: not because it was politically correct; not because it was morally right; but, rather, because the rule would set a standard by which we all agree our conduct should conform.

STEVEN B. TUBBS
Caucasian, age 46,
and Governor, Third District (soon to be removed)

—And Speaking of Not Getting It . . .

Editor:

Regarding the recent column on lawyer jokes [Exec's Report, *Bar News*, April, 1993]:

1. I like lawyer jokes;

2. I like tasteless lawyer jokes even more;

3. I like lewd and tasteless lawyer jokes most.

One question: If I tell them, or if I laugh at them, do I run the risk of violating the professional misconduct "Harassment Rule"? We lawyers may not be of a certain creed, but we do have disabilities.

JAN K. KITCHEL
Portland

Stability for Client's Security Program

by **Steve DeForest**
WSBA President

Have you wondered why it is that lawyers in this state are entrusted with millions of dollars of their clients' money each year without either having to demonstrate financial responsibility or post a fidelity bond? Although the incidence of lawyer theft or dishonesty is extremely limited, the fact is that every year a small number of clients will suffer a financial loss because of such defalcation. And while (fortunately) it does not happen every year, substantial sums may be involved. It is the latter which invariably draws media attention and unwanted publicity for the legal profession. A quick review of Title 18 of the RCWs will demonstrate that those who handle other people's money are required to be licensed and bonded (e.g., auctioneers, debt adjustors, escrow agents, collection agents, health club operators, commission merchants, warehouse and grain dealers, industrial loan companies, notaries public, etc.). That similar requirements have not been imposed upon lawyers may be attributable to several factors:

1. Historical precedent—the law is a profession which in years past has earned the public's trust.

2. The separation of powers doctrine creates a potential constitutional impediment to legislation that would require state-supervised regulation and bonding of lawyers.

3. Since 1960, the WSBA has funded the Client's Security Program to reimburse victims of lawyer dishonesty. This last leg of the stool is wobbly. In the last several years, $100,000 has been budgeted for this purpose. As a part of the WSBA budget, the program is subject to the availability of funds. To avoid big hits, the maximum payment for claims as a result of any one lawyer's dishonesty is $50,000.

The purpose of the Client's Security Program is to promote public confidence in the administration of justice and the integrity of the legal profession by reimbursing losses caused by the dishonest conduct of lawyers. The underlying philosophy is that the legal profession functions by seeking and obtaining the trust of clients. The trust cannot be breached, as the profession depends upon it. Thus, it is reasoned that every lawyer, as a member of the profession, has an obligation to participate in the collective effort of the Bar to reimburse persons who have lost money or property as a result of the dishonest conduct of another lawyer.

The Client's Security Program is being challenged from two sides. On the one hand, the supporters of the program believe that it should be removed from the WSBA budget and separately funded through an assessment by the Supreme Court. Their support for such a program is based upon the belief that protection of the public is an obligation of the entire profession; that it is a price we should be willing to pay for the privilege of self-regulation; and that public confidence in the legal profession can only be maintained if the program funding is assured. The opposing point of view would eliminate the program, citing various reasons, including the following: annual license fees should not be used to pay victims of another lawyer's dishonesty ("I am not my brother's/sister's keeper"); the program does not generate favorable press, and often has the opposite result, when the payment is less than the amount of the loss; and those who handle client funds should pay for the cost of protection, without contribution from those who are not in private practice or who do not handle client funds.

The bonding of each lawyer or law firm would be an expensive alternative. Pat Sainsbury, Chief Deputy Prosecutor for King County, appeared before the Board of Governors at its May meeting

to report on his experience with bonding various businesses and professions. He predicted that the amount of a lawyer's fidelity bond would be not less than $100,000 and perhaps $200,000, if set by the Legislature. Bond premiums for other businesses or professions are in the range of $10 to $12.50 per thousand, which would mean an annual cost of $1,000 to $2,000 per lawyer. Premiums might also depend on the risk. If so, larger firms generally would receive a lower rate than individual practitioners, especially those recently admitted. The latter might be charged two to three times as much, and possibly also required to furnish collateral. In addition to the premium, Sainsbury estimated that there would be a $15 per lawyer per year registration fee.

While most of the meritorious claims for reimbursement presented to the Client's Security Program Committee have involved the misuse of trust account funds, lawyer dishonesty may arise in other circumstances. Thus, a fee based upon the privilege of maintaining a trust account, as a source of funding for the Client's Security Program, would not fairly apportion the cost of discharging the profession's collective responsibility.

Acting upon the recommendation of the Client's Security Program Committee, the Board of Governors has recently proposed to the Supreme Court adoption of a new Admission to Practice Rule (APR 15). Under the rule, if adopted, a fund would be established for the purpose of ameliorating financial losses suffered by clients and others because of the actions of dishonest lawyers. It would be funded by an annual assessment, in the range of $10 to $25, imposed by the Supreme Court upon all lawyers licensed in this state. The fund would be maintained and administered as a trust by a committee of the WSBA, overseen by the Board of Governors.

Annual assessments to fund client security programs is not a new idea. The program is underwritten in 18 states by a Supreme Court mandatory assessment, and in six jurisdictions by mandatory assessments authorized either by the State Bar or the Legislature. Sixteen states, including Washington, pay for the program through the Bar budget. Four states rely on voluntary contributions, and three states have sufficient capital that payments are made out of income. Only three states do not have a client security program.

When the proposed rule is published, all lawyers will have an opportunity to submit comments to the Court for its consideration. In evaluating your position, I urge you to reflect upon whether or not compensation of victims in this manner is a responsibility of a self-regulated profession, and to assess what the consequences might be if we discontinued the existing program. Would such an event pass unnoticed in the press and by legislators, or would it provoke legislation establishing a bond requirement? If such legislation were to be introduced, what arguments would you make either in favor of or opposed to a legislatively required fidelity bond? What would it cost to obtain such a bond, if the legislation were to pass? Should we continue to fund the program as a line item in the WSBA budget, and if so, what priority should be given to it?

If you have questions about the program, or need additional information, please contact me, or your representative on the Board of Governors, or Bob Welden, WSBA general counsel.

Executive Director's Note:
We all talk about the changing demographics of the legal profession. Here is a glimpse of the Washington State Bar Association.

Responses to 1992 WSBA Request for Demographic Information

WSBA Active Membership at Time of Survey (12-1-91) = 16,908
WSBA Active Membership as of 3-23-93 = 17,549

Warning: This information is based on voluntary responses. There is no assurance that the information provided was correct. Extrapolated numbers are based on the assumption that non-respondents have the same diversity as respondents.

	Number of Respondents			*Percent of Respondents*		
	Male	Female	Total	Male	Female	Total
American Indian/Alaskan Native	41	15	56	0.37%	0.14%	0.51%
Black/African American	127	104	231	1.15%	0.94%	2.10%
Asian/Pacific Islander	80	52	132	0.73%	0.47%	1.20%
Caucasian	7,532	2,724	10,256	68.33%	24.71%	93.04%
Hispanic	38	14	52	0.34%	0.13%	0.47%
Other	66	19	85	0.60%	0.17%	0.77%
Gender given, but not ethnicity	149	62	211	1.35%	0.56%	1.91%
Total	8,033	2,990	11,023	72.87%	27.13%	100.00%

Extrapolated Estimates of Total Membership as of 12-1-91

	Male	Female	Total
American Indian/Alaskan Native	63	23	86
Black/African American	195	160	354
Asian/Pacific Islander	123	80	202
Caucasian	11,553	4,178	15,732
Hispanic	58	21	80
Other	101	29	130
Gender given, but not ethnicity	229	95	324
Total	12,322	4,586	16,908

Extrapolated by Congressional District
as of 12-1-91

	Male	Female
Out of State	1,376	574
First	1,673	500
Second	607	166
Third	842	291
Fourth	675	115
Fifth	1,078	248
Sixth	963	339
Seventh	3,375	1,742
Eighth	1,270	413
Ninth	463	198
	12,323	4,586

Extrapolated Estimates of Total membership as of 3-23-93

	Male	Female	Total
American Indian/Alaskan Native	65	24	89
Black/African American	202	166	368
Asian/Pacific Islander	127	83	210
Caucasian	11,991	4,337	16,328
Hispanic	60	22	83
Other	105	30	135
Gender given, but not ethnicity	237	99	336
Total	12,789	4,760	17,549

Extrapolated by Congressional District
as of 3-23-93

	Male	Female
Out of State	1,428	595
First	1,737	519
Second	630	172
Third	874	302
Fourth	700	119
Fifth	1,119	258
Sixth	1,000	352
Seventh	3,502	1,809
Eighth	1,318	428
Ninth	481	205
	12,790	4,760

LAWYER RATING GUIDES

And the Print Is Bigger Than In That Other Set

Earlier this year, South Carolina-based Woodward/White, Inc. released the results of its biennial survey, in which thousands of U.S. lawyers are asked to name the best and brightest in the legal profession.

The survey results, published in February as *The Best Lawyers in America,* 1993-94 edition, named 11,363 lawyers in twenty areas of practice: family law, corporate law, business litigation, tax law, employee benefits law, real estate law, personal injury litigation, trust and estates, bankruptcy law, labor and employment law, criminal defense, maritime law, natural-resource law, environmental law, entertainment law, health-care law, first-amendment law, intellectual property law, public-utility law, and immigration law. The guide represents about one percent of the 715,000 lawyers in America, and sells for $110 [Order from Woodward/White, Inc., 129 First Avenue S.W., Aiken SC 29801, (803) 648-0300].

Of the guide's 11,000-plus lawyers, 280 are from Washington. They are scattered through 126 firms; most are in Seattle, but 18 are in Spokane, eleven are in Tacoma, six are in Yakima and two are in Walla Walla. One each was found in Renton, Hoquiam, Mt. Vernon, Mill Creek, Bainbridge Island, Pullman and Bellevue.

Half the firms represented had listings in one field; 30 had two to ten listings, and five firms had more than ten listings. Perkins Coie carried the honors this year (29), followed by Davis Wright (27), Bogle & Gates (23), Foster Pepper (13), and Preston Thorgrimson (11).

A few lawyers were listed in more than one category. Seattle attorney William Helsell made it into Business Litigation and Personal Injury Litigation. Immediate past WSBA president Joe Delay of Spokane is under Business Litigation and Real Estate Law; Irwin Trieger of Seattle won highest honors in Corporate and Tax Law; Gerhardt Morrison, also of Seattle, earned listings in Employee Benefits Law and Tax Law. In Spokane, Eugene Annis was voted into Business and Personal Injury Litigation; his partner, Scott Lukins, is in Trusts and Tax.

Besides Delay, former WSBA presidents William Gates, Lowell Halverson and Elizabeth Bracelin are listed, as is president-elect Paul Stritmatter. Three current members of the WSBA Board of Governors—Thomas Chambers, Monte Hester, and Jan Peterson, are also listed, as are three past governors: Donald Curran, Lem Howell, and Harold Vhugen.

In Walla Walla there's even a father-son listing. Both Herman "Dutch" Hayner and his son, James K. Hayner, are listed among Washington's best in Trusts and Estate Law.

HISTORIC PRESERVATION LAW IN WASHINGTON

by **Nicholas J. Manring**

At the present time in Washington, as in the entire United States, the body of law known as historic preservation law is a small and developing one. The growth essentially began with the National Historic Preservation Act of 1966 [1] and the publicity surrounding the U.S. Supreme Court's 1978 *Penn Central Transportation Co. v. New York City* [2] case. As this body of law grows, lawyers are increasingly being asked to advise governmental and private clients on the formulation of new policies and laws (e.g., ordinances) to incorporate historic preservation concepts, and on the interpretation of existing preservation laws and regulations. This article is intended as an overview of the primary sources of that body of law for practitioners in Washington.

State Law—Statutes & Regulations

The fabric of Washington state law contains a number of threads pertinent to historic preservation. They primarily involve:

- property tax relief provisions and
- building code exceptions.

In addition, local counties and cities may have their own historic preservation ordinances which protect building facades, prohibit major alterations and the like. [3]

The state property tax relief provisions, codified in R.C.W. Chapter 84.26, provide for up to ten years of relief from property tax increases on rehabilitated improvements to real estate. The property receives a "special valuation" [4] for the period, which amounts to the assessed valuation less the costs of the rehabilitation. The total cost of the rehabilitation must equal or exceed 25 percent of the assessed valuation of the improvements, and the rehabilitation must have occurred within the 24 months preceding the application for special valuation. The statute further requires the property owner to enter into an agreement to maintain the property and to

> [m]ake the historic aspects of the property accessible to public view one day a year, if the property is not visible from the public right of way. [5]

Applications for the special valuation are processed by the county assessor, working with a local review board. [6]

Property receiving a special valuation can be disqualified for a number of reasons, including the owner's failure to abide by the terms of the maintenance agreement. [7] The disqualification can result in the imposition of the taxes which would have been due but for the special valuation, with interest and penalties. [8]

In addition to property tax relief, state law provides relief from certain other codes as well. The primary relief is from the State Building Code. Codified as R.C.W. Chapter 19.27, the State Building Code adopts various uniform codes—e.g., the Uniform Building Code. R.C.W. 19.27.120 allows a broad exception to compliance with those codes for historic buildings. The exception must be authorized by an "appropriate building official" acting pursuant to rules adopted by the State Building Code Council. [9] Those rules were codified in 1991 as W.A.C. Chapter 51-19 and entitled the "Washington State Historic Building Code." Copies of the code, in booklet form, can be obtained for a nominal charge of $2 from the Department of Community Development, Washington State Building Code Council, Ninth and Columbia Building, Olympia, WA 98504-4151; (206) 586-3423.

The Washington State Historic Building Code provides for specific situations which commonly arise in historic buildings. One example is the exemption for handrails on small stairs. [10]

The code also contains broader avenues for exceptions. One example is the building code official's ability to "accept compliance alternatives or grant modifications for individual cases . . ."[11]

The Washington State Historic Building Code also addresses handicapped access [12] and compliance with the State Energy Code. [13]

In addition, Section 104(f) of the Uniform Building Code itself authorizes the building official to exercise a great deal of latitude when dealing with "designated" historic structures. The standards to be used by the building inspector under this section are that

> Any unsafe conditions as described in this code are corrected.

and

> The restored building or structure will be no more hazardous based on life safety, fire safety and sanitation than the existing building." [14]

These provisions give local building officials a great deal of flexibility to allow continued use of certain aspects of historic buildings, which, although no threat to safety, simply do not meet modern codes.

State Law—Case Law

To date, Washington courts have not played a significant role in developing the body of historic preservation law. In one case, however, the court of appeals upheld the local government's right to deny a project that would adversely impact historic buildings or areas in Bellevue. [15] In a case twice before the Washington Supreme Court—before and after remand from the U.S. Supreme Court [16]—the Washington Supreme Court's decision held, "[T]he preservation of historical landmarks is not a compelling state interest," [17] and that Seattle's Landmarks Preservation Ordinance violated a church's right of free exercise of religion as guaranteed by the first amendment to the U.S. Constitution *and* Article 1, §11 (amend. 34) of Washington's Constitution. In the two opinions, the Court reasoned that the city ordinance requiring the church to obtain secular approval of exterior alterations to its historic church, where the changes requested could be based on liturgy, created "unjustified governmental interference in religious matters of the Church," added administrative burdens and decreased the value of the property. [18]

Federal Law

As in any other area of law, federal law has a significant overlay in the area of historic preservation. There are five primary sources of this federal overlay:

- the Internal Revenue Code;
- the National Historic Preservation Act of 1966;
- the National Environmental Policy Act of 1970;
- U.S. Federal Court decisions; and
- federal funding statutes.

Internal Revenue Code (IRC)

As a boost to historic preservation, Congress included in the Tax Reform Act of 1976 [19] income tax credits for rehabilitation expenses spent to restore or rehabilitate historic buildings. The tax code has been revised several times since 1976, the most recent being in the Revenue Reconciliation Act of 1990. [20] The historic building rehabilitation tax credit provisions now are primarily in 26 U.S.C. §47. They provide a 10 percent annual investment tax credit for rehabilitation expenses on buildings which predate 1936 and 20 percent on *certified* historic structures. The statute contains a number of restrictions on qualifying for the credit—amount of external wall which must remain, the length of time for the rehabilitation, etc. Certified historic structures are defined as buildings listed on the National Register of Historic Places or being certified as a building of historical significance in a registered historic district. [21] In addition, to qualify for the credit, not only must a building meet certain criteria, but the rehabilitation work itself must be certified by the U.S. Department of the Interior as being "consistent with the historic character" of the building or its historic district. [22] Finally, other provisions of the tax code may impose limits (e.g., for passive activities) on the amount of the credit a taxpayer can use in any one year.

In Washington state, the Department of Community Development's Office of Archaeology and Historic Preservation ("OAHP") acts as the conduit for the necessary certifications needed to obtain this investment tax credit.

National Historic Preservation Act of 1966

This statute [23] provides for a national register of "districts, sites, buildings, structures and objects significant in American history, architecture, archaeology, engineering, and culture," [24] to be maintained by the Department of Interior. The statute establishes state historic preservation officers and programs to nominate properties to the Secretary of the Interior to be included in the National Register of Historic Places. National Historic Landmark listings and World Heritage List participation are also authorized.

The significance of the listings in the National Register, etc. are several-fold. First, all buildings listed there, when put to a depreciable use, automatically qualify for the 20 percent investment tax credit for rehabilitation expenses. Second, when federal or state rehabilitation or restoration grant funds are available, they tend to be restricted to—or, at least, favor—National Register-listed properties. Third, National Register-listed properties often receive preferred or protected status under state and local laws—e.g., zoning ordinances. Fourth, these properties are provided enhanced protection from federally funded destruction through the Section 106 review process and the National Environmental Policy Act of 1970. These last two aspects are of particular importance to archaeological sites.

Section 106 Review Process

The Section 106 review process is unique because a good portion of state OAHP time is occupied here. Section 106 of the National Historic Preservation Act is codified as 16 U.S.C. §470(f). It requires the head of any federal agency involved in an "undertaking in any state" to "take into account" the effect of the undertaking on any district, site, building, structure, or object that is included or eligible for inclusion in the National Register. The "taking into account" is to happen *before* federal funds are spent or a federal license issued. The head of the federal agency is also required to

afford the National Advisory Council on Historic Preservation an opportunity to comment on the "undertaking." By regulation and contract, [25] the state OAHP is delegated the authority to review proposed federally funded or licensed "undertakings" in Washington state to determine whether or not National Register-listed or eligible properties will be affected.

The impact of this process is that it provides a review by the state agency with expertise in historic preservation of all federally connected projects in the state, with the opportunity to propose mitigating steps to decrease the adverse import to historic places.

National Environmental Policy Act of 1970

While most of the attention relating to the National Environmental Policy Act of 1970 [26] (NEPA) is focused on flora and fauna, this statute provides the same protection to historic and/or cultural sites. [27] The protections afforded include the environmental impact statement procedures, [28] which require identifying whether or not a proposed federally funded or sponsored project will have an impact on National Register sites or buildings. If so, steps to be taken to mitigate the proposed project's impact on the historic or archaeological building or site must be stated. Too, just as with the natural environment, persons or groups with sufficient standing may use the courts to enforce the historic-site protection aspects of this statute. These environmental impact statement procedures are similar to those of the Section 106 review process. The focus, however, is broader under NEPA (covering impact on flora and fauna, as well as historic and other cultural sites) than it is under Section 106 (National Register-listed or eligible properties only).

Federal Case Law

While more publicity attends U.S. Supreme Court decisions in this field, [29] the bulk of the federal case law in this field is made by lower courts. This is perhaps the area where historic preservation law has grown the most in the last 20 years. The U.S.C.A. and various digests should be consulted to analyze the decisions in particular situations. Parenthetically, reviewing the cases often provides interesting reading about historic and archaeological sites around the country, and the various grass-roots organizations which have sprung up to preserve them. [30]

Federal Funding Statutes

From time to time, federal-appropriation statutes have provided grant funds for historic preservation rehabilitation projects. These are usually allocated to the state historic preservation office, where grant applications are received, awarding decisions made, funds disbursed and projects monitored. The last such grant appropriation was part of the Emergency Jobs Act of 1983. As a part of the Scenic Byways Program instituted by the Intermodal Surface Transportation Efficiency Act of 1991 ("ISTEA"), states may apply for federal grant funds for projects which maintain or protect "scenic, historic, recreational, cultural and archaeological characteristics" in areas adjacent to designated scenic highways. [31] To what extent this will provide grants to local or privately controlled preservation projects is as yet undetermined.

Conclusion

Like all laws and regulations, those cited in this article have their own defined terms, nuances of interpretation and exceptions. This article is intended merely as an introduction to an interesting and growing body of law. For more detailed information, the practitioner is well-advised to analyze the cited authorities, or to contact the Office of Archaeology and Historic Preservation (the staff, I have found is enthusiastic and helpful) at (206) 733-4011, or the Western Regional Office of the National Trust for Historic Preservation in San Francisco at (415) 956-0610.

Endnotes

1 16 U.S.C. § 470 *et seq.*

2 438 U.S. 104, 57 L. Ed. 2d 631, 98 S. Ct. 2646 (1978).

3 *See*, e.g., Cheney Municipal Code Chapter 19.22.

4 R.C.W. 84.26.070(1).

Above: The author's house, the R.C. McCroskey House, in rural Garfield. The exterior has been restored to its original 1898 appearance. Besides being a residence, it is used as a bed-and-breakfast inn.

Below: The Dan Goodman House, Yakima, built in 1901 and restored in 1991. The building is owned by Hopunion U.S.A., Inc. (a corporate grower, dealer and processor of hops). The ground floor is leased as office space to the travel agency, Town and Country Travel, Inc. Photo by Thomas E. Leonard, Hopunion U.S.A., Inc.

5 R.C.W. 84.26.050(2)(c).
6 R.C.W. 84.26.040 and .050(1).
7 R.C.W. 84.26.080(1).
8 R.C.W. 84.26.090(1).
9 R.C.W. 19.27.120(1).
10 W.A.C. 51-19-440(1)(b).
11 W.A.C. 51-19-180.
12 W.A.C. 51-19-700 and 710.
13 W.A.C. 51-19-800.
14 Uniform Building Code §104(f)(2) and (3).
15 *West Main Assocs. v. Bellevue*, 49 Wn. App. 513, 521, 742 P.2d 1266 (Div. I, 1987).
16 113 L. Ed 2d 208 (1991).
17 *First Covenant Church v. Seattle*, 114 Wn. 2d 392, 409, 787 P.2d 1352 (1990); 120 Wn. 2d 203, 223, __ P.2d __ (1992).
18 *First Covenant Church v. Seattle*, *supra* at 114 Wn. 2d 408, and *supra* at 120 Wn. 2d 219.
19 Section 2124 of Public Law 94-455.
20 Section 11813 of Public Law 101-508 (Title XI), codified as 26 U.S.C. §47.
21 26 U.S.C. § 47(c)(3).
22 26 U.S.C. § 47(c)(2)(C).
23 16 U.S.C. § 470 et seq.
24 16 U.S.C. § 470a.
25 36 CFR § 800.7.
26 42 U.S.C. § 4321 et seq.
27 42 U.S.C. § 4331(b)(4): *Save the Courthouse Committee v. Lynn*, 408 F. Supp. 1323, 1340, (D.C. N.Y., 1975).
28 42 U.S.C. § 4332.
29 See, e.g., *Penn Central Transportation Co. v. New York City, supra*, where the Court upheld New York City's use of its Landmarks Preservation Law to prohibit partial demolition of the 1913 Beaux Arts style Grand Central Station and the erection of a 55-story tower above it.
30 See, e.g., *Morris County Trust for Historic Preservation v. Pierce*, 714 F.2d 271 (3rd Cir., 1983).
31 Section 1047, Public Law 102-240 [December 18, 1991].

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The Meaning of "Product Seller" of Real Property as Used in the Washington Product Liability Act

by **S. Karen Bamberger**

This article focuses on three discrete issues raised by the Washington Product Liability Act's definition of "product seller" as it relates to home builders: (1) the meaning of mass producer of standardized dwellings; (2) how the term "product seller" can be applied to limit a home builder's liability; and (3) the problem of the implied warranty of habitability. The significance of exposure to liability under the Washington Product Liability Act includes the imposition of strict liability[1] and the discovery rule for the three-year statute of limitation.[2]

Mass Producer of Standardized Dwellings

The Washington Product Liability Act ("WPLA"), enacted on July 26, 1981, contains the following definition of "product seller":

> "Product seller" means any person or entity that is engaged in the business of selling products, whether the sale is for resale, or for use or consumption. The term includes a manufacturer, wholesaler, distributor, or retailer of the relevant product. The term also includes a party who is in the business of leasing or bailing such products. *The term "product seller" does not include:*
>
> *A seller of real property, unless that person is engaged in the mass production and sale of standardized dwellings or is otherwise a product seller . . . .*
>
> RCW7.72.010(1)(a) (emphasis added)

To date, there are no reported Washington decisions which interpret this exception, i.e., what is meant by "a person engaged in the mass production and sale of standardized dwellings."

Definition of "Product Seller"

WPLA's definition of product seller, including the exception, is taken verbatim from the Model Uniform Product Liability Act ("MUPLA"), Section 102(A)(1). The analysis of this section of the MUPLA provides as follows:

> The Act excludes the seller of real property from its coverage, except for a builder-vendor engaged in the mass production and sale of standardized dwellings, including modular homes. *See Schipper v. Levitt & Sons,* 44 N.J. 70, 207 A.2d 314 (1965); "Berman v. Watergate West, Inc.," 391 A.2d 1351 (D.C. 1978) (extending "Schipper" to cooperative apartments); *Fuqua Homes, Inc. v. Evanston Bldg. & Loan Co.,* 52 Ohio App. 2d 399, 370 N.E.2d 780 (1977) (modular homes). *But see Wright v. Creative Corp.,* 30 Colo. App. 575, 498 P.2d 1179 (1972) (rejecting *Schipper*). The potential liability of sellers of real property not engaged in such large-scale operations is left to each state's laws governing real property transactions. However, all sellers of building materials, furnishings, appliances, and other products made part of improvements to real property are not exempted from the coverage of the Act. *See* Maldonado, "Builder Beware: Strict Tort Liability for Mass Produced Housing," 7 *Real Estate L.J.* 283 (1979).

Definition of "Product"

Of the three key terms ("product," "mass production," "standardized dwellings"), only "product" is defined in the WPLA.

> "Product" means any object possessing in terms of value, capable of delivery either as an assembled whole or as a component part or parts, and produced for introduction into trade or commerce. Human tissue and organs, including human blood and its components, are excluded from this term.
>
> The "relevant product" under this chapter is that product or its component part or parts, which gave rise to the product liability claim.
>
> RCW 7.72.010(3)

According to MUPLA's analysis,

> "Product" means property which, as a component part or an assembled whole, is *movable,* and possesses intrinsic value . . . . The definition follows existing case law including movable dwellings, such as mobile homes, campers and similar vehicles. *See Morrow v. New Moon Homes, Inc.,* 548 P.2d 279 (Alaska 1976) (mobile home)."
>
> 44 Fed.Reg. 62714, 62719 (emphasis added)

Because a conventional home (as distinguished from a mobile or modular home) is not movable, it should not be considered a "product" under the WPLA. *But see Blagg v. Fred Hunt Co.*, 272 Ark. 185, 612 S.W.2d 321 (1981) (holding that word "product" is as applicable to house as to automobile under Arkansas strict liability statute; "product" is defined to mean "any tangible object or goods produced" under Ark. Stat. Ann. § 16-116-102(2) (1991)). *Cf.*, 15 U.S.C. § 2301(1) [Magnuson-Moss Act] ("the term 'consumer product' means any tangible personal property which is distributed in commerce and which is normally used for personal, family or household purposes . . . ."); *Clark v. Jim Water Homes, Inc.*, 719 F. Supp. 1037, 1043 (N.D. Ala. 1989) (judgment entered in favor of defendant-builder on Magnuson-Moss claim because home did not fall within definition of "consumer goods"); *Kravitz v. Homeowners Warranty Corp.*, 542 F. Supp. 317, 321 (E.D. Pa. 1982) (in *dicta,* houses not covered under Magnuson-Moss Act). *See also Kaneko v. Hilo Coast Processing*, 65 Haw. 447, 654 P.2d 343 (1982) (recognizing that although building is not product within meaning of Section 402A of Restatement (Second) of Torts, seller-manufacturer of prefabricated building that must be assembled is a product for which seller-manufacturer may be found strictly liable for injuries caused by defective component part).

This analysis, however, raises the question of why the WPLA addresses the possibility that a mass producer of standardized dwellings could be a *product* seller, if a conventional home is not a "product" in the first instance. There seems to be no explanation for this anomaly. *See* 3 *Commercial Law Desk Book* § 32.13(3), at 32-32 (Wash. State Bar Ass'n. 1987).

Without addressing this internal inconsistency, the Senate Select Committee, in its section-by-section analysis of the WPLA in its draft form, stated:

> The seller of real property is not included in the definition of "product seller" unless the seller is involved in the mass production and sale of standardized dwellings. Recovery may be had, of course, under applicable real estate law and, for example, nothing in this act affects the potential liability of a seller of real estate under any implied warranty of habitability recognized by Washington courts. Sellers of improvements upon real property are included and, for example, the manufacturer of a defective sliding glass door may be liable under this act for harm proximately resulting from it.
>
> *Journal of the Senate*, at 630.

See Dipangrazio v. Salamonsen, 64 Wn.2d 720, 393 P.2d 936 (1964) (finding no negligence on part of home builder who had installed defective sliding glass door); *Morse v. Toppenish*, 46 Wn. App. 60, 63, 729 P.2d 638 (1986) (WPLA applied to diving board used within swimming pool because pool was improvement to real property).

Definition of "Mass Production" of "Standardized Dwellings"

The only assistance Washington cases have offered on what either "mass production" or "standardized dwellings" might mean is to note that many homes are mass-produced, such as when a buyer purchases from a model home or from predrawn plans. *Frickel v. Sunnyside Enterprises*, 106 Wn.2d 714, 719, 725 P.2d 422 (1986).[3] *See also Petersen v. Hubschman Constr. Co.*, 76 Ill.2d 31, 40, 389 N.E.2d 1154 (1979). In *Frickel*, however, the court was not interpreting RCW 7.72.010(1)(a).

In the seminal case of *Schipper v. Levitt & Sons, Inc.*, 44 N.J. 70, 207 A.2d 314 (1965), the builder was described as being "a well-known mass developer of homes, specializing in planned communities. Its homes are generally sold on the basis of advertised models constructed in accordance with Levitt's specifications." The plaintiffs had leased one of "thousands of homes" built by Levitt. Levitt installed heating systems into these homes which provided water of unusually high temperatures. The plaintiffs' infant child was badly scalded as a result. In finding that the plaintiffs could proceed against Levitt under a strict liability theory, the court held as follows:

> We consider that there are no meaningful distinctions between Levitt's mass production and sale of homes and the mass production and sale of automobiles and that the pertinent overriding policy considerations are the same.
>
> *Id.* at 325.

The court further reasoned:

> When a vendee buys a development house from an advertised model, as in a Levitt or in a comparable project, he clearly relies on the skill of the developer and on its implied representation that the house will be erected in reasonably workmanlike manner and will be reasonably fit for habitation. He has no architect or other professional adviser of his own, he has no real competency to inspect on his own, his actual examination is, in the nature of things, largely superficial, and his opportunity for obtaining meaningful protective changes in the conveyancing documents prepared by the builder vendor is negligible. If there is improper construction such as a defective heating system or a defective ceiling, stairway and the like, the well-being of the vendee and others is seriously endangered and serious injury is foreseeable. The public interest dictates that if such injury does result from the defective construction, its cost should be borne by the responsible developer who created the danger and who is in the better economic position to bear the loss rather than by the injured party who justifiably relied on the developer's skill and implied representation.
>
> *Id.* at 325-26.

Accord Kriegler v. Eichler Homes, Inc.,

269 Cal. App. 2d 224, 74 Cal. Rptr. 749 (1969) (holding that strict liability applied to mass producer of homes who incorrectly installed radiant heating system).

To avoid imposition of the WPLA, the home builder in Washington would best be served by emphasizing the small number of homes the builder has constructed and the fact that they vary, i.e., size, style, location, floor plan. This type of information, if available, should be useful in removing a home builder from the type of home builders apparently contemplated by WPLA's definition of "mass producer of standardized dwellings."

Characterization of Home Builder as "Product Seller" Other than Manufacturer qua the Allegedly Defective Product, Where Product is not the House Itself

Notwithstanding the problem in characterizing a conventional home builder as a *product* seller, home builders have been, or could be, sued for homes they have built on the basis that the houses contain allegedly defective products, such as heating systems, *see Schipper* and *Kriegler, supra*, or less obvious products such as insulation, carpeting [4] or wood products made with formaldehyde. *Cf., Tiderman v. Fleetwood Homes of Washington*, 102 Wn.2d 334, 684 P.2d 1302 (1984); [5] *Kaminszky v. Kukuch*, 553 N.E.2d 868 (Ind. App. 1990) (court dismissed, and did not address, claim for breach of implied warranty of habitability based on presence of urea-formaldehyde foam insulation because claim was brought against owner of home, who was not builder-vendor of home). *See generally Annot.*, "Liability of Builder-Vendor or Other Vendor of New Dwelling for Loss, Injury or Damage Occasioned by Defective Condition Thereof," 25 A.L.R.3d 383 (1969). Although in these scenarios there is a separate manufacturer of the allegedly defective product, plaintiffs may choose to sue the home builder either because it has a "deeper pocket" or because the manufacturer of the component item is insolvent. *See* RCW 7.720.40(2)(a),(b).

The home builder's first line of defense is to argue that the home itself is not defective, but only the component product is. The definition of "product" defines the "relevant product" to be "that product or its component part or parts, which gave rise to the product liability claim." RCW 7.72.010(3).6 Thus, the home builder can argue, for example, that only the asbestos-containing insulation is defective rather than the house itself. The difficulty with this argument is that plaintiffs may allege that the defective component product renders the entire house unfit to live in, thereby exposing the home builders to a claim for breach of implied warranty of habitability. For further discussion of the implied warranty of habitability, *see infra* .

Another argument available to a home builder faced with a product liability claim based on a defective home is to characterize itself as a product seller other than a manufacturer insofar as the allegedly defective component product is concerned. If the home builder is not involved in the sale of standardized dwellings, it can be argued that the home builder cannot be considered a product seller *qua* the house. Unless the manufacturer is not solvent[7], not amenable to service of process, or the court determines that "it is highly probable that the claimant would be unable to enforce a judgment against any manufacturer," the builder's liability should be limited to the three bases enumerated in RCW 7.72.040(1) (negligence, breach of express warranty made by the product seller, intentional misrepresentation or concealment of facts) for product sellers other than manufacturers. The primary advantage of characterizing a home builder as a seller, rather than as a manufacturer, is that the bases of liability for a seller are much narrower than those for a manufacturer. *Compare* RCW 7.72.030 *with* RCW 7.72.040.

The Inescapable Implied Warranty of Habitability

The WPLA's definition of a product liability claim is broad, encompassing strict liability, negligence and breach of express and implied warranties. RCW 7.72.010(4). All common law product-related causes of action have been preempted. *See Washington Water Power v. Graybar Electric Co.*, 112 Wn.2d 847,

850-56, 774 P.2d 1199 (1989). However, the implied warranty of habitability is not subsumed under "product liability claim." *See supra, Journal of the Senate*, at 630 ("[N]othing in this act [WPLA] affects the potential liability of a seller of real estate under any implied warranty of habitability recognized by Washington courts.")

The elements of a claim based on breach of the implied warranty of habitability are that the vendor-builder is in the business of constructing homes for sale and that the home is not fit to live in. The first two elements are relatively straightforward. *See Atherton Condominium Apartment-Owners Ass'n v. Blume Dev. Co.*, 115 Wn.2d 506, 799 P.2d 250 (1990). *See also Frickel v. Sunnyside Enterprises*, 106 Wn.2d 714, 725 P.2d 422 (1986) (implied warranty of habitability did not apply because apartment complex was not built for resale, but for builder's ownership); *Klos v. Gockel*, 87 Wn.2d 567, 570, 554 P.2d 1349 (1976) (sale must be "commercial rather than casual or personal in nature").

The scope of what conditions may render a home unfit to live in, however, have not been sharply defined. Until the Washington Supreme Court's recent decision in *Atherton*, a case involving condominiums constructed with materials which did not satisfy the Uniform Building Code's fire resistivity standard, the implied warranty of habitability was limited to "egregious defects in the fundamental structure of a home." 115 Wn.2d at 520. *See, e.g., Stuart v. Coldwell Banker*, 109 Wn.2d 406, 745 P.2d 1284 (1987) (defects in access walkways); *Klos v. Gockel*, 87 Wn.2d 567, 554 P.2d 1349 (1976) (no recovery where patio and backyard damaged by mud slide and settling of fill, but house itself suffered only minimal damage); *House v. Thornton*, 76 Wn.2d 428, 457 P.2d 199 (1969) (faulty foundation); *Hoye v. Century Builders*, 52 Wn.2d 830, 329 P.2d 474 (1958) (discharge of raw sewage); *Allen v. Anderson*, 16 Wn. App. 446, 557 P.2d 24 (1976) (alleged foundation faults, cracks and bows in retaining walls, dismissed on other grounds); *Gay v. Cornwall*, 6 Wn. App. 595, 494 P.2d 1371 (1972) (leaks in roof, plumbing defective, sewer pipe dumped raw sewage into crawl space, furnace motor burned out, drain field washed away).

In *Atherton*, the court signalled its intention to back away from this narrow application of the warranty. 115 Wn.2d at 518. The court recognized that the exact parameters of the warranty have not yet been definitely established, but also stated that "the implied warranty of habitability protects purchasers from latent construction defects." *Id.* at 520. In addition, the implied warranty of habitability does not extend to "mere defects in workmanship" or "impose upon a builder-vendor an obligation to construct a perfect residential dwelling . . ." *Id.* at 522.

In the event an implied warranty of habitability claim is brought against a builder, the builder should consider tendering the defense to the manufacturer of the "relevant product" (e.g., the heating systems or the cabinets containing formaldehyde), bringing a third party action against the manufacturer, or seeking indemnity and/or contribution from the manufacturer. *See* RCW 4.22.040.

Finally, the builder should argue that the correct measure of damages for the breach of warranty is the cost of repair (in practicality, the replacement cost of the allegedly defective product, not the difference in value of the home if constructed with the proper materials and the value of the home as constructed). *See Allen v. Anderson*, 6 Wn. App. 446, 449, 557 P.2d 24 (1976).

Conclusion

Home builders should be aware that they can be exposed to strict liability and the other provisions of the Washington Product Liability Act if they are involved in the "mass production and sale of standardized dwellings." Although no Washington court has directly addressed what is meant by this phrase in the context of a product liability action, if a home builder sells homes based on a model or from pre-drawn plans, he faces the very real risk of defending against a product liability claim. To avoid product liability claims, the home builder should emphasize the small number of homes it has built and/or the differences in the homes, argue that the problems arise solely from the component product, or characterize itself as

merely the seller of the component product. Even if the home builder is successful in avoiding application of the WPLA, it still may be subject to a claim based on breach of the implied warranty of habitability.

Endnotes

[1] *See* RCW 7.72.030. The Washington Supreme Court recently has held that strict liability will be imposed for design defects, *Falk v. Keene Corp.*, 113 Wn.2d 645, 782 P.2d 974 (1989), as well as for inadequate warning claims, *Ayers v. Johnson & Johnson*, 117 Wn.2d 747, 818 P.2d 1337 (1991). Claims based on construction defects also expose manufacturers to strict liability, as set forth by the statutory language itself. *See* RCW 7.72.030(2) ("A product manufacturer is subject to strict liability to a claimant if the claimant's harm was proximately caused by the fact that the product was not reasonably safe in construction. . . .")

[2] *See* RCW 7.72.060 ("[N]o claim under this chapter may be brought more than three years from the time the claimant discovered or in the exercise of due diligence should have discovered the harm and its cause.")

[3] The recent decision of *Washburn v. Beatt Equip. Co.*, 120 Wn.2d 246, 259, 840 P.2d 860 (1992), alludes to these terms, albeit, again, not in the context of interpreting RCW 7.72.010(1)(a). In *Washburn*, the defendant offered an instruction on the definition of manufacturer identical to the definition in the WPLA. *See* RCW 7.72.010(2) ("Manufacturer includes a product seller who designs, produces, makes, fabricates, constructs or remanufactures the relevant product or component part of a product before its sale to a user or a consumer.")

The defendant had constructed a pipeline system. In arguing that it was not a "manufacturer," defendant argued that this term only applied to "manufacturers of standardized, pre-manufactured products which are later incorporated into an improvement to real property." *Washburn*, 120 Wn.2d at 258-59. The court rejected this argument, reasoning as follows:

> Superficially there is some appeal to defendant's contention—one tends to think of a manufacturer as the operator of a factory, mass producing products. However, the definition supplied by defendant completely destroys this superficial appeal. Defendant's argument goes to the nature of production, i.e., standardized products, and to the quantity of production, i.e., mass produced product. No such limitations are in the definition furnished by defendant's instructions.

Id. at 259. These are precisely the types of limitations found in RCW 7.72.010(1)(a), however.

[4] *See Blagg v. Fred Hunt Co.*, 272 Ark. 185, 612 S.W.2d 321 (1981) (finding that plaintiffs, remote purchasers of home, stated claim for breach of implied warranty of habitability against home builder based on formaldehyde fumes traced to carpet and pad installed

by builder).

[5] Although the presence of formaldehyde exposed a *manufacturer* to liability in *Tiderman, supra*, the issue in *Tiderman* was breach of implied warranty of merchantability, not habitability. In addition, *Tiderman* (which predated WPLA) involved a "product"—a mobile home. *See generally Annot.*, "Products Liability: Construction Materials or Insulation Containing Formaldehyde," 45 A.L.R.4th 751 (1986 & Supp.).

[6] This argument was unavailable to the home vendor in *Schipper, supra*, because the heating units which produced the excessively high temperatures of water were not themselves defective. The defect alleged by plaintiffs was not due to the heating unit itself, but the manner in which it was installed by Levitt. Levitt did not follow the recommendations of the manufacturer of the heating unit and, instead, chose to install the units using common spigots, rather than a mixing valve or other tempering device.

[7] Washington law also offers no guidance on the solvency requirement. Based on the analysis contained in MUPLA, home builders should argue that the burden of proof in establishing the insolvency of the manufacturer rests with plaintiff. 44 Fed. Reg. at 62727 ("the claimant must show that the manufacturer is unavailable under the provisions of Subsection (C)").

Subsection (C) of § 105 of the MUPLA subjects product sellers to the liability of manufacturers if:

(1) The manufacturer is not subject to service of process under the laws of the claimant's domicile; or

(2) The manufacturer has been judicially declared insolvent in that the manufacturer is unable to pay its debts as they become due in the ordinary course of business; or

(3) The court determines that it is highly probable that the claimant would be unable to enforce a judgment against the product manufacturer.

See also Seals v. Sears, Roebuck & Co., Inc., 688 F. Supp. 1252 (E.D. Tenn. 1988).

S. Karen Bamberger *is an attorney with the Seattle law firm of Betts, Patterson & Mines, P.S. She is a litigator, practicing primarily in the areas of product liability and personal-injury defense.*

SPONSORED BY THE LAW PRACTICE MANAGEMENT SECTION

IRS AUDITS: WHAT TO EXPECT - HOW TO PREPARE

by **Paul M. Fruci**

Receiving mail from the Internal Revenue Service is an event looked upon with apprehension, even for attorneys who deal routinely with problems and conflicts. When the correspondence announces the upcoming audit of your business or personal tax return, most people feel a combination of panic and nausea. This is when some background knowledge of and preparation for the audit process not only is helpful, but can save you money.

There are two types of auditors that review tax returns—field auditors and office auditors. Either one may be assigned to your audit. The field auditors are graduate accountants who prefer to study your records at your place of business. They usually have access to all your records, or at least all of your major records, when they begin the audit. They may go into any specific area and may be given directions from the Ogden Service Center on specific items they must examine. The field auditors tend to look at large issues and not get into much nitpicking of details. In contrast, there are the office auditors whom the IRS trains to be auditors and who often have no professional background. They generally do not understand business bookkeeping but work directly from checks and bills to verify payments. The office auditors are very thorough and tend to review fairly small numbers for adjustments.

As CPAs, we frequently work with clients on IRS audits—probably more than we like. We often analogize being audited to being sued; the process takes time and creates expense. Since an audit rarely results in the IRS owing the taxpayer money, the question we usually ask is how much we can limit the losses. A lot depends on the "judge" who, in this case, is the IRS auditor. If we do not agree with the auditor, there is an appeal process. However, from a practical standpoint what the auditor decides is often the end result.

When our clients are being audited by the IRS, we suggest that we have a preparatory meeting to review the records well in advance so that we can schedule a second meeting if necessary. We normally advise the client on how to prepare the records for the audit meeting and what additional documentation to organize. If it is to be a field audit and we know the identity of the auditor before the audit meeting, we try to call the auditor to discuss the situation. This serves several purposes: it allows us to be more prepared for the audit, makes a good first impression, and allows us to answer any background questions so that the auditor can start the audit with greater understanding.

Most individuals are audited by office auditors. There are many more office auditors in Spokane than there are field agents. Normally, the office auditor handles three or four people per day, whereas field auditors may spend a day, a week or more on each case. Office auditors focus on the following areas:

1. Office auditors review the bank records for your personal and business accounts to see if you can identify the sources of money. We advise our clients to keep a copy of each deposit they make and to record who wrote the check on the deposit receipt. This way we have a record of the deposit in case a question arises.

2. Business meals are another area of concern to the auditor. Many people estimate their business meals. The IRS is looking for a contemporaneous record that includes where the business meal took place, the amount spent, who was there, the date, and the business purpose. Recording the "business purpose" is not crucial as long as you can explain the business connection. We always suggest that a separate business bank card be used for meals. Then a simple, yet complete, record of the meal is achieved by simply noting the name of the dining partner on a copy of the receipt. This receipt should then contain all the information the IRS requires.

3. Business use of cars is another area of concern to taxpayers, and auditors like to review this as well. It is not necessary to keep a mileage log, but it is a good practice to do so. Most business professionals do not have the time nor the inclination to make these logs. We usually suggest that a person do a study

of one month of use, record it, and repeat the study at least once every two years to illustrate how the car is used in business. The IRS usually accepts this as proof.

The IRS audit is an unpleasant taxation experience for everyone and, like a court case, preparation can make all the difference in the world. Preparation begins in how you keep your records, continues in the way that your tax returns are prepared, and concludes in the manner with which you prepare for the actual audit meeting once you have been notified.

How long should records be kept? Generally, business records must be kept for three years. In cases where fraud could be alleged, the statute of limitations is six years. The statute of limitations in both cases extends from the date that the return is actually filed. If returns have not been filed, there is no statute running. It is a good idea to keep a copy of your tax returns indefinitely. Some other records that should be kept indefinitely are records concerning purchase of assets like real estate and improvements to real estate in order to establish basis value for resale.

In preparing your taxes, it is wise to remember the "pig and hog" theory. The theory is that if the pig tries to eat too much it grows into a hog and is then slaughtered. In other words, be reasonable when estimating your business expenses or you will invite an audit and regret the consequences.

My hope is that through preparation everyone will be better prepared for an audit, but that no one will ever have to experience one.

Paul M. Fruci *is a Certified Public Accountant in Spokane.*

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

Q & A: Form Letters

by **David M. Sandhaus**

A reader writes:

A portion of my practice concerns obtaining disability retirement benefits for police officers and firefighters. As in many fields of law, with some imagination and effort, much of what I do can be reduced to forms, form letters and pleadings, which save me a lot of time and the client a lot of money.

Among the programs that our firm uses are *Windows*, *Word for Windows* and *Access*. It seems to me that it should be possible to enter all the information about the client and the case into a database and then, somehow, imbed an instruction at the appropriate place on a form document to retrieve and insert the desired information from the database, so that it happens upon opening the form document and typing the client and matter number, and without the need to retype the information. Is this level of automation possible, and how does one accomplish it?

Answer:

You are absolutely right in your assumption that the forms you need can be automated with *Microsoft Word* and *Access*. This can provide real economic and marketing advantages. If you lower your hourly costs by reducing the time required to fill in repetitive forms, you can then increase profitability by pursuing a value-added billing strategy and/or by increasing the number of clients you serve an hour.

There are basically three different strategies your firm can undertake using *Word* and *Access*. One would be to use *Word* exclusively to fill in repetitive forms. A second would be to use *Access* exclusively for form work. A third would be to use *Access* in combination with *Word*. Each strategy has its own strengths and weaknesses, and the proper automation strategy depends on what you ultimately want to accomplish with your client information, as well as the cost-benefit analysis of employing each strategy.

The Word Strategy

Word has several functions that allow you to create fill in the blank repetitive forms: document templates, data file and print merge. All are described in your "Word User's Guide."

First, you create an intake form to gather all the relevant client information for disability forms. This is saved as a *Word* "data file" that you create using the "print merge" function. Second, you use print merge to insert the data into your disability forms and client letters.

Most likely, the disability form contains repetitive boilerplate text and document formatting that you can save on the disability form as a *Word* "document template." This is a saved document type that contains word processing elements such as formatting, boilerplate text, and styles. Templates also can have special attributes attached to them such as glossaries, macros, and menu, keyboard and toolbar assignments. For example, the retirement form for a police officer might always require the same margins, text, and check boxes in specific locations on the form. A document template saves all the formatting and text for the form.

A glossary is typically a collection of boilerplate text alternatives used to fill in a form. These boilerplate answers can also be attached to the template.

Word allows you to create data fields called, FILLIN, ASK, and REF that can then be used to further automate filling in the form template. Hence, at an appropriate place in the document, the template will prompt the word processor, "Is this a police officer or a fireman?" The police answer then automatically fills in repetitive client information such as the matter number, throughout the document.

Macros can be used to memorize repetitive keystrokes used to fill in the forms. At the top of Word is a toolbar that contains functions (represented by icons) such as printing a document or an envelope. Similarly, you can assign your forms to the toolbar with a user-designed icon or to the file menu itself.

Word is extremely flexible in allowing a user to define and customize specific form applications. If your word-processing staff is already comfortable and confident in their ability to use *Word*, it is an excellent tool for automating form work.

The drawback to *Word* is the lack of flexibility you have in using client data for other administrative tasks, such as conflict checking and billing, which require new keystroking of information.

The Access Strategy

The advantage of using a database such as *Access* is that once information is entered into it, that same information can be used for multiple purposes—conflict checking, marketing and case man-

agement. A database also allows for much more flexible sorting, reporting, and manipulation of data than a word processor does.

The first step in *Access* is to design a database by creating a "table" of all the information you would want included in your forms. You then program individual field attributes of the table. The second step is to create the form letter. Use the *Access* "create form" function and special design effects. While both *Word* and *Access* have drawing tools for creating forms, it is easier to apply the drawing tools in *Access*. If your disability forms have a highly structured style, (e.g. check boxes, lines and tables) *Access* is probably better than *Word* for form design.

The drawback to *Access* is that because it is a database program, you don't have the flexibility of *Word* in formatting or editing your document (although *Access* does have a spell checker). Moreover, *Access* is difficult to use (see below), and it may be difficult for many of your staff to become comfortable with.

The Access & Word Strategy

The ideal solution would be to enter your client information into a database and then be able to export the necessary data to a form in your word processing software. This solution would allow you to use client information for various database functions (e.g. conflict checking and case management) while being able to take advantage of the formatting, editing, and ease-of-use strengths of a word processor.

There are two basic ways to get information from an *Access* database into *Word*. The first is to copy and paste information from a retrieved *Access* search into the *Word* document. That method isn't practical, since a filled word-processing document may contain a multitude of fields that require a multitude of copies and pastes.

The second method is to use the "paste link" function to create an automated link that automatically copies and pastes information from *Access* to *Word*. Such a link requires a programming statement entered by the user.

An example of the type of programming statement required to make such an automatic link takes too much space for this article. However, if you want to get an idea of what I am talking about, take a look at page 144 of the "Introduction to Programming" manual that comes with *Access*. It is difficult for a nonprogrammer to automatically link *Access* Version 1.0 data with a *Word 2.0* document.

This brings me to my final point, and let me preface it by saying that I'm not a Microsoft basher. I own Microsoft stock. I use Microsoft *Word* and *Publisher* on a daily basis. If I were stuck on a desert island (not the same one with all those doctors that have headaches), and I could choose only one software application to use—it would be Microsoft *Excel*.

Nevertheless, my conclusion is that *the current version of Access* is a dud. It's a program touted by Microsoft as being easy to use, but it isn't. Take a look at *Approach* (which has no Word connectivity) if you want an easy-to-use *Windows* database.

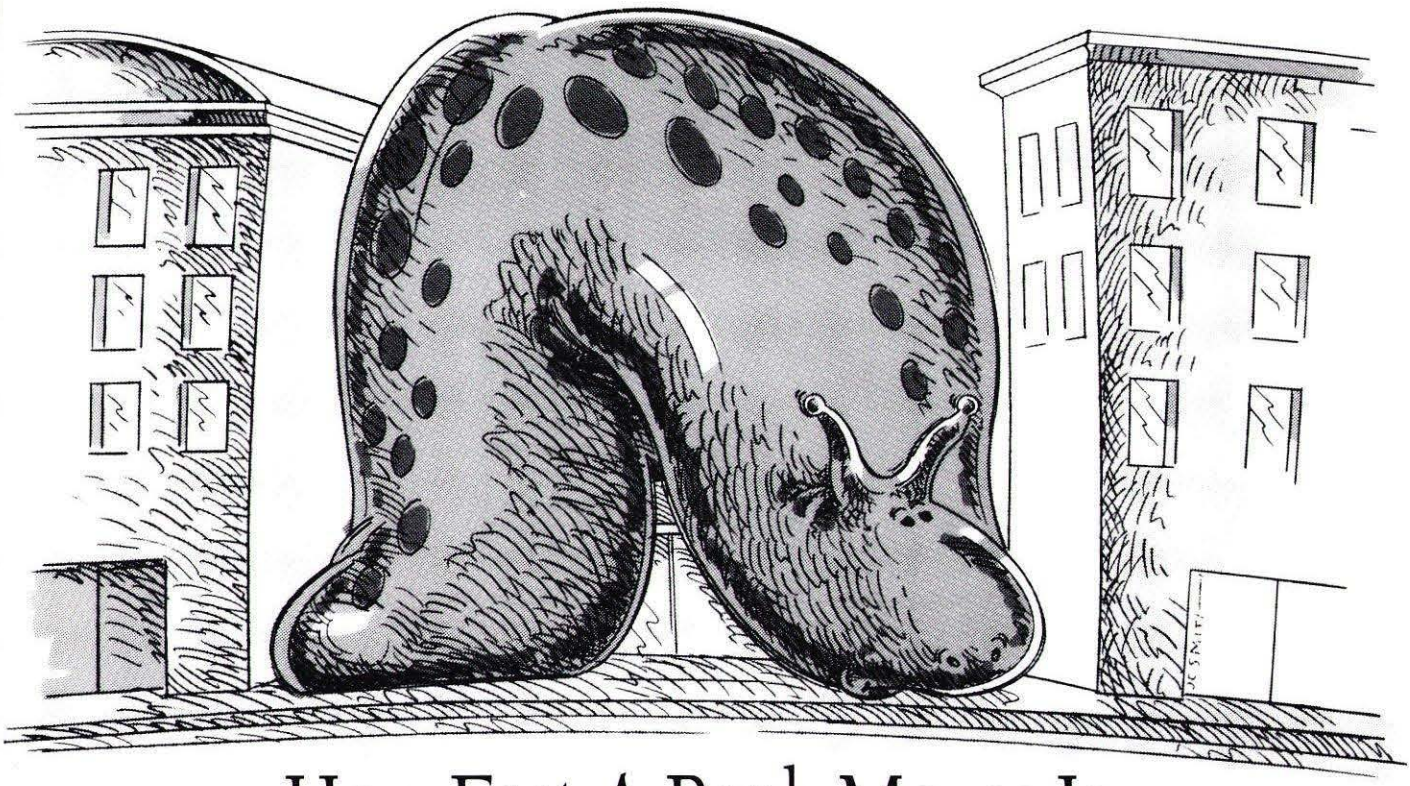
The documentation that comes with *Access* is voluminous, which reflects its functionality and its complexity. The *Access* language and database metaphor are so significantly different from other database programs as to leave one scratching one's head. The program has bugs and security problems. (Users can modify database designs).

Simple attributes such as creating a "required" field require too many keystrokes. Forget the $99 you paid for *Access*, this program, as it is presently configured, is going to take you hundreds of hours just to become a novice user.

However, many Microsoft programs (e.g., *Word* and *Windows*) were not great when they were first released and are now superlative. By the time you read this,* *Access* version 1.1 will have been released, and inside sources tell me that it will contain bug fixes as well as vastly improve connectivity to *Word*. You may want to take another look at *Access* at that point. I will.

*As we went to press, we received a news release on the update to Access (version 1.1). It says it has "added a new export option for moving data into Word for Windows mail-merge format."

David M. Sandhaus *is a practicing attorney and law office automation, marketing and management consultant who can be reached at (509) 449-8757.*



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

Leavenworth, Washington, June 18/19, 1993

Present: The president, the president-elect, Paul Stritmatter, and the Governors, save Thomas Chambers, absent on other business. Also present: Mary Jo Diaz, Government Lawyers Bar Association; Dennis P. Harwick, WSBA executive director; Jim Kaufman, Washington Association of Prosecuting Attorneys; Lisa Lowe, WSBA Young Lawyers Division; Linda Moran, Washington Women Lawyers; Narda Pierce, Washington Solicitor General; Larry Shannon, WSTLA; Mark Shepherd, King County Young Lawyers; Judge T.W. Small, Legal Foundation of Washington; Judge Evan Sperline, Superior Court Judges' Association; Lindsay Thompson, *Bar News* editor; Mary Wechsler, King County Bar Association trustee; and Robert Welden, WSBA general counsel.

For Openers, A Decision: The Board met in executive session Friday morning, reviewing the disciplinary docket, Client's Security Program claims, and judicial recommendations. In open session, the president said the Board had approved 18 claims for $195,000 in losses, though the actual amounts paid will be less. The Board budgeted $100,000 for such claims this year, and, on a motion by Governor Joe Nappi, they moved that sum from the general budget to a "trust account." Nappi told the Board it was important to sequester the funds so they cannot be reached if money gets tight in the waning days of the budget year.

First, Our Announced Dates: The Board decided where they'll meet during the 1993-94 year: Ellensburg, October 22-23; Seattle, December 3-4; Olympia, January 7-8, 1994; February 11-12; Bellingham, March 25-26; Seattle, April 8-9; Spokane, May 6-7; Vancouver, WA, June 17-18; Ocean Shores, July 29-30; and Seattle, September 8-9. All meetings are open to WSBA members.

Friendly Offer Affecting Deficits: Allan Kirtley and Sandy McDonald appeared for the Alternative Dispute Resolution Section. For several years, the section has sponsored a successful, money-making CLE on ADR with the UW School of Law. They split the profits, half-and-half. Kirtley told the Board the law school had asked for a guarantee of half of any losses, up to $5,000, if any are ever incurred. The section has set aside funds to cover that eventuality, so the Board ok'd the guarantee.

McDonald told the Board the section had worked up a "pledge" to use ADR. They want to send it out to law firms and businesses as a trial run to getting it into wider circulation. Governors were concerned about some implied anti-lawyer feeling such a pledge conveys, as well as that WSBA members might froth a bit at a bar-endorsed project going directly to clients urging them to not use lawyers.

Proponents called those fears exaggerated. The pledge only urges use of ADR where it's appropriate. And where lawyers have used ADR more, they find they get cases wrapped up sooner, and that, rather than lose business to nonlawyers, they get more. That's because as the cost of problem-solving comes down, more people can talk to lawyers about resolving theirs. The debate went back and forth a while. When the Board voted, they ended up in a tie, which the president broke in favor of the pledge program.

Furor Over Assessment Decision: At the May meeting, the Board approved an Admission to Practice Rule 15 to create a Lawyers' Fund for Client Protection. John Hoglund appeared for the Client's Security Program Committee with a set of rules to govern the program, and asked the Board to recommend them for approval by the Supreme Court. He asked the Board to seek expedited approval by the Court as well. The new fund is to be topped up by an assessment of active WSBA members; the committee recommended that it be set at $15. That would bring in about $270,000—enough to handle pending claims and some under investigation that look meritorious, with a little left over to carry into future years. The thought is that, over time, the Fund can be made self-supporting.

Mary Jo Diaz, the Government Lawyers representative, made the Ritual Announcement That Government Lawyers Don't Want to Pay Anything. Solicitor General Narda Pierce expressed the concern of Attorney General Christine Gregoire that maybe there hadn't been "enough process" to get WSBA members supporting the idea. Jim Kaufman, speaking for the prosecutors, said some were for it, and some agin' it. Maybe it needed some more time to be thought about.

Governor Steve Tubbs commented, a bit pointedly, that for his part, he'd been seeking comment on this idea for months, directing his newsletter to members of all the groups that now wanted to "process" the idea some more. He'd gotten no answers, no objections, no nothing, and now the representatives of the same groups whose members apparently couldn't be troubled to comment were saying they wanted more time to comment. Governor Jan Peterson said everyone seemed to be arguing for more time to think about whether a fund should be created. "We did that last month," he observed. "Today the questions are, what will the rules be, and how much will the assessment be?"

Governor Wayne Blair agreed. His solution was to go ahead and approve the rules and assessment recommendation, but not to ask the Court to expedite the matter. That would give more time for mulling and ruminating. Peterson moved to do just that. Governor Joe Nappi countered that he'd rather deal with the rules and the assessment separately. He preferred $10. Peterson said no. Governor Tubbs said he thought $8 is enough to cover pending claims. Governor Jim Handmacher moved to amend the recommended assessment from $15 to $10. Peterson agreed, and the amended motion passed, 7-3, Tubbs, Larson, and Governor Alva Long opposed.

Freeze Over-reaching Advertising? Discussion: Allan Barris brought the Board two proposals considered by the Rules of Professional Conduct Committee. One was a proposal championed by Governor Tom Chambers. It would amend RPC 7.2 to ban "predatory advertising"—sending things to people who've had a death or severe injury, been in mass disaster and the like—until 15 days have passed. The RPC Committee recommended not adopting it in April; they stuck by that recommendation. The problem is that U.S. Supreme Court decisions make lawyer advertising exceedingly difficult to regulate. The Board took no action on the proposal.

A second proposal fared better. It amended RPC 1.7 to address conflicts of interest that may arise when a private attorney is hired to represent a governmental entity. In such a

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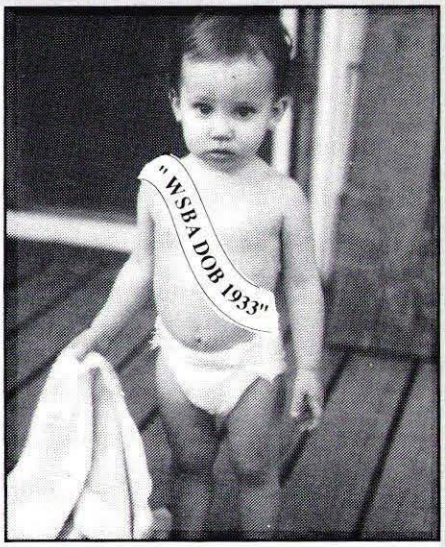

AND HERE'S HOW!

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.

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case, would the lawyer (or other lawyers in the firm) be precluded from representing clients with interests adverse to those of the governmental entity? The amendment specified that the lawyer would be considered to represent the specific entity that hired the lawyer, not the larger entity of which the lawyer might be a part. It passed unanimously.

The Board had a consultant in recently to look at the continuing legal education department and recommend how it can Operate on More Business-like Lines. The Board received his report last month and referred it to the CLE Policy Committee for comment. The committee made five recommendations, each of which the Board considered.

First, the Board approved the recommendation that WSBA stay in the CLE business. Governor Vicki Norris said she wanted it added into the recommendation that the CLE department keep on Operating on More Business-like Lines, lest it otherwise "turn into a Sucking Vortex."

A general pause ensued.

Next, the Board battled whether reimbursement of CLE speakers should be reinstituted, since it was eliminated last fall as part of budget reductions. Arguments for reimbursement: everyone is having trouble getting good speakers without it, and CLE is making enough money that it's affordable. Arguments against: sections can do it, CLE isn't doing *that* well yet, and good speakers *can* be had without pay. Governor Jim Handmacher said since the Board's policy is to run CLE as a break-even venture; to cut out speaker expenses turns it into a profit center for other programs. He also saw some inconsistency in governors' being reimbursed for attending their meetings while CLE speakers aren't. Governor Alva Long, the noted antiestablishmentarian, saw no conflict: "Lawyers owe something to the bar, they should put something back in. What we get as reimbursement for serving as governors is nothing compared to the two or three hundred hours we put in each year."

The Board tied, 5-5, on reinstating reimbursement. The president broke the tie in favor of restoring payment in the new budget.

That out of the way, it was easy for the Board to decide to defer the consultant's recommendation to restructure the relationship with WSBA sections in putting on CLEs—the consultant thought the Bar doesn't charge sections enough. We've got that sorted out with the sections, everyone said; there's no reason to get into all that again. Likewise, they didn't feel a need to restructure the relationship of CLE to section midyear meetings. Finally, they voted to have a CLE summit with the Board, CLE Committee and CLE staff to plan the future of WSBA CLE. The Board also added CLE to the list of programs subject to sunset review.

Finally—Our Altered Direction: The Board's ad hoc communications committee presented its final report. It had previously recommended the opening of most WSBA committees to all comers, a project now underway. Also started is the recommended creation of a database of non-WSBA committee and board nominations, so they can be better publicized and wider interest from members increased. A recommendation that governors receive a per capita budget allocation to let them communicate more often with all their constituents (in the bigger districts it costs thousands to send out one mailing) was adopted by the Budget Committee for 1993-94. Efforts will be made to publish more of Board agendas further in advance, though the limits of such an aspiration were demonstrated by part of the committee's report, handed out at the meeting. And the committee recommended that the president

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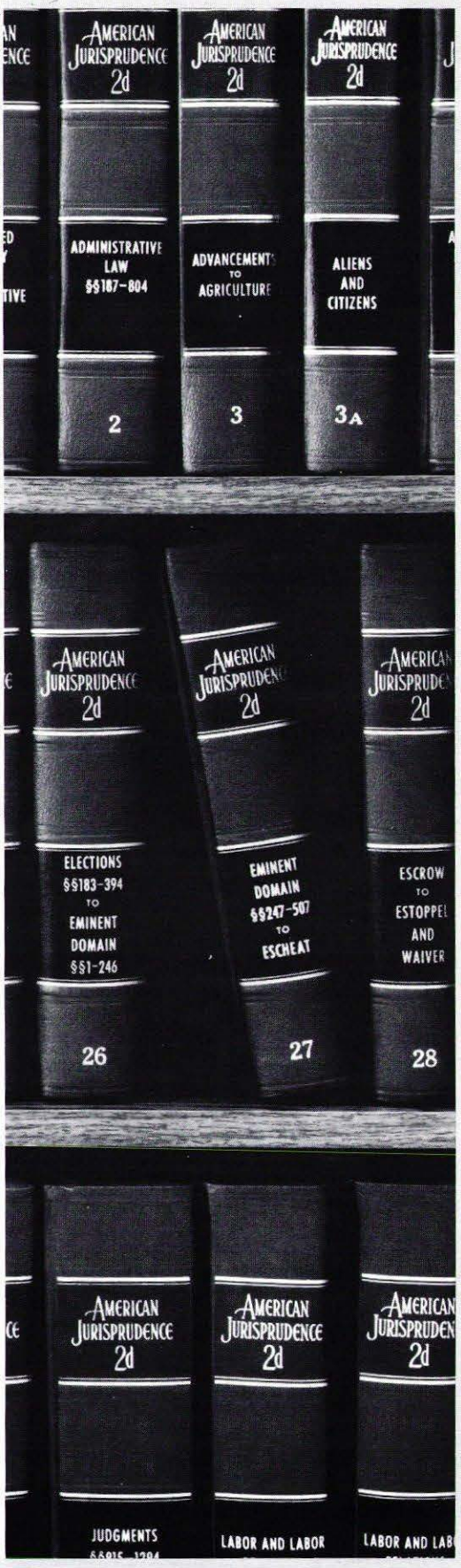

write all the specialty bar associations each fall reminding them they are welcome to send observers to Board of Governors meetings. The Board also passed a resolution noting that there are significant numbers of WSBA members who feel out of touch with WSBA affairs, and directing the Communications Department (that's what they renamed Public Affairs) to change its service emphasis from outside public relations to member relations and the promotion of greater involvement and interaction with the Bar.

Wrap-up in Leavenworth: In other action, the Board deferred action on a reendorsement of HJR 4221, a proposed constitutional amendment which would allow district courts to hear cases in equity, and which will be on the ballot again this fall. They approved membership fee increases requested by the sections on criminal law, health law, corporate law, and administrative law; deferred action on the creation of a Board personnel committee; and heard a report from Chelan-Douglas County Bar Association president Steve Crossland on bar activities in the two counties. They elected Llew Pritchard, Karen Wong, and Paula Boggs ABA delegates,—Boggs to the Young Lawyers Division seat—and nominated Ted Spearman to replace Karen Tall on the Disciplinary Board.

The Board declined to act on a proposed set of ABA standards for running lawyer referral services (WSBA doesn't have one any more, and didn't want to get into regulating local and county services); and approved, with expressions of appreciation, the disbanding of the Domestic Relations Task Force Implementation Committee chaired by Mary Wechsler; accepted the recommendation of the sunset review committee that the WSBA convention not be revived in its old form; heard a preliminary report on the 1993-94 budget; talked some more about a membership survey; met with the board of the Young Lawyers Division and heard a report on the Division's activities from its president, Lisa Lowe.

The Board also gave preliminary consideration to extensive changes proposed by the Court Rules & Procedures Committee; approved a revision of the WSBA bylaws that updated and brought them into conformity with current practice; and adopted a policy prohibiting the holding of meetings at facilities, and in political subdivisions, which discriminate on the basis of race, color, national origin, religion, creed, sex, age, disability, sexual orientation, or marital status, while reaffirming the right of WSBA members to associate freely in their private lives.

Next meeting: Winthrop, Washington, July 30-31.

NOTICE OF APPOINTMENT

The Board of Governors seeks nominations for appointment to the Board of Trustees of the Legal Foundation of Washington. Qualifications for the position include a commitment to equal access to the justice system for all, a knowledge of the legal needs of the poor in Washington, a familiarity with volunteer attorneys and legal services systems, and a willingness to attend half a dozen one-day meetings each year. The Board is a working board which expects a full contribution from each member. The appointment will be made at the Board of Governors' October 22-23 meeting, and runs from January 1, 1994 to December 31, 1995, with the possibility of appointment to a second term. WSBA members interested in the appointment should contact their member of the Board of Governors.

Notices of Interest to Bar Members

WSBA Nondisciplinary Notices:

Interim Suspension: Tacoma lawyer **Mark Russell Hanna** (WSBA #13504, admitted 1983) was ordered suspended from the practice of law, pending the outcome of disciplinary proceedings, by Supreme Court order entered April 13, 1993.

The suspension is based upon his guilty plea to a felony of manufacturing marijuana.

Interim suspension: Spokane lawyer **Michael James Ryan** (WSBA #17882, admitted 1988) was ordered suspended from the practice of law, pending the outcome of disciplinary proceedings, by Supreme Court order entered April 7, 1993. This suspension is the result of Mr. Ryan's felony conviction for knowingly and fraudulently failing to list all interests in property on a Statement of Financial Affairs filed in his Chapter 7 bankruptcy proceeding.

Interim suspension is pursuant to RLD Title 3 and is not a disciplinary sanction. [May 4, 1993]

Interim suspension: Spokane lawyer **Brad Alan Plumb** (WSBA #20337, admitted 1991) was ordered suspended from the practice of law, pending the outcome of disciplinary proceedings, by Supreme Court order entered May 4, 1993. This suspension is the result of Mr. Plumb's first degree theft felony conviction for obtaining public assistance to which he was not entitled, or greater public assistance than he was entitled to.

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

WSBA Disciplinary Notices:

Everett lawyer **James Thomas Hopkins** (WSBA #5667, admitted 1974) was suspended from the practice of law for six months by the Washington Supreme Court's April 27, 1993 order, effective immediately. The discipline, following a hearing, was based on Hopkins' falsification of a certified mail receipt and submission of the falsified receipt to opposing counsel in response to a request for production of the original receipt. It was also based upon Hopkins' failure to notify opposing counsel or the court that the receipt had been falsified after opposing counsel submitted the falsified receipt to the court. The certified mail receipt was crucial to Hopkins' client's position in a nonjudicial real estate contract forfeiture. Hopkins was also ordered to pay costs and expenses associated with the disciplinary proceedings. [May 5, 1993]

Public Notices

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 June 1993 is 3.32 %. **The maximum allowable interest permissible for July 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 39 in October, 1987 for 1982-1984; page 37 in June 1989 for 1984-85; page 47 in June 1992 for 1986-1992, and on page 49 in June 1993 for 1987-1993.

Vietnam Trademark and Service Mark Registration Update:

Pursuant to Ordinance 84, promulgated March 20, 1990, effective March 20, 1993, Vietnam implemented a "first to file" system (*see Bar News*, "Digest," April 1993, page 37). A number of problems have arisen when some companies tried to register trademark and service marks belonging to others. For example, one Asian company registered "Pizza Hut" and "Mister Donut" as its own.

Vietnam has tried to correct the problem by Decree 437/SC (March 19, 1993). According to this new regulation, trade and service marks although registered under Ordinance 84 will not be protected if they are 1) copies of trade or service marks well-known or widely used elsewhere or 2) already protected under an international convention where Vietnam is a signatory. The new regulations also set forth the procedure to contest the illegal registration.

[The Bar News *thanks attorney Le Dinh Tuyen for this update]*

Rules Committee Seeks Your Comments:

When it reconvenes this fall, the WSBA Court Rules and Procedures Committee is scheduled to review the Criminal Rules for Superior Court (CrR) and the Criminal Rules for Courts of Limited Jurisdiction (CrRLJ). Your comments and suggestions about these rules are invited. Please send them to: Steven Rosen, Staff Attorney, WSBA, 500 Westin Building, 2001 Sixth Avenue, Seattle, WA 98121-2599.

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 canceled, there will be an Annual Business Meeting. *The 1993 WSBA Annual Business Meeting will be held on Friday, September 10, 1993, beginning at 2 p.m. at the Washington State Convention Center in Seattle.*** (Note: The location was moved from the Seattle Sheraton to the Convention Center.)

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

Note: Telephone numbers for regular CLE providers and other groups presenting listed events are listed on page 36. Contact them for further information.

July 1993

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

13 Lewiston, ID: Northwest Power Planning Council public hearing—Phase IV amendments to the council's Fish and Wildlife Plan. *For information:* R. Ted Bottiger (206) 956-2200/Tom Trulove, (509) 359-7352.

14 Idaho Falls, ID: Northwest Power Planning Council public hearing—Phase IV amendments to the council's Fish and Wildlife Plan. *For information:* R. Ted Bottiger (206) 956-2200/Tom Trulove, (509) 359-7352.

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.

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

27 Kelso-Longview: Northwest Power Planning Council public hearing—Phase IV amendments to the council's Fish and Wildlife Plan. *For information:* R. Ted Bottiger (206) 956-2200/Tom Trulove, (509) 359-7352.

28 Portland, OR: Northwest Power Planning Council public hearing—Phase IV amendments to the council's Fish and Wildlife Plan. *For information:* R. Ted Bottiger (206) 956-2200/Tom Trulove, (509) 359-7352.

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

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

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) 727-8239.

9 Yakima: Northwest Power Planning Council public hearing—Phase IV amendments to the council's Fish and Wildlife Plan. *For information:* R. Ted Bottiger (206) 956-2200/Tom Trulove, (509) 359-7352.

11 Hood River OR: Northwest Power Planning Council public hearing—Phase IV amendments to the council's Fish and Wildlife Plan. *For information:* R. Ted Bottiger (206) 956-2200/Tom Trulove, (509) 359-7352.

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

13 Deadline for written comment on Phase IV amendment proposals of Northwest Power Planning Council's Fish and Wildlife Plan. *For information:* R. Ted Bottiger (206) 956-2200/Tom Trulove, (509) 359-7352.

13 Seattle: Trial Lawyers Say and Do the Darndest Things: The Most Common Mistakes Made at Trial and How to Fix Them. *Sponsored by* NITA.

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

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

20 Olympia: How to Probate. *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.

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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 resolution published in the *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.

* * * * *

September 1993

1-2 Seattle: Taking and Defending Depositions. *Sponsored by* NITA.

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 Seattle: Water Law. *Sponsored by* WSBA.

17 Seattle: Advising the Small Business. *Sponsored by* WSBA.

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

17 Seattle: Intellectual Property. *Sponsored by* WSBA.

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

24 Spokane: Advising the Small Business. *Sponsored by* WSBA.

24 Seattle: Advising the Injured Worker. *Sponsored by* WSBA.

24 Seattle: Environmental Law. Sponsored by WSBA.

Business Advisory Services, Inc. (206) 223-5400
CLE International (206) 621-1938
Idaho Bar Foundation (208) 342-8958
King County Bar Association (206) 624-9365
Lewis & Clark Law School/Northwest School of Law (503) 768-6642
National Business Institute, Inc. (715) 835-7909
National Institute of Trial Advocacy (NITA) (800) 225-6482
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) (206) 727-8202
Washington State Trial Lawyers Assn (WSTLA) (206) 464-1011, (800) 732-9251

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.

1-2: Spokane: Macs and Tax, Gonzaga University School of Law's 20th Annual Tax Institute, Hills Resort, Priest Lake, Idaho. Program focus is estate planning in the Clinton Administration. Lake trout fishing is reportedly excellent this time of year. *Contact:* John Maurice, (509) 328-4220.

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.

December 1993

3 Idaho Falls: Annual Law Update. Also presented 12/10 in Boise and 12/17 in Lewiston. *Sponsored by* Idaho Bar Foundation.

4 Tacoma: Annual Year-End Potpourri CLE. *Sponsored by* TPCBA.

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

WSBA Annual Meeting
September 10, 1993
Afternoon
Seattle Convention Center

NOTE NEW LOCATION

The Business of Business—
Stress and the New Solo Practitioner

Lawyers seem to fall into two categories—those who found law school tolerable and those who hated it. I was so turned off by law school that I spent several years afterwards trying different kinds of businesses. I even entertained the notion of going back to school, but I couldn't muster the patience for more entrance exams and prerequisite courses. So I finally decided that I would at least try to be a lawyer. I took an administrative pseudo-lawyering job to help me get my foot in the door. It worked beautifully. Although the job was not very challenging, I was exposed both to the field I was interested in and the lawyers practicing in it. I made friends and contacts, learned a lot, and after a few years I felt confident enough to go off on my own. Ten years after law school, I started practicing law.

The first month was exciting; there was little time to be nervous. I was relieved to be my own boss—able to set my own schedule and pace. In spite of administrative details, I looked forward to the variety of tasks. But it wasn't long before the excitement turned into full-fledged anxiety. The administrative details took much more time than I had imagined. There were so many procedural and practical things I didn't know and couldn't begin to figure out. There were worthy clients who didn't have any money, and ones who had plenty of money but expected free advice anyway; there were ones to whom I'd given incredibly optimistic fee estimates. I couldn't distinguish between what was chargeable and what was not. The cash flow was very tight. After paying for rent, telephone, secretary, supplies, and yellow-page ad each month, I had almost nothing to take home. I started feeling guilty about not being an equal contributor to my household; until then I had always been the "responsible" partner. I obtained a very small line of credit, but I knew is wouldn't see me through even two months. Self-doubt started building.

Anxiety over money was augmented by insecurity about my legal abilities at every turn. Had that other attorney been right when he said I didn't have a leg to stand on? Does that attorney really mean those threats, or is she just blowing off steam? How do other lawyers learn to be so glib over the phone? Did I miss a crucial rule of procedure? Did they miss a crucial rule of procedure, and how will I know? What does that document look like? Who needs to get notice? How do I have to give notice? . . . I knew that the answers to these and hundreds of other questions were somewhere in my library or with someone I knew, but I couldn't afford to spend all my time in the library, and I didn't want to become a pest to the lawyer I knew. I didn't realize it at the time, but I needed to be reassured that nobody has all the answers all of the time, even if they act like it. I'm now convinced that an inexperienced attorney stands out like a sore thumb, and that certain more experienced attorneys feel it is their job to exploit their inexperience and make their jobs twice as hard as they are. I was quite the target, and I began to seriously doubt my ability to be a lawyer, not to mention my ability to run my own practice.

Those doubts fed an anxiety that left me feeling paralyzed in panic at some moments and in depression at others. I switched back and forth, sometimes several times per hour. I was isolated and scared. I could not go on like this, but I had no idea what to do about it. Then I read about the Lawyers' Assistance Program in the *Bar News*. The article mentioned depression. I wasn't as desperate as the author of the article, but I definitely had some of the same feelings. I called LAP and learned that there was a support group, made up of lawyers with different backgrounds but similar doubts about the law or their place in it. I went to a meeting and felt an almost instant fellowship. I listened to the problems others faced in their offices. My concerns paled in comparison to the stresses of practicing in a large firm. I learned that I was not the only inexperienced lawyer in town, and that I was often on the right track even when a big-shot lawyer tried to tell me I wasn't. I realized I was blessed by not having to work a ridiculously high number of hours to support an inhuman billable-hour requirement. I made friends in the group and started to feel "connected" to other lawyers. I knew I could call on these people if I had a question about the law that was out of my league or if I needed someone to give me feedback about a problematic case or client.

This group made it possible for me to get through a very difficult starting period; some days the only thing that got me going was looking forward to our meeting. Now I realize that if I had not been able to rely on the group to reassure me, to advise me and to share experiences with me, I would have had a *much* harder time concentrating on my clients' needs. The support helped me conquer my paralysis. Today I enjoy a thriving practice, and I have become the lawyer I never though I would, or could, be. I am sure that the LAP saved my legal career, and for that I am truly grateful.

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.

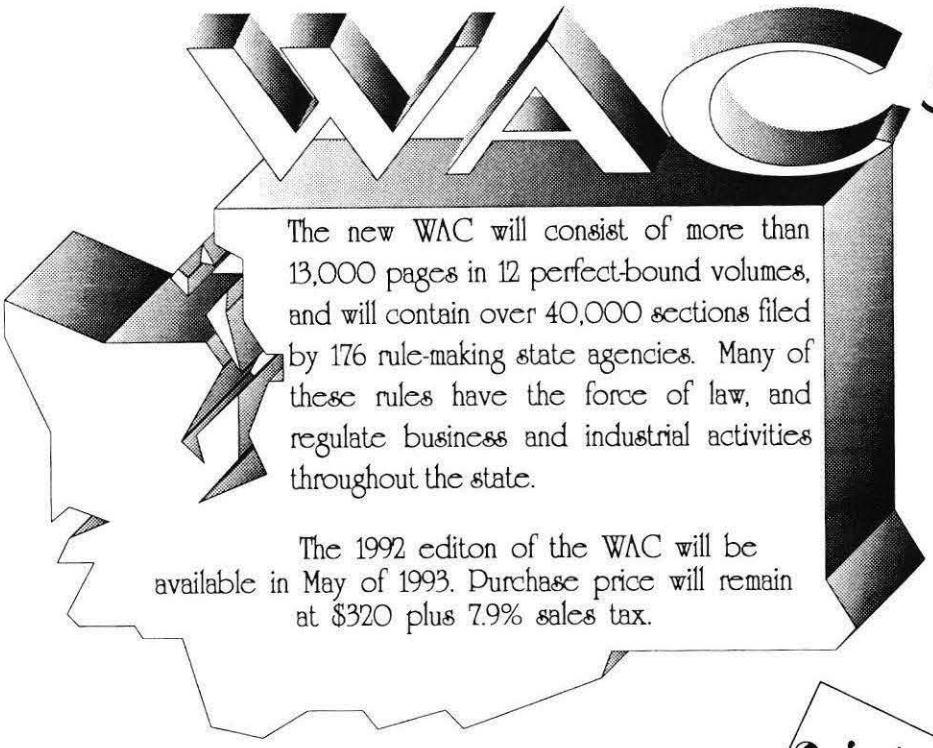
Every Tuesday at noon in the WSBA Presidents' Room, (4th floor, Westin Building), LAP sponsors a free job hunters' support group for WSBA members who are actively involved in the search for a new position. This is a drop-in group focusing on the exchange of ideas, job leads, and job finding ideas.

This month there will be two programs with speakers:

July 13 Part-time Contract Lawyer and Businessman: Todd Fairchild.

July 20 Come With Your Questions About Job-searching or Career Satisfaction: Carol Vecchio.

WASHINGTON ADMINISTRATIVE CODE



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.

The 1992 editon of the WAC will be available in May of 1993. Purchase price will remain at $320 plus 7.9% sales tax.

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The Douglas-Fortas Connection

by **John N. Rupp**

The minor historical event which I am about to relate occurred one summer. I am quite sure it was summer because one of the actors was Mr. Justice William O. Douglas of the Supreme Court of the United States, and Douglas used to spend the time of the Court's summer recess at his home at Goose Prairie in Yakima County, Washington. I am not sure of the year, although I think it was either 1971 or 1972. I know it was after 1969 because another actor was Abe Fortas, acting as a private attorney, and Fortas was a member of the Supreme Court until he resigned in 1969; and I know it was prior to 1973 because the incident involved the War in Vietnam, and this country withdrew from Vietnam in 1973.

Anyway, here is what happened.

Someone of the many individuals, groups and organizations opposed to our involvement in Vietnam petitioned the Supreme Court to declare the war illegal and unconstitutional and to enjoin the President from continuing it. The Court was in its summer recess, but somehow the petition was referred to Douglas. I assume that most judges would have simply denied such a petition, but Douglas decided to pursue it and to hold hearings on it. So he came down from Goose Prairie and held a several-day hearing in a Yakima courtroom. Naturally, the hearing received considerable attention from the press. Douglas announced that he would promptly write and file an opinion. I assume that he planned to grant the petition.

After he figured out what he wanted to write, he telephoned his office in Washington, D.C. and dictated his opinion to his clerks there. Within a day or so, and before the opinion was released, Chief Justice Burger convened the Court in a special session, and the Court voted to deny the petition.

I'm guessing, but my guess is that Douglas's plan was to have his opinion given to the press before the Court could be convened and that there would be front-page stories with headlines such as "Douglas Enjoins Vietnam War." But the prompt action of the Chief Justice and the Court spoiled all that. How did Burger find out so soon, thus enabling the Court to finesse Douglas? Naturally, Douglas thought there had been a "leak" somewhere, and he employed his friend Abe Fortas to be his lawyer to find out what happened.

All I knew about the Court's action was what I had read in the newspapers, and the press coverage was fairly routine. It is hardly big news when the Supreme Court refuses to enjoin the President in a foreign-policy matter, or to entertain any of the hundreds of similarly goofy petitions which, one assumes, the Court receives every year.

Suddenly, however, the matter became important to the Pacific Northwest Bell Telephone Company. I was informed that Abe Fortas had telephoned PNB's Yakima manager and had flatly accused the Company of having leaked to someone in Washington, D.C. the substance of Douglas's opinion. The startled manager had told Fortas that he would ascertain the facts and report to him as soon as that was done. I phoned the manager and told him not to do so. I said that, if anyone was to talk to Fortas, it should be Rupp as the Company's General Counsel. This was a considerable relief to the manager because (a) he was not keen on getting into the middle of a high-level scrap and (b) Fortas had been quite high-handed and rude in talking to him.

So the manager gave me the facts of the matter, and I telephoned Fortas in New York or Washington. I introduced myself and then told him that under the Communications Act, I could discuss Douglas's phone calls only with Douglas or his attorney. He took umbrage at that and said, if I didn't believe him, he'd get a letter from Douglas. I told him there was no need for that formality and that, if he'd just tell me that he was Douglas's attorney, that would be sufficient. I thought I was being quite courteous, but Fortas seemed to think I was impugning his honor. Anyway he said he was indeed Douglas's attorney in the matter, and I gave him the facts as follows:

Douglas did not have a telephone at Goose Prairie, so he made his phone calls from a public telephone at "Whistling Jack," a small resort on the Naches River by the side of the Chinook Pass Highway. (A "whistling jack" is a hoary marmot. They make a sharp whistling call). PNB did not serve that area, and the telephone was the property of the Naches Telephone Company. Long distance calls from it went into Yakima and were handled by the PNB operators there. The telephone was in an open booth outside of Whistling Jack, and the wires from it out to the telephone cable on the highway went right past the window of one of the resort cabins. Anyone could stand outside the booth and hear everything that Douglas said, and a sleuth who wanted to tap the wires could simply reach out the cabin window and put a couple of clips on the two wires. Since that was Naches Telephone Company territory, PNB had no control over it, but we had checked at Whistling Jack and had been informed that no one there had seen any such eavesdropping or wire-tapping, either then or any other time. Still, it was evident that such a telephone was hardly the thing for a man to use if he were seriously concerned with privacy.

When the call came into the Yakima office it would be handled by a PNB operator who would take directions from Douglas and put the call through on the Bell System long-distance lines to Washington, D.C. "Ah," said Fortas, "that operator could listen to the call." I replied that of course it was possible, but such conduct was a major sin in the

telephone business, and operators don't do it and anyway they're too busy to spend time that way. "Yes, I know," he said, "but Bill Douglas says there was something fishy about that call. He told me that the person he talked to was not an operator. It was a man!"

I thought it a bit ironical for Douglas and Fortas, of all people, not to realize that there were no longer "women's jobs" and "men's jobs" in industry, but I contented myself with pointing out that we had three male telephone operators at Yakima. I added that one of them was blind. That seemed to surprise Mr. Fortas, and I sensed that he was backing off a little from his earlier challenging attitude.

Then I told him, "You know, I think you're looking at the wrong end of the line. Bill Douglas was brought up in the Yakima country, and the people there take him for granted. They don't pay much attention to him. And when he does come into town from his ranch he looks like any other farmer. I think he likes it that way. And I don't think those Yakima folks are much interested in what he might try to do about Vietnam. Don't you think that, if there was a leak, it was in Washington, D.C.? I gather that leaks are a way of life there." After a little more conversation we agreed that, if either of us learned any more facts bearing on PNB's possible involvement, we would be back in touch. I learned nothing more and I assume that he didn't either because we had no further contact. Nor did I ever read or hear anything about whether there had been a leak or whether Fortas had found out where it was. There could well have been one, but maybe not. Burger knew Douglas and probably could have figured out what Douglas planned to do without benefit of leak.

So that ended the incident, and we went back to pursuing what Archbishop Cranmer in The Book of Common Prayer called our "lawful occasions." I'm not sure whether Fortas ever actually understood that our operators and the other people in Yakima really didn't give much of a damn about Bill Douglas and his hearing on Vietnam. People in and around the Government in Washington, D.C. tend to think that nothing of importance occurs west of the Potomac and Hudson Rivers and that the rest of the country waits every day with bated breath to find out the news from Washington and New York. Perhaps Fortas really did think that Yakima County was teeming with wire-tapping spies (armed with alligator clips) and eavesdropping telephone operators, all just dying to learn of Douglas's opinion so they could phone the Chief Justice and tell him about it.

I wonder if Abe Fortas ever saw a whistling jack.

Seattle attorney ***John N. Rupp****, founding editor of the* Bar News, *continues to be a contributor to the magazine.*

From the Legal Aid Committee: Coordinated Family Law Program Succeeds in Spokane

by **Kenneth Isserlis**

For as long as anyone can remember, the demand for free legal assistance in family law cases has far exceeded available public and private resources. Recognizing this, three legal-assistance organizations in Spokane have developed an innovative, cooperative program to ensure the most efficient delivery of their services to the clients they serve.

The three participating organizations are Spokane Legal Services Center (SLSC), Gonzaga Law School's University Legal Assistance Program and the Spokane County Bar Association's Pro Bono Program. Here's how their coordinated family law project works:

- The three organizations have prioritized family law cases as follows: "Priority One" cases—time is critical and the physical well-being of an adult or a child is at risk; "Priority Two" cases—urgent cases involving non-financial issues (*e.g.*, an extended denial of visitation; a situation where available evidence appears to support an immediate custody change; or a situation where a child has been removed from the state); "Priority Three" Cases—all other cases involving a legitimate (but less urgent) need for assistance (e.g., divorces involving only property or financial issues; or most paternity actions).
- SLSC staff screens by telephone and prioritizes all requests for family law services for the three participating organizations.
- Service requests are then met according to their priority status as follows:

1. "Priority One" cases are accepted by SLSC staff;
2. "Priority Two" cases are referred to the pro bono program for referral to a participating private attorney or the University Legal Assistance Program;
3. An attempt is made to refer all other cases to an appropriate resource. For example, uncontested dissolution actions are referred to a do-it-yourself divorce class; paternity cases are referred to the Prosecuting Attorney's office; and child support modification cases are referred to the Office of Support Enforcement;
4. Where this type of specific referral cannot be made, individuals may attend advice and consultation clinics. There, volunteer attorneys meet privately with the individuals to review their legal situations, provide them with advice, and, if it's appropriate, help them prepare necessary documents. These clinics are held several times each month. They are sponsored by the three participating programs and are staffed by private attorneys and attorneys from the Office of the Attorney General.

From all reports, this new coordinated family law project is working extremely well. Unlike earlier local approaches to the delivery of family law services—where each of the three organizations devoted substantial resources to screening cases and where clients were often placed on months-long waiting lists—this new coordinated effort both frees up resources for actual service delivery and ensures the most efficient and appropriate use of those limited resources.

The Legal Aid Committee commends the staff and volunteers involved with this model family law program for their creativity and hard work and wishes them continued success with this important effort.

Kenneth Isserlis *is a partner in the Spokane law firm Lee & Michaud, P.S., and a member of WSBA's Legal Aid Committee.*

NEWS FROM HOME

Attorney General **Christine Gregoire** has named two lawyers to senior posts in her administration. **Kathleen Mix**, formerly chief of the department's Corrections Division, has been appointed chief deputy attorney general. She will be responsible for day-to-day operation of the Attorney General's office and will oversee several of its divisions. Gregoire has also announced the appointment of **Philip G. Hubbard**, formerly a partner with Karr Tuttle Campbell and Revelle Hawkins, as chief of the department's Labor & Industries Division. Gregoire said Hubbard is the first African-American appointed to a top management position in the Attorney General's office.

Scott Swindell has joined the Bessert Law Firm, P.C. in Vancouver, and will practice in various areas of tax and business law.

W. Jeff Davis has been appointed assistant general counsel for Longview Fibre Company. He replaces **Richard H. Wollenberg**, who has been promoted to manager-production for the company's Western Container Division. A Longview native, Davis was formerly with Revelle Hawkins in Bellevue.

Timothy C. Dunton has joined Stonemark Mergers & Acquisitions in Seattle as vice president and director of research. He was previously a senior consultant to KMPG Peat Marwick.

Roger F. Chase, a principal of the Spokane firm Chase, Haskell, Hayes & Kalamon, is the new president-elect of the Washington State Society of Hospital Attorneys.

Orchestra Seattle/Seattle Chamber Singers has named **Robert J. Roche** Volunteer of the Year for his work in their behalf. Roche practices with Bullivant, Houser, Bailey, Pendergrass & Hoffman.

Bruce R. Colven has joined Morse & Bratt in Vancouver as an associate, concentrating in personal injury and civil litigation.

Michael E. Brand, formerly in solo practice and previously associate counsel at Intermec Corporation, has been appointed corporate attorney at Egghead Software. **Thomas M. Hogan** is vice president, general counsel and assistant secretary at Egghead.

Janna R. Lovejoy, former prosecutor and associate corporation counsel with the city of Longview, opened her solo law practice in Woodland on May 3. Her practice focuses on general civil law and criminal defense, primarily serving south Cowlitz and north Clark County areas.

CLARK COUNTY REPORT

by **JOHN F. NICHOLS**

Massage Redux

Ben Shafton was somewhat chagrined at his mention in last month's report on his recent endorsement of therapeutic massage. He thus challenged this reporter to undertake an investigative journey into the inner circle of the massage industry. An under-the-sheets look at the rubbing business. My curiosity plus Ben's offer to pay for my visit was sufficient enticement to take up my journalistic quest. Now here is the rubdown. My visit to Elite Muscular Therapy was completely legit. In the words of Mr. Shafton, "I went in feeling good and came out feeling better." My masseuse stated that I definitely "kneaded" a massage due to my high pressured job and deadline. We started with a bare-skin rub and proceeded to a Mr. Spock Vulcan Mind Meld. After exhausting all massage-puns, she concluded with a foot energizer and left me in complete relaxation. In sum, I was very impressed and satisfied, especially at that price. So far, I have not received a similar offer from **Bob Yoseph** and his favorite spot, "Club Paradise."

Be Careful What You Wish For:

Yes, folks, be careful of what you wish for, it might come true. This was brought home to that well-wisher **Bill Robison,** who had the misfortune of wishing in front of the unblinking eye of Judge **Robert Harris**' video courtroom. Bill, laboring long and hard in a never-ending probate, stated in open court, "If I ever finish this estate I'll give up smoking."

As luck would have it, and it was apparently more luck than skill, the probate was somehow completed. Like most of us who make pacts with the occult, Robison forgot his pledge. Fortunately the camera doesn't forget. When Bill refused to quit smoking, partner **Tim Dack** moved the court for specific performance. Upon reviewing the tape, the judge was compelled to enforce the contract and ordered terms against Robison. The terms and length thereof are still being negotiated, but a word to the wise about what one promises in court.

EAST KING COUNTY REPORT

by MARIJEAN E. MOSCHETTO

The First Suburban County Bar Association Golf Challenge will kick off the month of July, the first leg being played in the South King County Bar Association annual golf tournament, July 30 at the Enumclaw Golf Course. Participants will play both the South's tournament and the annual East King County Bar Association Golf Tournament held on August 19 at the Carnation Golf Course. The scores of each association's entrants playing both tournaments will be averaged with the winner being the bar association whose players have the lower average scores. To attend either tournament is a good time, but to attend both is even better! Call **Rod Stephens**, (206) 228-1880, regarding Enumclaw and **Chris Frost**, (206) 882-2929, to enter Carnation.

The Eastside Legal Assistance Program will once again be selling tickets to its annual raffle event, prize-drawing to be held at the annual EKCBA Holiday Party in December. Several people have commented that although the grand prize is terrific, the other prizes are great for holiday gift-giving. ELAP is a tax-exempt organization, so all donations are tax-deductible.

Congratulations to **Stephanie Searing**, who became a principal of Kinzel, Allen, Skone & Searing, Inc. P.S. effective January 1, 1993.

Author **Peter V. MacDonald**, lawyer, collects and publishes funny legal stories. His article "Major-League S.Q.S. (Stupid Questions, that is)" relates true anecdotes of lawyers whose brains are not running in synch with their mouths; he recently included the following probing questions:

Q. Now, Doctor, isn't it true that when a person dies in his sleep, in most cases he just passes quietly away and doesn't know anything about it until the next morning?

.

Q. So you say that the stairs went down to the basement?
A. Yes.
Q. And these stairs, did they also go up?

.

Q. Do you know how far pregnant you are right now?
A. I'll be three months on November 8.
Q. Apparently, then, the date of conception was August 8.
A. Yes.
Q. What were you and your husband doing at that time?

.

Q. Were you acquainted with the deceased?
A. Yes.
Q. Before or after he died?"

.

I think that Tom Chambers has nothing to worry about.

GOVERNMENT LAWYERS BAR ASSOCIATION

***by* NANCY KRIER**

The 1993-1994 executive board of the Government Lawyers Bar Association held its first meeting in May, following elections at the annual membership meeting in April. The new board members are: **Evelyn Fielding**, president; **Kristal Wiitala Knutson**, president-elect; **Jan Frickelton**, vice president; **Bill Frymire**, treasurer; **Judy Giniger**, secretary; **Kate Walsh**, membership; **Mary Jo Diaz** and **Nancy Krier**, WSBA liaisons; **Linda Sullivan** and **Bryce Brown**, program co-chairs; **Gretchen Leanderson**, **Linda Moran**, and **Stephanie Croom Williams**, CLE co-chairs; and **Trish Nightingale**, immediate past president.

GLBA members met with **Mary Fairhurst**, incoming WSBA governor from the Third District, at a luncheon in May. GLBA also sponsored yet another successful CLE seminar entitled "Government Legal Ethics," featuring the following speakers: **Maria Regimbal**, WSBA chief trial counsel; **Maureen A. Hart**, Senior Assistant Attorney General; **William A. Williams**, Senior Assistant Attorney General; **David Akana**, Judicial Conduct Commission Executive Director; **Mary Gallagher Dilley**, Administrative Law Judge, Office of Administrative Hearings; and **Marilyn Showalter**, Deputy Chief Clerk, Washington State House of Representatives. Kudos to **Ed Dee** and **Kristal Wiitala Knutson** for arranging another stellar and timely event.

GLBA continues to provide informative (and cheap!) programs and CLEs relevant to public-sector attorneys. For $10 yearly dues, the organization also provides members regular newsletters on issues affecting their practice, and sends representatives to WSBA Board of Governors meetings. If you are interested in joining, please contact Kate Walsh at (206) 438-7402 or write to GLBA at P.O. Box 2341, Olympia, WA 98507.

KITSAP COUNTY REPORT

by **KATHLEEN M.S. WRIGHT**

Washington Women Lawyers met at the home of president **Cheryl Rife** for a rousing "After Hours" complete with appetizers and parlor games. Newly appointed superior court judge **M. Karlynn Haberly** continued her support of the group by showing up, which is more than many of the members did. The "Best Pizza" award went to **Holly Banks.** After a lively game of Balderdash, all attendees agreed not to cozen other women lawyers.

Moves: **Richard Shattuck** recently opened his own office in Silverdale.

The Ultimate Pro Bono: **Roger Sherrard** continues his involvement with a national group of attorneys dedicated to bringing the workings of American jurisprudence to emerging nations. Roger plans to return to Romania this summer, after a week-long conference in Washington DC in February. Not only are the attorneys foregoing billable hours; each pays his or her own transportation and accommodations.

Athletes Among Us: Planning a daring ride in the "STP" (Seattle to Portland bikeathon) are Smith, O'Hare, Crane and Mesenbrink attorneys **Kathleen Lappi, Cheryl Rife,** and **Drake Mesenbrink.** Their intrepid leader is Bainbridge Island pediatric nurse **Judy O'Hare**, spouse of **Tom O'Hare,** one of the partners of the aforementioned firm. Tom will be driving the "SAGmobile," and it is fortunate that a nurse will be on board, as it is rumored that the training bikes have yet to leave the office.

New Arrivals: To the all-attorney family of **Steve** and **Sally Olsen** a son, **Ryan Michael**, in March. Sally is a deputy prosecuting attorney in King County, and Steve's offices are on Bainbridge. Another all-attorney baby: **Andrew Becker** and **Donna Fisher** welcome **Samuel**, born in April.

PIERCE COUNTY REPORT

by **GEORGE S. KELLEY**

If it's Spring, it must be time for weddings. We are pleased to announce the wedding of WSBA No. 16645, a.k.a. **Kim Comfort**, to WSBA No. 19160, a.k.a. **Kathryn Carman**. We are not sure who will take whose name after the ceremony as these are very complicated times in which we live and practice law. However, if their union is blessed with children, may we suggest that the first-born be known by the square root of the sum of their bar numbers, which, according to our calculations, will be WSBA No. 189.22? This may be preferable to having the child be known as a small Comfort.

In other news, court commissioner **David Johnson** had two daughters get married within a two-week period. Johnson's only complaint was that all the festivities cut into his golf game.

Court of Appeals Division II Judge **John Petrich** retired and says he is going on a cruise. He was recognized at the bar association's May lunch meeting, where Judge **Gerry Alexander** gave a presentation in his honor.

Retired superior court judges **Robert Peterson** and **Robert J. Doran** held an open house at their Tacoma office of JAMS, a rent-a-judge service for those of you who are tired of having your cases bumped at the courthouse. The offices and hearing rooms were well furnished and nicely done. However, neither judge could point out where the jury was supposed to sit.

Bob Helland and **Elaine Houghton** have moved to new offices at the corner of Market Street and 11th in Tacoma. Old-timers will recall that this was once the used-car lot for the local Volvo dealer, and a tall sign behind the building still advertises the sale of used Swedish automobiles. Bob may leave the sign in place as it attracts a better class of clients than a lawyer's sign does.

Finally, in sports news, the Young Lawyers' slow-pitch softball team has been given a reprieve by the Parks and Recreation Department. You may recall that manager **Larry Couture** forgot to send in the entry forms for the 1993 season, and the team was banned from playing. The day was saved when someone in the county executive's office heard about the problem and arranged for a spot in one of the leagues. So far, the team has lost one game and been rained out of six. Larry is now looking for someone who has a contact in the weather bureau.

IN MEMORIAM

Gale D. Barbee

The following remembrance of Gale Barbee was contributed by Wayne Blair, one of Barbee's law partners and a member of the WSBA Board of Governors.

Gale D. Barbee, a senior partner of Montgomery, Purdue, Blankenship & Austin of Seattle, died of cancer on April 5, 1993. He was 59 years old, and practiced with the firm for 31 years. He graduated from the University of Washington School of Law in 1962, he was admitted to the Washington State Bar Association that same year, and was hired by the firm shortly thereafter. He recently completed a term on the firm's executive committee and also served as chair of the executive committee.

He was active in both the Washington State and Seattle-King County Bar Associations. In the early 1970s, he was one of three lawyers from around the state who helped create Evergreen Legal Services, and he subsequently served for many years on its Board of Directors. He was also a trustee of the Seattle-King County Bar Association and acted as his firm's pro bono coordinator (and enthusiastic advocate) for many years. As a result of his efforts, the firm received one of SKCBA's pro bono awards in 1991.

Gale Barbee was an avid camper, hiker, skier, backpacker, sailor and mountain climber. Even though slowed somewhat by Parkinson's disease in 1988, he kept an active schedule that included a climb of Mt. St. Helens in 1988 to celebrate his 30th anniversary with his wife, Barbara. He worked on a home-building project for Habitat for Humanity in Guatemala in 1990.

He served on the boards of Lafromboise Newspapers, Mercer Island Youth and Family Services, Seattle Hearing, Speech & Deafness Center, and Mercer Island Presbyterian Church, and was legal counsel to the Seattle Presbytery.

Remembrances may be sent to Mercer Island Church Foundation, the University of Washington Law School Class of 1962 Scholarship Fund, the American Cancer Society, or the American Parkinson's Disease Association.

Jack R. Dean

Jack R. Dean, 70, died March 27, 1993 in Spokane. While statewide lawyers may best remember him as president of the Washington State Bar Association for 1987-88, those who knew him recalled his inspiring example as a leader in civic life, politics, good government, and the provision of legal services to the poor. "Jack Dean glided through Spokane's elite corridors of power, but spent most of his career stretching out his hand to the city's poor," Spokane *Spokesman-Review* staff writer Jim Lynch observed in a March 31 profile. "During his 70 years, Dean earned a Purple Heart in World War II, shared law offices with a state Supreme Court judge, ran the Spokane Democratic Party and dined with governors."

Spokane Legal Service Center executive director Jim Bamberger called Dean the "most public-spirited attorney I have ever met." The Center's new offices are to be named the Jack R. Dean Poverty Law Center in his honor. Spokane citizens honored the city native in 1991 by observing Jack R. Dean Appreciation week.

Washington Legal Foundation president William P. Bergsten recalled how Dean was the foundation's second president, "stepping in at Chuck Goldmark's death to lead us through a very difficult year. Stepping straight from the presidency of our board to the presidency of the Washington State Bar Association, he continued to play a visionary role in shaping the Foundation's mission. Jack tirelessly met with every local bar association throughout the state, raising the need for local bar involvement in the delivery of volunteer attorney services to the poor. As a result, there are now 20 pro bono programs throughout the state." Bergsten also praised Dean's leadership in the creation of a state bar pro bono coordinator position to provide local programs with service and coordination help. The Legal Foundation presented Dean with its Goldmark Award in 1992.

Known for his omnipresent bow ties, Dean was a wonderful raconteur and a figure of unimpeachable honesty. "His word was his bond," Bamberger told the *Spokesman-Review*. "If Jack Dean said he was going to do something, he did it." Spokane County Bar Association president John Powers called Dean "persuasive . . . an excellent advocate—a lawyer's lawyer, a politico's politico."

Dean brought the same qualities to everything he touched, great and small. He helped guide the *Bar News* safely through a period when its independence was at hazard, and encouraged its development as a voice for all elements of the state bar. To meet him was to make a

friend for life; to have known him was a rare privilege.

Survivors include his wife, Elise; four daughters, seven stepchildren, eight grandchildren, and 14 step-grandchildren.

Bruce Maines

Bruce Maines, 66, died May 3, 1993 in Seattle. Born in Tacoma and raised in Seattle, Maines served in the Navy during World War II. He graduated from the University of Washington and its School of Law after the war and was admitted to practice in 1949.

Maines spent his career with SAFECO Corporation, rising through the ranks to serve, successively as general counsel, vice president and chief operating officer of the corporation's property and casualty insurance companies. He joined the board of the corporation in 1977 and was named president and chief executive officer of the property/ casualty insurance operation in 1979. In 1981 he was named president and chief operating officer of SAFECO Corporation, becoming chief executive officer in 1986, and chairman of the board in 1989. He retired at the end of 1991.

Maines was active in civic affairs, serving with the Seattle University President's Club, the University of Washington President's Club, and service on the boards of the Seattle Alliance for Education, the Corporate Council for the Arts, and the Fred Hutchinson Cancer Center. He chaired the Council for Corporate Responsibility, Leadership Tomorrow, the Greater Seattle Chamber of Commerce, the Washington Roundtable, and several insurance industry groups, and served on the boards of a number of Northwest corporations.

Maines' survivors include his wife, two daughters and four grandchildren.

Lady Willie Forbus

Lady Willie Forbus, 100, died April 27, 1993 in Seattle. A member of the Washington State Bar since 1919, she was the only woman lawyer in Seattle her first ten years in practice.

Forbus was a graduate of the University of Michigan School of Law. Active in Washington politics, she served in the Washington State Senate in the 1940s. She remained in practice well into her nineties, and was featured in the Washington State Bar Association's centennial video history of the bar in 1989. She was a figure of veneration among the state's women lawyers for her pioneering role in the profession.

J.M.B. Crawford

J.M.B. Crawford, 58, died April 18, 1993 in Tacoma. A 1983 graduate of the University of Puget Sound School of Law, Crawford held a number of other degrees, including a doctorate in philosophy from the University of St. Andrews in Scotland. Friends said he combined his two main interests, law and philosophy, in his practice, and in a recently published book on intent in the law.

Crawford was an unsuccessful candidate for the Pierce County Superior Court bench in 1988 and 1992. Survivors include his mother and two sons.

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R. Max Etter, Sr.

R. Max Etter, Sr., 82, died in Spokane in January. Born in Redfield, South Dakota, Etter was raised in Medicine Hat, Alberta, and moved to Seattle when he was sixteen. A distinguished high school athletic record won Etter a scholarship to Gonzaga University; he graduated from the undergraduate school in 1934 and the law school in 1936.

Admitted to the bar in 1937, Etter served as a deputy prosecuting attorney and assistant state attorney general. His practice was interrupted by World War II, in which he served with the Navy in the South Pacific.

Etter also served as an assistant U.S. attorney for the Eastern District of Washington before entering private practice. He quickly became known as an exceptional attorney, and he handled numerous precedent-setting cases in both the civil and criminal fields. He appeared before the state and federal supreme courts, and before the Ninth Circuit Court of Appeals more than 30 times.

Active in a variety of organizations, Etter chaired the Washington State Committee on Civil Rights and was a member of the board of the Washington State Trial Lawyers Association. He was a member of the American, Washington State and Spokane County bar associations, the Association of American Trial Lawyers, and the National Association of Criminal Defense Lawyers; he was a fellow of the International Academy of Trial Lawyers. For his contributions to the law and his state, Etter was a recipient of the Award of Merit, the highest honor of the Washington State Bar Association. Gonzaga University granted him its Alumni Merit Award in 1965.

Survivors include six children, fourteen grandchildren, two great-grandchildren, and one sister.

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June 1, 1993

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WILL SEARCH

Jennie Havirco. Anyone having a copy or knowledge of a will of Jennie Havirco, please contact LuAnne Perry, (206) 689-5650.

Ilse (Rodegg) Menzel. O'Shea, Barnard, Martin & Hendrickson, 10900 N.E. 4th Street, Suite 1500, Bellevue, WA 98004, (206) 454-4800, is trying to locate the last will and testament of Ilse Menzel, a.k.a. Ilse Rodegg Menzel, who passed away on April 3, 1993. Please contact Kristin Olson at the address or telephone number listed above.

SERVICES

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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.

Urology forensic consultant: Experienced, boards, professor, M.D., J.D., plaintiff or defense. (314) 361-7780.

Legal search consultant: Gordon Kamisar, Esq. A Washington attorney placing and recruiting attorneys throughout Washington and nationwide. Member, Washington State Bar. Call (206) 392-1969 in strict confidence.

Expert witness: economist. Loss valuation, critical analysis and expert testimony in injury, death and environmental damage cases. Professor of economics since 1976. Dr. Allen Scafuri, (206) 842-8043.

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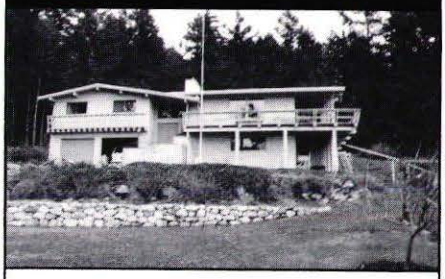

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