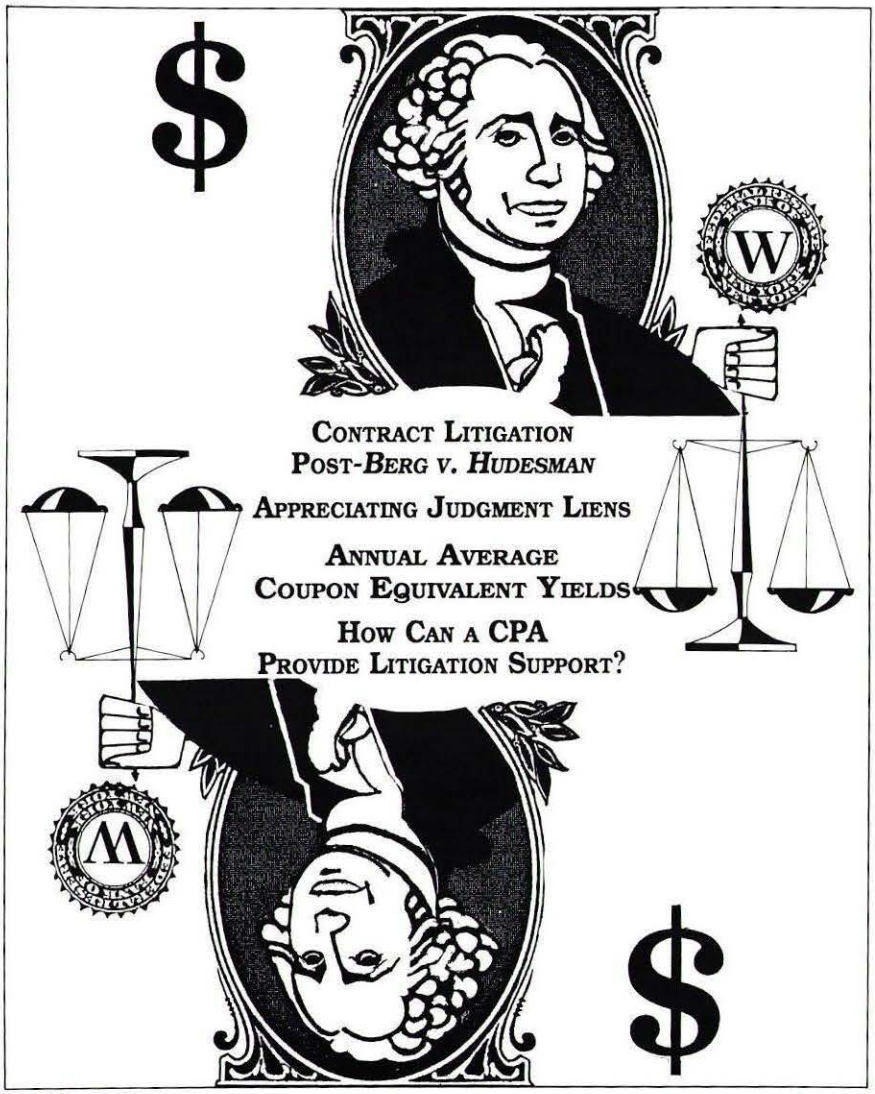
Washington State Bar News
Vol. 48, No. 6, June 1994

ANNUAL FINANCIAL ISSUE



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FEATURES

Annual Financial Issue

WSBA REPORTS: THE TASK FORCE ON GOVERNANCE

VOLUNTEER LEGAL-SERVICE EVENTS

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Jack in June: it's in the cards, a word play on the financial theme by *Bar News* managing editor Jennifer Klamm, who also adapted the Japanese classical art on the May 1994 cover.

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DEPARTMENTS

Readers are invited to submit letters of reasonable length to the editor. They should be typed on letterhead and signed. The editor reserves the right to select excerpts for publication or edit them as may be appropriate.

No, I *haven't* moved to Hawaii for six months, or at all . . .

Editor:

Your January issue contained an article by a Jeffrey Jones (obviously a pseudonym), describing an arrangement he had achieved in his practice which allowed him to spend six months in Hawaii and six months at home minding the office. Because I typically don't get around to reading the *Bar News* until it has occupied a space on my desk for at least a few weeks, I was not yet aware of the article when I started getting calls from friends in the Bar to see if I was back from Hawaii.

The first call I got was from the Roach brothers, who practice law together in Pasco. They were calling to make sure I was not the author of the article, as they couldn't tolerate the thought of my basking in the sun while they were slaving away in the Tri-Cities. This call was followed by innumerable calls from friends and comments from opposing counsel, all telling me how happy they were about my new arrangement. Initially I couldn't believe that a close friend, whom I may have seen within the week, actually believed I had decided to pack up my family and move to Hawaii. However, it soon became clear that my constant whining about what the practice of law has become, had, over the years, convinced even my closest friends that I was capable of packing it in. The fact that I had recently changed firms, moving my practice to Seattle, probably also contributed to the problem.

After receiving 30 or 40 calls the first month, along with various humorous faxes inquiring if my new partners were aware of my arrangement, my friend Steve Hayne suggested that perhaps, in the interest of my ever receiving another referral from a fellow member of the Bar, I should write to you to dispel the apparently widespread belief that it was I who was walking the beaches of Maui. However, I remained certain that most of those who knew me well would not seriously consider that I had authored this article.

It has now been several months. I do not know what prompted me to write this letter now. Perhaps it is the fact that my mother called me at work to ask why I hadn't told her I was moving to Hawaii. Or it could be the opposing counsel who suggested last week that the real reason I needed a continuance of my trial was that my six months in Hawaii was coming up. Or maybe it's just that I have noticed in the Bar directory that there is no other Jeff Jones listed as a member, and I am now concerned that this guy may be charging mai-tais in my name. In any event, to paraphrase Mark Twain, the rumors of my semi-retirement have been greatly exaggerated. And to that attorney who, but for my Hawaii address, was poised to send me that $10,000,000 case, I am (unfortunately) still practicing law *full time*. For those who feel that I ought to have six months off in Hawaii, contribu-

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(Editor's note: The author of the article—the lucky Jeff Jones—is a member of the British Columbia Bar).

More on Pacific Practice

Editor:

Like Mr. Parsons ("Do They Have Laws in the South Pacific?" *Bar News*, February 1994), I, too, was an assistant attorney general working for the Commonwealth of the Northern Marianas Islands. I left prior to Mr. Parsons' arrival. I wish to provide another perspective regarding working as a lawyer in the CNMI.

First, to correct a misstatement of fact, the CNMI is not in the South Pacific, it is in the western Pacific. The largest island of the Northern Marianas Islands, Saipan, is about 13 degrees north of the Equator, three hours by plane from Japan and the Philippines.

Second, and more important, I was surprised by the tone of Mr. Parsons' article, and implications regarding the lawyers in the AG's office. He wrote with broad, sweeping generalities to describe the lawyers, implying they were lazy and would decide whether to appeal a case based on matters other than the substance of the issues. My experience as an assistant attorney general was quite different.

For background, and to provide some perspective, the CNMI negotiated a commonwealth status with the United States, the terms of which are contained in a unique covenant agreement. No other political entity has the same relationship with the U.S. Thus, there are few places as small as the CNMI that must deal with the same complex issues. In some ways the CNMI is like an independent nation with its own immigration and customs laws, as well as international-relations concerns. It is like a city, county or state because it must also deal with schools, infrastructure, waste disposal, licensing professionals, alcohol distribution and the like. All of these issues were in the context of (1) a society changing at an alarming rate as western values clashed with the traditional island culture; and (2) staggeringly rapid growth fed by the Japanese bubble economy.

The attorneys general under whom I worked, as well as the majority of the lawyers in the office (there were exceptions, as there are in any law office), were hard-working, dedicated individuals, albeit looking for an alternative to the 12-hour days of private practice. We all worked diligently to find the answers to the complex and unusual legal problems resulting from the CNMI's distinctive political existence and its unique relationship with the U.S. While I may not have always agreed with the legal positions that the office pursued, I did not witness attorneys pursuing a legal course of action to "obtain frequent-flier miles." The lawyers with whom I worked in the Solicitor and Civil divisions approached their work with dedication, integrity, and within their ethical obligations as officers of the court.

I realized while at the AG's office that a lawyer can be a good lawyer and practice good law anywhere. The range of legal issues I addressed was enormous, and sometimes overwhelming for a young lawyer, but they were never boring, and was never-ending. I was challenged both professionally and personally, since we lived on Saipan without our families and friends as a support group. We developed new support groups and new ways to cope. I learned about myself as a professional, as an individual, and as a member of a family and community.

I am now employed as an attorney with the Department of Justice on Guam. I miss my panoramic view of Saipan's breathtaking lagoon from my house every day, and I miss the sunsets every evening, too beautiful to be real.

In response to the question raised on the cover of the *Bar News*: "Are There Laws in the South Pacific?" Yes, there are laws in the Northern Marianas Islands. While there is certainly some disagreement regarding what those laws should be, there are many dedicated professionals who have worked, and are working, with the CNMI to assist its officials as they struggle with these issues.

GAIL B. GEIGER
Agana, Guam

Revising the Top Ten List

Editor:

Dennis Harwick has written a very interesting and important report about the ten most common disciplinary complaints against Washington lawyers (*Bar News*, April 1994, page 17). However, one answer in particular bothered me as a plaintiff's trial lawyer.

Mr. Harwick says that if it takes longer than a week to ten days for the money to be disbursed to the client following a settlement the client "should consider filing a grievance," as the WSBA considers this a serious issue. That answer is not realistic in many major cases and is not advice that a client should be given by the Bar Association.

In fact, it generally takes a minimum of two weeks, and frequently even longer, before disbursement can be made in many major cases. After deposit of the funds most, if not all, plaintiffs' attorneys will contact all expert witnesses, healthcare providers and possible client subrogation or lien holders to obtain written verification of amounts due them when the case is concluded.

There are often many people who have to be contacted to obtain verification. It may be necessary to negotiate with some subrogation claimants to fully represent the clients' interests. This important procedure should be done with care, and it takes time. Our clients' money is deposited in an interest-bearing trust account and they are fully advised as to the process. I, therefore, don't think it's appropriate for the Bar Association to advise clients to consider filing a grievance if disbursement doesn't take place in only a week to ten days. That's just not consistent with the real world of legal practice.

PAUL N. LUVERA
Mount Vernon

Dennis Harwick replies:

The problem with generic answers is

that they must assume "facts not in evidence." I have no quarrel with Mr. Luvera's thoughtful letter. What distinguishes Mr. Luvera's situation from the common thread in "The WSBA's Generic Answer to Each of the Ten Most Common Disciplinary Complaints" is that Mr. Luvera is communicating specific reasons for the delay in disbursing settlement funds.

Our generic answer would have been much improved if we had said, "This [check clearing] usually takes a week to ten days. If you have waited longer than that, *and haven't been provided a satisfactory answer on why it is taking longer*, you should consider filing a grievance."

Voir Dire: Every Lawyer His Own Game Show Host?

Editor:

In "Struck Jury Voir Dire—A Case Study," Whatcom County Superior Court Judge David A. Nichols says struck voir dire should be used to "educate the jurors on the significant issues upon which the case will turn." To illustrate how to do this, he then presents excerpts from a struck voir dire conducted by attorney Jon Komorowski. Mr. Komorowski's significant issues included, for example, whether a parent can perceive his child's emotions when others cannot, and whether our biases affect our credibility judgments. If it is possible to begin to sell one's case (my translation of "educate the jurors") during voir dire, Mr. Komorowski does, indeed, show how to do it smoothly.

But is it possible? I doubt it. If it is not possible, then the way most lawyers conduct voir dire, either under the struck format or the traditional serial format, needs to change. Most lawyers spend more time in voir dire giving information than getting it. A lawyer does not ask, "Would you refuse to believe a witness just because he had a robbery conviction?" to probe for bias; the lawyer asks it to insinuate that one *should* not reject testimony for such a reason.

Every venireperson has spent at least 18 years developing a way of viewing the world and a set of attitudes about it. Those attitudes can change in response to experience, but a few hours of "educational" voir dire will not change them. With the encouragement of a lawyer and another member or two of the panel, a venireperson may say in voir dire—and think he means—that a parent can read his child's emotions better than others can. In deliberations, though, this may turn out to be little but polite conversation, which bears no relationship to how the person weighs credibility and makes decisions.

The best use of voir dire is the official one: to identify for challenge venirepersons whose attitudes bias them against one's case. Judge Nichols seems to recommend educating instead, because he believes one cannot ferret out bias, except in "egregious types." Indeed, one cannot often find bias merely by asking for it, but one can find it, and not just the extreme cases. For example, deep racial prejudice may show up best in the speed and certainty with which a venireperson denies having any; in contemporary America, the people most sensitive to the

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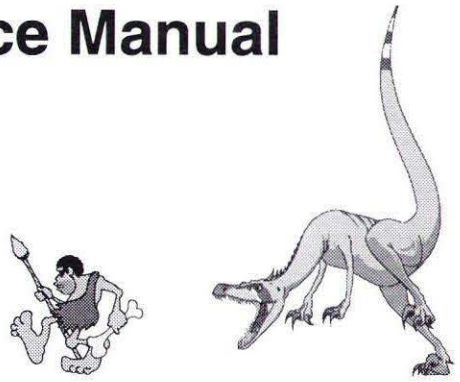

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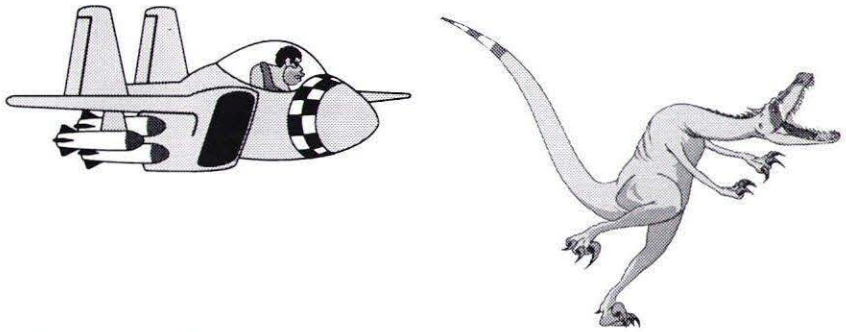

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problem of racial prejudice have thought about it enough to realize that they, too, have at least a little of it.

The best indication of one's attitudes, of how she makes decisions, usually does not come in response to questions about attitudes. It comes in response to questions about experiences, or, better yet, about decisions the person made in reaction to experiences. Knowing what problems had befallen a venireperson in rearing her children would have meant something to Mr. Komorowski, but knowing how the person handled those problems would have meant even more.

The popularity of the struck system, I fear, has nothing to do with its merit, compared to serial voir dire, in choosing an unbiased jury. Judges and venirepersons like it because it is shorter and more interesting. Lawyers like it because it gives us the closest thing we will ever get to filling in for Phil Donahue or David Letterman.

The struck format does improve voir dire by putting the panel more at ease. On the other hand, it lets the most gregarious venirepersons dominate (even when they have drawn positions in the panel that almost exclude the possibility of their sitting on the jury), and it curtails voir dire time per venireperson, at least compared to prior practice in most courtrooms.

Struck voir dire will likely stay with us for awhile, so we must learn to make the most of it. In doing so, let's avoid the trap of thinking that we are winning the "predeliberations" when we should, instead, be learning just who these people are who may soon hold our clients' fates.

DAVID S. MARSHALL
Seattle

Professionalism: We Can Do More

The following letter was addressed to the WSBA Board of Governors and to this Department:

Editor:

I write as March 1994, designated as "Professionalism Month," draws to a close. I think progress is starting to be made in increasing the level of civility with which we treat out fellow practitioners. This letter concerns the question of what we are to do with those lawyers who will not be touched by the type of appeals generated by this month and other efforts in the past. Specifically, how is our profession to deal with situations where lawyers act in conscious disregard of peer pressure, and where discovery sanctions are viewed merely as a cost of doing business?

I am talking about those attorneys, and even entire firms, that consciously seek a reputation for hardball tactics, professionalism be damned. Discovery sanctions are well worth the price when a reputation for abusive tactics is rewarded by a flood of business from the insurance industry. What measures can be taken that can outweigh the lure of more money from increased business? I suggest that the only action that will suffice, for those lawyers ignoring the pleas made by the majority of their colleagues, is to take action against their lawyer licenses.

The state Supreme Court has spoken: discovery abuse *is* an ethical violation. *Washington Physicians Exchange v. Fisons*, 122 Wn.2d 299 (1993). But the penalty imposed by the *Fisons* court was

not enough. The fine mediated by the opposing parties was likely only a fraction of the attorney fees made by counsel for the offending party, to say nothing of the intangible benefits accruing from engaging in hardball discovery behavior. No amount of fine is large enough to stop those who deliberately engage in these types of abuse. But under the present distribution of functions, all courts can do is levy fines for the most part. The Bar needs to do more.

It is my understanding that the Bar allocates more of its scarce resources for investigation and discipline stemming from complaints against attorneys than from other lawyers. I ask that more resources be earmarked to act upon complaints about lawyers from their colleagues. If increased funds from the membership are needed to balance the present lopsided approach to these priorities, then so be it. Either this profession taxes itself more heavily to police its own now, or we can almost guarantee yet larger levels of some form of levy from Olympia later.

The public has a legitimate complaint about the behavior of lawyers. Unless we clean our own house it is only a matter of time before we are regulated by the Legislature.

JOHN W. MERRIAM
Seattle

We're Calling It a Dead Heat After the First Two Rounds

Editor:

I am now in receipt of a copy of Mr. Hodgkin's latest submission to the *Bar News* (Letters, May, 1994): a lesson in semantics if there ever was one.

With regard to his gender defense, one can only say, "He just doesn't get it." And, not to confuse him with the facts, but the Governance Task Force was appointed by President Stritmatter, not by the Board of Governors. The continuance of the Task Force in the face of the member survey results is in response to a vocal contingent clamoring for change, like Mr. Hodgkin.

As for his equation of one-week jury duty and three-year service on the Board of Governors, I note when our founding fathers guaranteed the right to trial by jury, they didn't also suggest that Congress and the presidency be selected in the same fashion. In their wisdom, they probably had a reason. Maybe they thought the functions were somewhat different?

Have a nice day.

JAN ERIC PETERSON
Seattle

The Collective Bargaining Controversy Fosters Good Reporting

Editor:

I just finished reading "The Board's Work" in the April *Bar News* and wanted to drop you a note to express my sincere appreciation for your good work. I routinely read your column, and recognize your attempt to report not only the facts concerning the Board of Governors' meetings, but also the "flavor" of the discussions. You also appear to be giving sincere effort to provide balance in the reporting of the Board's work.

Thank you for your contribution to keeping Bar members in touch with the leadership of the Bar.

MICHAEL A. WINSLOW
Mount Vernon

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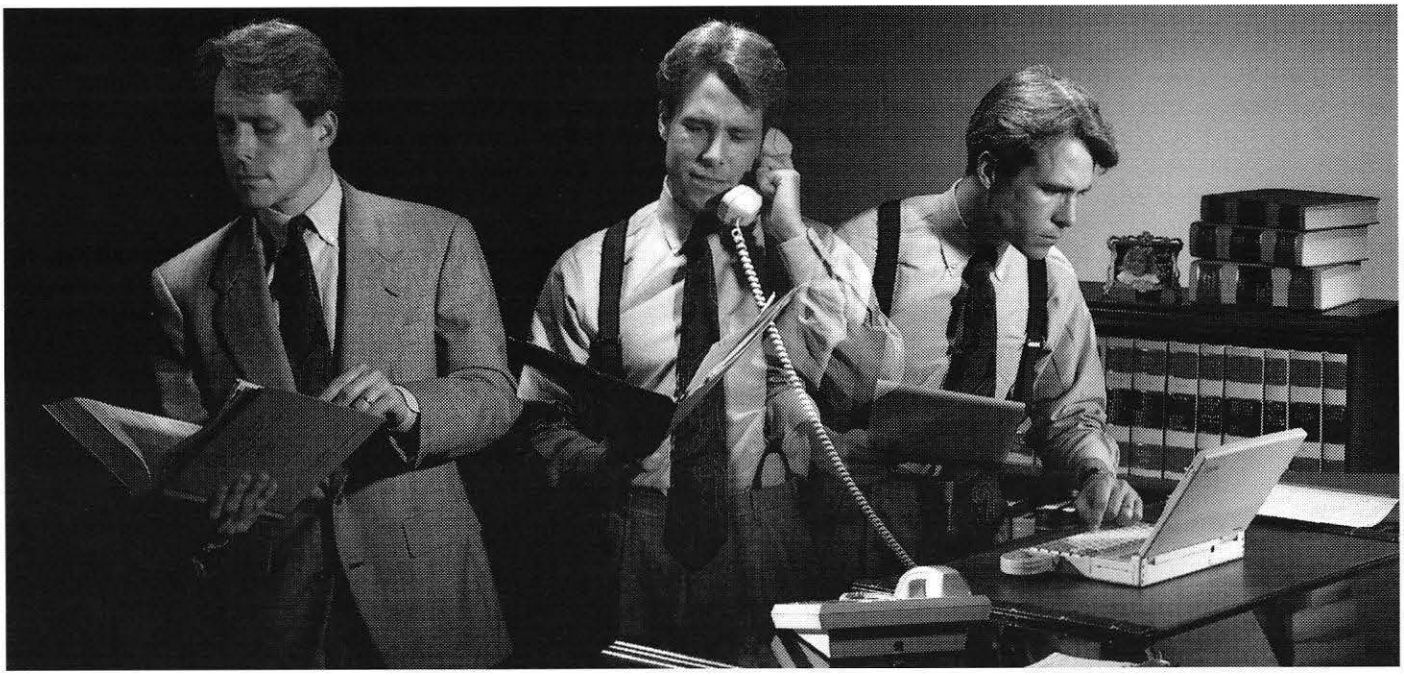

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Editor:

Thank you very much for the long and informative report in the April 1994 *Bar News* about the unionization issue facing the Board of Governors ("The Board's Work, April, pages 31-39). I am also grateful for President Paul Stritmatter's thoughtful column about various facets of the issue. The road to hell is paved with good intentions, and you did a commendable job of telling us some of the things we can hear and see on the way. Before it is over, we will all learn if the right to collectivize is just as fundamental as the right to be, or not to be, pregnant. When Mr. Harwick moves on to other things, I hope he will take up the problem of getting public school teachers to give a year's work for a year's pay. I know he will understand the equity of doing that and am confident that he is courageous and reckless enough to see it through to the end.

WILLIAM G. SIMMONS
Seattle

More on Gun Control

Editor:

I, too, read with dismay Jack Richey's article "The Right to Bear Arms," the fictional account of a father who killed his own son with the "family" handgun (*Bar News*, February 1994). However, I read with more interest the responses from our colleagues in the April B*ar News* that followed.

I am certainly no authority on the subject, but have read and listened to enough informed sources to know that the Second Amendment has been grossly distorted in the last twenty years. There is simply no disputing that where guns are, innocent people die or get seriously hurt. It is simply the law of mathematics. I have not heard of drive-by knifings or drive-by rock-throwings as a chosen method of assault. The more guns that there are in the general population, the greater is the likelihood of the migration of the same into the criminal segment. Greater, too, is the likelihood of accidental death or unintended injury due to momentary insanity or loss of control of someone in the home. In the main, guns have one purpose: to kill.

I would never advocate the removal of the standard rifle or shotgun for the legitimate hunting of birds, deer and the like. Why can't a target handgun be left at the target range in a locker? No other country suffers from the insanely escalating violence the Second Amendment has wrought. With all due respect to Bob Raymond and his explanation of all the rules of handling a firearm for defense purposes ("Letters," *Bar News*, April 1994, page 9), he misses a simple fact. Absent police or military-level training on a frequent and regular basis over many years, the average person taking an NRA gun-handling safety course and even brushing up once in a while is never going to be able to exercise the checklist of "dos" and "don'ts" he outlines. By encouraging individuals to think they can own a gun without consequences and that an NRA course imparts the average non-combat citizen knowledge and experience sufficient to handle a confrontational emergency with the calm and deliberation of a gold-shield detective, is

both uninformed and unrealistic. This is so, notwithstanding the rare citizen (i.e., the Seattle North End pharmacist who was recently celebrated for shooting would-be assailants who threatened her and her elderly mother while stealing drugs) who may actually pull off a shooting in self-defense.

Unfortunately, the average NRA-trained homeowner will shoot in the dark at an unknown silhouette and will even shoot at the fleeing burglar carrying his or her television set. In this day and age, where we see all too many would-be Rambos killing people for stealing a pack of cigarettes, we need to turn away from *self*-defense and toward *community* defense through disarmament and de-escalation. Sadly, many of us rue the fact that this is not the Wild West. Let's face it, all of us breathed much more easily when START, SALT, and other nuclear disarmament treaties progressed internationally. Let's turn from the insanity of escalating gun violence to the sanity of citizen disarmament.

MARC L. SILVERMAN
Bellevue

Editor:

I never did read Commissioner Richey's story, "The Right to Bear Arms," published in the February *Bar News*. I did, however, read the letters his story provoked in response in the April issue. Royce Ferguson's letter is typical of the lack of forethought that goes into many NRA zealots' advocacy of maintaining our constitutional guaranty to bear arms.

I am sorry, Mr. Ferguson, but the chance that one of your gun-wielding clients might put her weapon to what currently passes for socially acceptable use, such as blowing away an intruder, is simply not the kind of argument that, for me at least, passes muster as we move into the 21st century. I won't bother throwing statistics about the percentages of those who actually use their handguns in defense of their person or another, versus the percentage of drive-by shootings by teenagers and accidental shootings of toddlers by siblings, at you. They wouldn't mean much, would they? Hey, it's a tragedy, but maybe they should all take a friendly NRA course in how to break down, clean, load and polish their weapons of choice.

Handguns have absolutely no place in modern-day society. There is no excuse to own a handgun today which ameliorates the destruction that ownership has caused and will cause in the future. Handguns have one purpose: to kill human beings. Handguns are convenient because they can be easily hidden on the owner's person. With a handgun, one can kill on a moment's thought. Answer me honestly—isn't there one time in your life when you were angry enough to kill someone if the means was in your power, even for a second? That is what the handgun gives you—the ability to kill with a thought. Please, all of you NRA lovers, don't give me any more about the Second Amendment or the right to defend oneself. A shotgun will do a much better job of defending you and your family than a handgun. Better yet, why don't you get a big old dog with a mean streak?

Finally, Mr. Ferguson, as you advised Mrs. Palmer, if someone wants you dead and is willing to go to any length to see it happen, you will die. Accept it, and move on. It has been a cost of life since our ancestors walked on all fours. What would Mrs. Palmer have done with a handgun? Maybe a bullet-proof vest would have helped. Maybe leaving the state would have helped. You advocate fighting fire with fire. I recommend you try a hose.

DANIEL C. GALLAGHER
Seattle

Editor:

I read with interest the firestorm of response generated by Commissioner Richey's piece in the *Bar News*. For those unable to attend the World Peace Through Law Section's lunch-hour CLE on gun violence February 28, I'd like to share some of what we learned.

In 1990 there were 10,567 handgun homicides in the United States. This compares with 10 in Australia, 68 in Canada, 22 in Great Britain, 13 in Sweden, 87 in Japan and 91 in Switzerland. Of the world's industrialized countries, the U.S. ranks last in this regard, and the numbers reveal we are in a class of our own. In 1992, Washington suffered 118 handgun homicides. These numbers are rising in Washington and the United States as a whole.

Fifteen young people are killed daily by handguns. Firearms are the leading cause of death of African-American males aged 15-24 and the second leading cause of death of all males aged 15-24.

We test and license car drivers. The primary purpose of cars is transportation. We do not test handgun owners even though the primary purpose of handguns is bodily violence. In the last two years, more than 60,000 Americans died from gunshots—more than died in the entire Vietnam War.

According to Washington Ceasefire, we incur more than $1 billion in direct medical costs from firearm injuries, and 85 percent of those costs are paid with public funds. The costs of gunplay are also reflected in additional police, court and prison costs.

A *Bar News* letter writer indicated that guns are valuable for home defense. While some homeowners may have successfully prevented harm to person or property, a recent Washington State medical study showed that a gun in your home is 43 times more likely to be used to kill you, your relatives or your friends than an intruder.

Other letter writers indicated that the Second Amendment to the U.S. Constitution offers a right to individual gun ownership. The law does not support this supposition. "A well regulated militia being necessary to the security of a free state, the right of the people to keep & bear arms shall not be infringed." Second Amendment, U.S. Constitution. The militia of 1776 has evolved into the National Guard. The United States may not deactivate or disarm the National Guards of the various states. It is also contemplated that militias will be "well regulated."

In 1875, the U.S. Supreme Court, in *U.S. v. Cruikshank*, held that the Second Amendment protects states' rights from the federal government, *not* individual rights from the states. This holding was affirmed by the Supreme Court in *Presser v. Illinois*, 1886).

The National Firearms Act restricted certain types of guns, including sawed-off shotguns. In *U.S. v. Miller*, 379 U.S. 1939, the Supreme Court ruled that because the possession or use of the weapon had no "responsible relationship to the preservation or efficiency of a well-regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument." The court said that the obvious purpose of the Second Amendment was to assure the continuation of such forces (militias or national guards).

These legislative restrictions on the use of firearms are neither based upon constitutionally suspect criteria, nor do they trench upon any constitutionally protected liberties...." The Second Amendment guarantees no right to keep and bear a firearm that does not have "some reasonable relationship to the preservation or efficiency of a well-regulated militia." *Lewis v. U.S.*, U.S. Supreme Court, 1980.

The Sixth Circuit Court of Appeals held that the Second Amendment did not give individuals the right to possess a firearm in *Stevens v. U.S.* (1971). This was reaffirmed by the Sixth Circuit in *U.S. v. Warin* in 1976. In *U.S. v. Johnson* (1974), the Fourth Circuit held that the Second Amendment confers only the collective right of a militia to bear arms. This has been the unanimous view of federal courts for 200 years.

The Second Amendment was simply not framed with individual rights in mind. *Burton v. Sills*, New Jersey Supreme Court, 1969. There is no doubt that state or federal governments have the authority to restrict or ban firearms, provided that such restrictions do not threaten the operation of the National Guard.

The wisdom of firearm restrictions can be debated. A significant reduction in homicides by firearms can certainly be achieved. Holding criminals accountable is one important aspect among many possible incremental steps. Criminal or civil accountability, however, is of little benefit to deceased victims.

Medical professionals have likened firearm violence to an epidemic. Epidemics require a knowledge of what causes the disease, how to treat it, how the epidemic spreads and how to stop that spread. A scientific approach is likely to be effective in the treatment of gun violence. No simple or singular answer is apt to be discovered. Firearms are a vector of violence, like the rats that carried the plague. Controlling the plague included vector control as well as treatment of the disease itself. So far, humankind has achieved only limited success in controlling individuals. A plan which relies solely on controlling people is, from a historical perspective, unlikely to succeed. A plan which addresses all aspects of the dynamics is more likely to achieve greater success.

The World Peace Through Law Section has monthly meetings featuring speakers addressing a wide variety of topics, all of them interesting. A CLE credit may be had for each meeting attended. They take place in the fifth floor conference room of the Bank of California Tower in Seattle on the fourth Monday of each month. You need not be a Section member to participate; you need not agree with the speakers to be welcomed.

JAMES R. HARDMAN
Chair, World Peace Through Law Section
Seattle

Editor:

I am compelled to write you concerning an article appearing in the February 1994 *Bar News*, titled, "The Right to Bear Arms," this being a fairy tale by Jack Richey, Commissioner of King County Superior Court.

I do not believe that I have ever read a more fatuous and emotion-filled, but lacking-common-sense, article.

It appears to be a story and, therefore I would assume, not a factual situation. We all know that guns do not kill people, but people kill people, whether the device used is a gun, a baseball bat or a knife. The article depicts a so-called factual situation which is ludicrous. Anyone who owns a handgun should know how to use it and how to approach an uninvited visitor during the night hours. One does not go blindly into a dark room, see an object and pull a trigger. Common sense indicates anyone looking for an intruder should have a flashlight which is held, not in line with the body, but to the side of the body at full arm's length so that the body will not be a target if the intruder is armed and decides to fire at the source of light. In addition, any child of any family who invades the family premises at night without informing the occupants or openly coming in the front door is not only a fool but is also risking his life.

It is such emotion-filled stories as these that unfairly prejudice those who have hand weapons and their right to keep and bear arms. Apparently, the author is against the right of U.S. citizens to keep and bear arms and illustrates a so-called belief against that right, by writing such a ludicrous and really stupid story.

It is a well-known fact that when the citizenry is deprived of its right to keep and bear arms, the only ones who will have arms are the criminals who obtain them from any source, but certainly not from the stores that sell them. If Commissioner Richey's desire is to have all weapons banned, then we are at the mercy of the criminals and at the mercy of a tyrannous state.

I really do not think that the *Bar News* should publish a tale such as this one, because it just does not make any common sense and is obviously done only to influence people through emotion who do not think rationally with reference to the right to keep and bear arms.

FRED E. WOEPPEL
Spokane

U.K. Solicitor Seeks Local Contact

Editor:

I am writing to enquire whether this firm can be of mutual assistance in working with and for attorneys in Washington. We are a general practice undertaking company law, commercial law, entertainment law, landlord & tenant, personal-injury work, matrimonial law, litigation and debt collection.

We already use the services of an attorney in Oklahoma and would very much like to develop a working association with a firm of attorneys in Washington.

I myself was a former Barrister of the English Bar and transferred professions to becoming a Solicitor in 1989.

I look forward to hearing favorably from you.

VALERIE A. BARKER
Barker & Co., Solicitors
Regents House
235/241 Regent Street
London W1R 7AG

Farewell, My Friends

Editor:

After 40 years of WSBA membership, always as an attorney in private practice, and never with my nose in the public trough, it is with deep misgiving that I have concluded I must hang it up.

I am very proud of the high quality of service rendered to thousands of clients over that span, and always at reasonable fees. I became a lawyer to help people, and I believe I accomplished that goal.

My decision to resign is not entirely voluntary, as I feel I still have a lot of good years left in me, but a total laryngectomy last fall left me mute, and what is a trial lawyer to do when he cannot speak?

I gave all of the State Bar, and particularly the legislative committee, all of my skills, and loved it!

If ever there is a question as to the legal services rendered to my clients, I want to know! And I know that all will say— A-ONE!

Thanks for the memories!

BARRETT J. WHITE
Olympia

What a Difference a Day Makes . . . .

Volunteer Attorney Legal Services Action Plan Conference

Invited by Chief Justice James Andersen to a work-filled day, they gathered at a SeaTac hotel—attorneys, managing partners, judges, law school deans, legal-service providers, WSBA adminstrators and staff, the attorney general and staff—to improve the future of volunteer attorney legal services for Washington state. The WSBA Legal Aid Committee's one-year and long-range action plans will be presented at a future WSBA Board of Governors meeting.

*Top L to R: Judge **William Dwyer**; WSTLA president **Judith Proller**; attorney **Nina Mendelson**, who received the WYLD 1994 Pro Bono Award.*

*Bottom L to R: attorneys **Patrick Monasmith** and **Yvette War Bonnet**; WSBA president **Paul Stritmatter.***

photos by Jo Rosner

What Have You Discovered About Discovery Recently?

Paul L. Stritmatter

by **Paul L. Stritmatter**
WSBA President

While computers may be the biggest change in the practice of law over the last ten years, the evolving face of discovery has also brought significant change affecting the legal profession and our clients. Discovery disputes seem to monopolize the motion calendar more than ever before. Local rules to deal with discovery disputes are popping up everywhere. Interrogatories and depositions are getting longer and longer. The cost of legal services is constantly driven by greater discovery expense. Some suggest that the state of legal discovery has reached a crisis.

When I began the practice of law, although the rules were in place for discovery generally as they exist today, little discovery was actually done. Interrogatories were the exception rather than the rule; depositions were limited. There were no independent court reporters in Grays Harbor County, and we generally conducted our depositions on Saturdays, using the full-time reporters who worked for the court. Discovery was generally an informal process, but there were drawbacks.

Our system of justice is meant to operate in a manner to discover the truth. Discovery rules were first adopted in order to provide a format that would allow both sides to discover the evidence of the opponent and thus be prepared to properly challenge claims to assure that the truth was developed. It was also a method to allow a full discovery of the facts in order to facilitate settlement. Discovery today, however, has taken on a life of its own.

We have all been involved in cases which have resulted in claims of discovery abuse. We have all seen discovery taken to an extreme that has significantly added to the cost of litigation. Abusive tactics during depositions have necessitated, unfortunately, the implementation of rules that mandate common courtesy and adherence to the rule of law.

The most significant recent development, which will, without doubt, have far-reaching consequences, is the new set of federal rules regarding discovery. They will change the way civil law is practiced in the federal courts where the rules are implemented. As I write this column, the federal district courts of Washington have imposed a moratorium on these new rules. Various sections of the Bar Association have been asked to comment before a final decision is made on whether or not to implement them in the state of Washington. It has been suggested that these rules should not be implemented until a decision has been made regarding whether to make similar changes to our state court rules. This would assure uniformity between the state and federal systems.

The linchpin of the new federal rules is the requirement that there be an initial disclosure by each party, without awaiting a discovery request, of all persons likely to have discoverable information relevant to the disputed facts alleged, with particularity in the pleadings; a copy or description of all documents that are relevant to disputed facts alleged, with particularity in the pleadings; a computation of damage claims with supporting documentation; and insurance policies available for inspection. In addition, at least 90 days before trial, all experts must be identified and must provide written reports which contain a complete statement of all opinions to be expressed, data or information considered by the experts in forming them, exhibits to be used to support them, the qualifications of the experts, the compensation paid to the experts and a list of cases in which the experts have testified at trial or deposition in the last four years. At least 30 days before trial, each party must present a list of every witness the party expects to call and a list of all documents or other exhibits the party intends to offer. The new rules also require the attorneys to meet and prepare a written discovery plan very early in the case.

As these proposed rule changes wound their way through various committees, commissions, the United States Supreme Court and Congress, considerable opposition was voiced. The new rules have, however, gone into effect with the proviso that individual courts can suspend their application. Currently, 32 of the 94 federal district courts have fully implemented the new rules. Thirty-one others have done so in part. Twenty-three courts have opted out of the new rules. The state of Arizona has had similar rules for medical-negligence cases for four years and for all civil litigation in place for two years. Many are asking that we await a review of the Arizona experience or the experience in the 32 federal district courts. Others believe that these new rules should be implemented immediately.

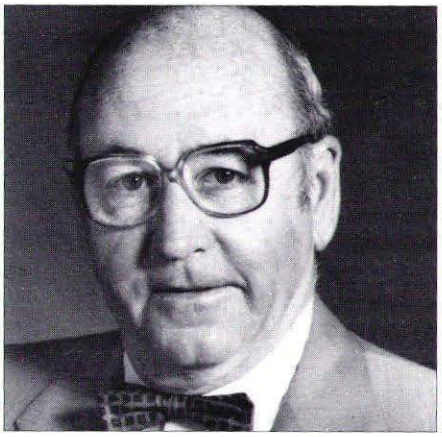
The recent decision in *Washington State Physicians Insurance Exchange and Association v. Fisons Corp*, 122 Wn.2d 299 (1993), demonstrates that the Washington Supreme Court will not countenance

the discovery abuses which existed in the past. The Court has urged the trial courts to impose sanctions when such abuses occur. The opinion sends a strong message to all of us that improper discovery practices of the past will no longer be tolerated.

Liberal discovery is necessary now, and it will always be necessary in order for the facts to be developed and the truth to be assured in all cases. Different methods of securing the information are becoming essential to eliminating the former abuses, diminishing the amount of time involved and reducing the costs to our clients from the discovery process.

At a recent professionalism seminar, much of the discussion by the speakers dealt with professionalism in the discovery arena. Implementation of automatic-disclosure rules will require a high degree of professionalism and, potentially, new rules to assure that everyone understands what the legal obligations are. Seminar participants expressed the strong opinion that changes need to be made in our discovery rules. In an effort to capture that impetus, judges Sharon Armstrong and Robert Alsdorf of the King County Superior Court bench called for a meeting between representatives of the Washington State Bar, Washington State Trial Lawyers and the Washington Defense Trial Lawyers associations. That meeting has resulted in a joint committee being established by WSTLA and WDTL to look at discovery rules and make suggestions for improvement to the current ones. Ultimately, any suggestions will come to the WSBA Rules Committee for study and potential recommendation to the Supreme Court.

We need to carefully consider new methods of discovery consistent with both our professional obligations to our clients and our concern for reducing the costs of litigation. We need to develop a different course, which will assure that justice is provided to litigants in resolving their disputes as inexpensively as possible. We may well find, after some experience under the newly adopted federal rules, that automatic disclosures and standard interrogatories will be significant answers to the discovery problem. Whatever the solution, it is important that we begin a serious investigation of how we can improve this area of our practice of law.



***Jack R. Dean**, WSBA President, 1987-1988*

JACK R. DEAN CENTER FOR LEGAL SERVICES OPENS MAY 6

With more than 200 members of the local legal community, House Speaker Thomas S. Foley celebrated the dedication of Spokane's new volunteer legal-service center. Said Foley:

> During the difficult times for legal services in the '80s—and they were difficult times—the organized bar generally, and of all political persuasions—conservatives and liberals, Republicans and Democrats—spoke out to support legal services and the right of representation for the poor. And it is to their great credit, as a profession and as a formal organized bar, that legal services is alive today. For otherwise, it would have faltered and failed . . . .
>
> There will be thousands and thousands of people who will come through these doors and will have an opportunity for qualified service at the bar, before the court, who would never have known Jack . . .but will still have a deep reason to bless his memory and name.

The Center, one of 300 such programs nationwide funded in substantial part by the federal Legal Services Corporation (LSC), has spent the better part of the previous 12 years struggling to survive fiscal and regulatory cutbacks. Today, it must serve an eligible client population of nearly 80,000 with a staff of nine lawyers.

The Center's advocacy is focused in areas of housing, public benefits, family safety, individual rights and Native American rights.

THE DIRTY WORD: "ADVERTISING"

by **Dennis P. Harwick**
WSBA Executive Director

One of the recurring experiences of a bar association executive director is the letter or phone call from an angry member wondering "why the Bar Association isn't doing anything about lawyer advertising!" My attempts to explain case law developments—virtually all of which strike down attempts by bar associations to regulate advertising practices—are usually inadequate to assuage the writer or caller. The legal inability of the state bar to prohibit advertising that some regard as unprofessional advertising and the unwillingness of the state bar to commit its limited resources to quixotic attempts to turn back the clock are not satisfactory responses to the genuine umbrage that many of our members take with lawyer advertising.

So, at the risk of generating more such letters and phone calls, let me try to summarize the "law of lawyer advertising." In the beginning, there was *Bates and O'Steen v. State Bar of Arizona*, [1] a 1977 U.S. Supreme Court case holding that advertising by lawyers may not be subjected to blanket suppression. The Court left open questions about the time, place, and manner of advertising, along with a suggestion that regulations could prohibit false, deceptive, and misleading advertising. In 1985, the Supreme Court held that lawyers could not be disciplined for soliciting legal business through print advertising containing truthful and non-deceptive information and advice regarding the legal rights of a potential client. [2] In 1988, the Supreme Court held that a state cannot categorically prohibit lawyers from soliciting business by sending truthful and non-deceptive letters to potential clients known to face a particular legal problem. [3] Finally, in 1990, the Supreme Court ruled that states cannot ban lawyers form truthfully communicating non-state-sponsored certifications of specialty. [4]

The lone ray of hope for those who would restrict lawyer advertising came in *Humphrey & Haas v. Committee on Professional Ethics and Conduct of the Iowa State Bar Association*, where the Supreme Court declined to accept a case challenging the Iowa advertising rules. [5] The Iowa rule discourages lawyer advertising by restricting the substance and manner of both print and electronic advertising to information about the firm's name, address, and telephone number, along with certain required disclaimers. Since then, a number of states, especially Florida, have tried to find the line between what is allowed and what is not—with little success. Texas even tried to enact legislative restrictions, but those were subsequently struck down as unconstitutional.

So what has Washington done? We've struggled with the same issues. We've looked at the restrictions proposed elsewhere, such as limitations on how soon after an accident a targeted mailing can be sent to a client known to be in need of legal services (a polite way of saying an accident victim or relative). We've debated restrictions at the Rules of Professional Conduct Committee level and at the Board of Governors level. If it were only a matter of who was for and against lawyer advertising, the vote wouldn't even be close. But facts are facts, and the Board of Governors has a duty not to use the WSBA's limited resources to pursue causes—even popular ones—when there is little, if any, likelihood of success. The U.S. Supreme Court has consistently held that commercial speech, such as lawyer advertising, is entitled to certain First Amendment protections.

The current status of Washington limitations on lawyer advertising are found in the Rules of Professional Conduct at Title 7. The most controversial portion of the Rule is found at subsection 7.3, which reads:

7.3 Direct Contact with Prospective Clients

(a) A lawyer shall not directly or through a third person solicit professional employment from a prospective client with whom the lawyer has no family or prior professional relationship in person or by telephone, when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain.

(b) A lawyer shall not send a written communication to a prospective client for the purpose of obtaining professional employment if the person has made known to the lawyer a desire not to receive communications from the lawyer.

Dennis P. Harwick

The gist of this rule is that personal contact is prohibited (unless there is a prior family or professional relationship), but that *written* solicitations are allowed until the prospective client says, "no."

There are many other issues connected with lawyer advertising—the image of the profession, the accusations that the "haves" are trying to protect turf, the argument that lawyer advertising is necessary to inform the public about the access to legal services, etc. For a more complete discussion, I commend an article in the February 1994 issue of the *ABA Journal*, "Image Problem: Burned by a fall in public favor, the organized bar turns up the heat on lawyer advertising."

If you are concerned that the WSBA isn't paying attention to this issue, don't worry. If anyone discovers a way to constitutionally restrict lawyer advertising, I can assure you that people will be falling over themselves to bring it to the Board of Governors' attention!

[1] *Bates and O'Steen v. State Bar of Arizona*, 433 U.S. 350 (1977).

[2] *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985).

[3] *Shapero v. Kentucky Bar Association*, 486 U.S. 466 (1988).

[4] *Peel v. Attorney Registration and Disciplinary Commission of Illinois*, 110 S.Ct. 2281 (1990).

[5] *Humphrey & Haas v. Committee on Professional Ethics and Conduct of the Iowa State Bar Association*, 475 U.S. 1114; petition for rehearing denied, 476 U.S. 1165 (1986).

CONTRACT LITIGATION POST-*BERG V. HUDESMAN*: DID YOUR BLACK & WHITE CONTRACT TURN A LIGHTER SHADE OF PALE? PART I OF II

by **Steven A. Reisler**

How *Berg v. Hudesman* Did and Did Not Change Washington Contract Law

To the layperson, a contract means putting something down "in black and white" and "signing on the dotted line." The savvy consumer tells salespeople to "put it in writing" and knows that she has to read the "fine print." After all, laypeople know that "a contract is a contract and a deal is a deal."

Lawyers know, however, that the interpretation and construction of contracts was never that simple. *Ergo*: 500,000+ attorneys in America!

Lawyers have always known that although "a contract is a contract and a deal is a deal," many contracts are more models of murkiness than models of clarity. Moreover, no matter how thoughtfully the parties prepare their contract, there will always arise an unforeseen situation which, the parties will dispute, either was or was not intended to be covered by their agreement. To deal with the problems of *contract interpretation* and *contract construction*, the courts have devised guidelines and maxims such as: the "plain meaning rule"; the "four corners of the document rule"; and the maxim that a contract must be "plain and unambiguous on its face." In order to avoid obviously unfair results due to rigid application of these guidelines, the Washington courts have overlaid rules of interpretation which, in certain situations, would permit a court to consider the *circumstances* surrounding the execution of an agreement or the intent of the contracting parties. In Washington, the net effect of having strict rules of interpretation overlaid with interpretative exceptions overlaid with exceptions to the exceptions was a baroque body of case law lovely as art and awful as a tool box for resolving contract disputes.

In *Berg v. Hudesman*, 115 Wn.2d 657, 801 P.2d 222 (1990), the Washington Supreme Court saw its opportunity to straighten out the confusion and inconsistencies which had crept into contract law. It adopted the analytic framework for interpreting contracts called the "context rule" and embraced the law of the *Restatement (Second) of Contracts* §§ 212 and 214(c).

Alas, the business and legal communities read *Berg* and shuddered: Did this signal the end of contract law in Washington? Could business people ever again count on written contracts as binding? Would every single I.O.U., every simple promissory note, every credit card transaction, every automobile purchase, every loan and purchase agreement become a multi-year odyssey through one fact-finding trial after another? Was *Berg* a business lawyer's ticket to malpractice or a commercial litigator's meal ticket?

First, it is important to distinguish between the interpretation and the construction of a contract. According to the *Restatement (Second) of Contracts* § 200 (1981): "Interpretation of a promise or agreement or a term thereof is the ascertainment of its meaning." (Cited in *Berg*, 115 Wn.2d at 663). According to Patterson, *The Interpretation and Construction of Contracts*, 64 Colum. L. Rev. 833, 835 (1964): "Construction . . . is a process by which *legal consequences* are made to follow from the terms of the contract and its policies that are applicable to the situation." (Cited in *Berg*, 115 Wn.2d at 663).

Thus, when the issue is the *construction* of a contract . . . that is, the legal consequences which flow from the terms of a contract . . . *it remains an issue of law. When the issue is the interpretation* of a contract, however, then *the intent of the parties* is the touchstone. According to *Berg*: "The cardinal rule with which all interpretation begins is that its purpose is to ascertain the intention of the parties." 115 Wn.2d at 663 quoting Corbin, *The Interpretation of Words and the Parol Evidence Rule*, 50 Cornell L.Q. 161, 162 (1964-1965).

A change *Berg* made in Washington contract law was its holding that "extrinsic evidence is admissible as to the entire circumstances under which the contract was made, as an aid in ascertaining the parties' intent." 115 Wn.2d at 667.

Berg held that extrinsic evidence is always admissible to understand the context of a contract regardless whether the contract itself is ambiguous. *Id.* at 669.

The natural outgrowth of *Berg* is that "rules of construction should not be applied except where the intent of the parties cannot be discerned from the circumstances and considerations outlined in *Berg*. To do otherwise would be to allow generalized rules of construction to frustrate the specific intent of the parties in a given situation." *Scott Galvanizing, Inc. v. Northwest EnviroServices, Inc.*, 120 Wn.2d 573, 584, 844 P.2d 428 (1993).

Despite the worst fears of the business community, the *Berg* case did not declare open season on contracts. Notwithstanding the liberal use of extrinsic evidence to understand the *intent* of the contracting parties, *Berg* did not abrogate the parol evidence rule or give parties free reign to rewrite their contracts after the fact.

Thus, if a contract is fully integrated, then extrinsic evidence may be admissible to *interpret* the words and terms of the contract in the context of the circumstances surrounding the contract. However, if the contract is not fully integrated, then extrinsic evidence is admissible to prove additional terms *so long as the additional terms are not inconsistent with the written terms. Id.* at 671.

The court in *Berg* cited the following language from *Emrich v. Connell*, 105 Wn.2d 551, 556, 716 P.2d 863 (1986):

> Where a contract is only partially integrated, *i.e.*, the writing is a final expression of those terms which it contains but not a complete expression of all terms agreed upon, the terms not included in the writing may be proved by extrinsic evidence *provided that the additional terms are not inconsistent with the written terms.*
>
> *Berg*, 115 Wn.2d at 670 (emphasis added).

Extrinsic or parol evidence, therefore, can be used two ways to interpret contracts. First, extrinsic evidence can be used to *add terms* to a partially integrated contract, *but only to the extent the additional terms are not inconsistent with the written terms*. Second, extrinsic or parol evidence can always be used to place the *context* and interpret the *words of the contract* so that the intent of the parties may be understood. Ambiguity is not a prerequisite to the admission of extrinsic evidence. *Berg*, 115 Wn.2d at 669, *Harris v. Ski Park Farms, Inc.*, 120 Wn.2d 727, 743, 844 P.2d 1006 (1993).

The *Berg* court, quoting from *Stender v. Twin City Foods, Inc.*,82 Wn.2d 250, 254, 510 P.2d 221 (1973), explained how to determine the intent of the parties:

> Determination of the intent of the contracting parties is to be accomplished by viewing the contract as a whole, the subject matter and objective of the contract, all the circumstances surrounding the making of the contract, the subsequent acts and conduct of the parties to the contract, and the reasonableness of respective interpretations advocated by the parties.
>
> *Berg*, 115 Wn.2d at 667.

Extrinsic evidence can be used to determine the intent of the contracting parties and the "reasonableness of respective interpretations advocated by the parties." *Id.* However, extrinsic evidence which *contradicts* the written terms of a contract is not admissible. As the Washington Supreme Court explained in *Nationwide Mutual Fire Ins. Co. v. Watson:*

> Under *Berg*, "extrinsic evidence is admissible as to the entire circumstances under which the contract was made, as an aid in ascertaining the parties' intent." In approving the context rule, this court also stated that such evidence is not admitted for the purpose of importing an intention not expressed in the writing, but to give meaning to the words employed. *Extrinsic evidence illuminates what was written, not what was intended to be written.*
>
> 120 Wn.2d 178, 189, 840 P.2d 851 (1992) (emphasis added).

The Appellate Court's Attempt to Bring Order Out of Chaos

Lawyers and trial judges are conservative by nature. When we, as a profession, read the *Berg* opinion, we had conniptions. Doomsayers prophesied the death of the parol evidence rule and the demise of summary proceedings to enforce simple contracts. Into the chaos wrought by *Berg* leaped the appellate courts.

One of the early post-*Berg* cases to come down the pike was *Olympia Police Guild v. City of Olympia*, 60 Wn. App. 556, 805 P.2d 245 (Div. 2 1991). *Olympia Police Guild* involved grievance procedures under a collective bargaining agreement. Specifically, the Olympia Police Guild sued the City for specific performance to compel arbitration relating to the suspension of a police officer without pay. The Superior Court dismissed the Guild's action on summary judgment on the basis that the collective bargaining agreement was ambiguous. The Guild appealed.

The Court of Appeals reviewed the summary judgment record and found the agreement was plainly worded. Citing the newly adopted context rule, it then examined the record and found it devoid of any "extrinsic evidence showing any meeting of the parties' minds that is inconsistent with the plain words of their agreement." 60 Wn.2d at 559. Whatever the City may have *intended*, the court found that its professed intentions were certainly not expressed in the words of the agreement. "We believe . . . that the intent of the parties to be divined by application of the context rule has to do

with their *real meeting of the minds*, as opposed to the insufficient written expression of their intent. Unilateral and subjective beliefs about the impact of a written contract do not represent the intent of the parties." *Id.* (emphasis added).

Thus, finding nothing in the record evidencing an "intent" different from that plainly expressed in the words of the written agreement, the Court of Appeals reversed summary judgment for the City and granted judgment for the Guild. *Id.* at 560. The significance of *Police Guild* was that the court, once it found no evidence of extrinsic evidence inconsistent with the plain meaning of the agreement, *summarily enforced the agreement*. Thus, although the Superior Court initially may have entered summary judgment for the *wrong party*, there was no flaw in the summary judgment procedure itself.

Two years later, in *Minter v. Pierce Transit*, 68 Wn. App. 528, 843 P.2d 1128 (Div. 2 1993), the court held that arbitration was *not* the exclusive remedy for an alleged wrongful termination under a particular collective bargaining agreement and affirmed the Superior Court's denial of the employer's motion for summary judgment. Focusing once again on the plain meaning of the words of the agreement and the absence of any extrinsic evidence of a *mutual* intent inconsistent with the plain meaning of those words, the court wrote: "Like the declarations in *Police Guild*, [the] declaration only shows the unilateral view of the intent of the Pierce Transit negotiators and fails to show any *meeting of the minds inconsistent with the words* of the collective bargaining agreement." 68 Wn. App. at 534 (emphasis added).

In *Vacova Company v. Farrell*, 62 Wn. App. 386, 814 P.2d 255 (Div. 1 1991), the trial court had granted summary judgment on a promissory note in favor of the seller of real estate. Although the party resisting the motion for summary judgment introduced affidavits asserting that additional terms needed to be read into the contract, neither the Superior nor the Appellate Court would add those terms. Citing the parol evidence rule articulated in *Berg*, the Appellate Court reiterated that, even if the written contract was not integrated, additional terms could be proved by extrinsic evidence *only if the additional terms were not inconsistent with the written terms*. 62 Wn. App. at 396. The Appellate Court affirmed the summary judgment.

Division One of the Court of Appeals again proved the vitality of the parol evidence rule by making it one of the foundations of its decision in *Wells Trust v. Grand Central Sauna and Hot Tub of Seattle*, 62 Wn. App. 593, 815 P.2d 284 (Div. 1 1991).

> [T]he general rule is . . . that the parol (extrinsic) evidence is not admissible for the purpose of adding to, modifying, or contradicting the terms of a written contract, in the absence of fraud, accident or mistake, but is admissible to show the situation of the parties and the circumstances at the time of the execution of the written instrument for the purpose of ascertaining the intention of the parties and properly construing the writing. Such evidence is not admitted for the purpose of importing into a writing an intention not expressed therein, but with the view of elucidating the meaning of the words employed. It is the duty of the court to declare the meaning of what is written, not what was intended to be written.
>
> 62 Wn. App. at 602.

However, as in the 1991 Division 2 *Police Guild* case before it, Division 1 of the Court of Appeals in *Wells Trust* focused once again on the "objective manifestations of the agreement rather than the less precise subjective intent of the parties not otherwise manifested." 62 Wn. App. at 602. Emphasizing one of the maxims of contract construction, the court in *Wells Trust* specifically wrote:

> Absent fraud, deceit or coercion, a voluntary signatory is bound to a signed contract *even if ignorant of its terms*. Therefore, the parties are bound by the contract as signed and the parol evidence cannot change the contract, only aid in its interpretation.
>
> *Id.* (citations omitted, emphasis the court's.)

Although these early post-*Berg* appel-

late decisions sounded reassuringly like the "plain meaning rule" swathed in the "context" of *Berg*, some early cases proved the usefulness of the context rule in avoiding the occasional harsh result of the older, more hide-bound rules of contract interpretation. Thus, in *Homeowners Ass'n v. Witrak*, 61 Wn. App. 177, 810 P.2d 27 (Div. 1 1991), the Court of Appeals reversed the trial court's summary judgment regarding a restrictive covenant in a housing development. The homeowners association had sought to force a lot owner to remove twelve 30-foot-tall Douglas firs he had planted along his lot lines without approval of the association. The trial judge concluded that because the restrictive covenant pertained only to fences, walls or shrubs, and mentioned nothing about 30 foot trees, it found that the trees were literally not restricted by the covenant. The Appellate Court reversed. 61 Wn. App. at 184.

Referencing the *context* of the restrictive covenant, the Court of Appeals in this case placed less emphasis on the covenant's choice of words than its clear purpose to prevent lot owners from blocking the outlooks or views of neighbors. 61 Wn. App. at 181. Distilling *Berg* to its essence, the court wrote: "Of particular interest to this case is the *Berg* court's emphasis on rejecting interpretations that are unreasonable and imprudent and accepting those which make the contract reasonable and just." *Id.*

There are more than two dozen published appellate decisions which mention *Berg* and the context rule either directly or in passing. These cases have gone a long way to alleviate the initial consternation lawyers felt when they first read *Berg* three and a half years ago. The decisions show that the older, sensible rules of construction are still vital, but they no longer reign tyrannically over reason. Perhaps the meaning of *Berg* is best expressed in the simple language of *Homeowners Ass'n v. Witrak*: contract interpretations which are either unreasonable or imprudent yield to those which make the contract reasonable and just, notwithstanding the four corners of the document. *Id.* To the extent extrinsic evidence makes the interpretation of a contract reasonable and just, it is admissible; however, to the extent extrinsic evidence robs the written words of meaning or introduces illogic or imprudence into the contract, such extrinsic evidence is inadmissible.

. . .

Part II of this article will appear in the July *Bar News*. Topics are *Berg v. Hudesman* and Insurance Contracts; What You Meant, What You Knew and What You Did: Litigation About Settlement Agreements and Releases; Real Estate in the Post-*Berg* World; The Choice of Laws Clause to the Rescue? and Discussion, Hoots and Mud-slinging. At the end of the article there is a selected list of post-*Berg* cases.

* * *

Steven A. Reisler *is a partner with Ogden, Murphy, Wallace in Seattle. He was Bar News editor from 1981 to 1985, served on the WSBA Board of Governors from 1985 to 1988 and was a member—and later chair—of the State Commission on Judicial Conduct between 1988 and 1992.*

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

Spokane, May 6-7, 1994

Present: The President and President-elect Ron Gould, the Governors, and Governor-elect Patricia Williams of Spokane (see *Bar News*, May 1994, page 42). *Also present:* Rebecca Baker (Legal Foundation of Washington); Thomas A. Campbell (Washington Assn. of Criminal Defense Lawyers); Barbara Clark (Legal Foundation of Washington); Judge Michael Donohue (Superior Court Judges' Assn.); Gregory J. Tripp (WSBA General Practice Section); Thomas M. Fitzpatrick (Washington ABA Delegation); Judge Dave Hansen (Administrative Law Judges' Assn.); Jim Kauffman (Washington Association of Prosecuting Attorneys) Nancy Krier (Washington Women Lawyers); Dennis P. Harwick (WSBA executive director); Janet Helson (Lesbian/Gay Legal Society of Puget Sound); Scott A.W. Johnson (King County Bar Assn. Young Lawyers); Mary Jo Diaz (Government Lawyers Bar Assn.); Larry Winner (Washington State Assn. of Municipal Attorneys); Alva Long (South King County Bar Assn.); J. Richard Manning (King County Bar Assn.); Mary McQueen (Supreme Court of Washington); Peter J. Karademos (WSBA Family Law Section); Narda Pierce (Attorney General's Office); John M. Riley, 3d (WSBA Real Property, Probate & Trust Law Section); Timothy E. Szambelan (WSBA Young Lawyers Division); Lindsay T. Thompson (*Bar News* editor); Judge Philip J. Thompson (Court of Appeals, Division III); and Robert D. Welden (WSBA general counsel).

Now That Charles Kuralt Has Retired, It Should Be "On The Road With Paul Stritmatter": The president reported that since the last meeting (*Bar News*, May 1994, pages 31-36), he held focus groups with lawyers in a Tacoma law firm as well as from the Spokane area; spoke to the Kitsap County Bar Association on professionalism; co-chaired meetings of the WSBA-Supreme Court Task Force on Lawyer Discipline (*Bar News*, March 1994, page 34); met with judges from the former Soviet Republics of Kazakhstan and Kyrgyzstan on how bar associations work (see story, this issue, page 55); met with six lawyers from China on similar topics (see story, this issue, pages 52-53); represented the Bar Association at the swearing-in of U.S. District Judge Franklin Burgess in Tacoma; met with the WSBA Young Lawyers Division at their midyear meeting; met with members of the Washington trial lawyers and defense trial lawyers organizations over some proposals for changing Washington civil discovery rules; met with the chair of the Legal Foundation of Washington; served as a facilitator for the Volunteer Legal Services Action Plan Conference at SeaTac (see story, this issue, page 24); and attended the Washington Women Lawyers Judicial Appreciation Luncheon with president-elect Ron Gould. The president also reported meetings with Rep. Pat Thibodeau and United Food & Commercial Workers Local 1001 president Joe Peterson on the WSBA staff unionization issue (*Bar News*, May 1994, page 15). In light of the Union's failure to obtain the withdrawal of the bill requiring the WSBA to unionize, in a special meeting several weeks before the regularly scheduled one in Spokane, the Board voted to challenge the law in court as a violation of the separation of powers, the bar being a branch of the Supreme Court. The law firm of Davis Wright Tremaine volunteered its services to the Association, at no cost, to challenge the statute; the case will be filed shortly.

Stritmatter also reported meeting with the Reporter of Decisions and signed the licensing agreement that will make appellate reports available on the WSBA computer bulletin board. However, an interesting wrinkle has arisen. Some of the private lawyers who've made "dirt-cheap" access to statutes and appellate decisions a personal crusade went off to Olympia pointing out to the Honorables that these databases were paid for by the taxpayers of Washington, so lawyers ought to have access to them for little, if not nothing, since they belong to the public.

The reaction of some of the Honorables and the green eyeshade crowd who back them up, was a collectively raised eyebrow. "We're subsidizing the provision of this information to lawyers? Hmm." The upshot was a budget note requiring the courts to recover the full cost of publishing the appellate reports. The net result will likely be a significant *increase* in the cost of the Advance Sheets in 1995. "We may have been hoisted on our own petard," Stritmatter commented.

The National Center for State Courts, a think tank, is coming out to do a study of what this will entail. Governor Mary Fairhurst will serve as the Board's liaison to the study.

The Board Is Coming, The Board Is Coming: The Governors approved a meeting schedule developed by president-elect Ron Gould. For the balance of the current bar year, and the 1994-95 year, here's the plan: Vancouver, Washington, June 17-18; Ocean Shores, July 29-30; Seattle, September 8-9; Yakima, October 14-15; Seattle, December 2-3; Olympia, January 13-14, 1995; Tacoma, February 17-18, 1995; Sudden Valley, near Bellingham, March 31-April 1, 1995; Spokane, May 12-13, 1995; Lake Chelan, May 16-17, 1995; Winthrop, June 28-29, 1995; Seattle, September 7-8, 1995. You've been warned.

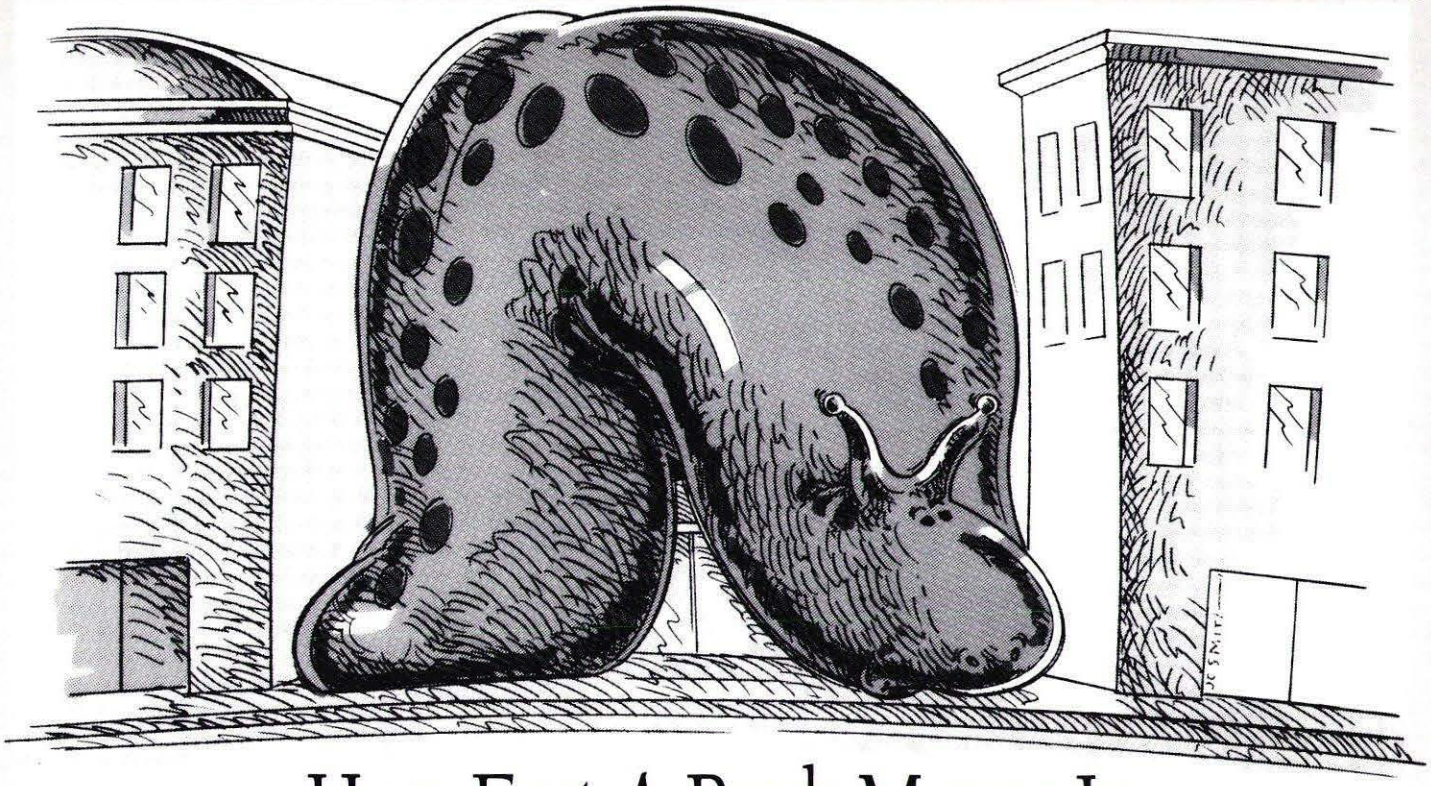
Almost As Many New Lawyers As There Are Liaisons At Board Meetings: 399 new hungry mouths will join us at the Bar thanks to the February Bar exam. 537 people sat the exam. The overall pass rate was 74.3%. 80.2% of attorney applicants and 69.2% of general applicants passed. Gonzaga University's School of Law had the highest pass rate, which made Dean John Clute very happy when he was told about it during his annual report to the Board.

But Not As Many As Committee Applicants: Some 1,100 WSBA members have sent in WSBA standing committee appointment preference forms. The Governors and president-elect Ron Gould hope to sort out all the appointments by midsummer.

Lists and Appointments: The Board approved a revision of its policy governing disclosure of WSBA membership mailing lists and labels. They appointed State government lawyers Janet Frickelton and Richard McCarton to four-year terms on the State Law Revision Commission (RCW Ch. 1.30), and sent a batch of names to the Supreme Court from which the justices will make appointments to the Disciplinary Board. They elected Scott Miller of Spokane to a two-year term in the ABA House of Delegates, to succeed Ed Shea of Pasco, and reappointed current delegates Margaret McKeown of Seattle and Jeff Tolman of Poulsbo.

This Time We'll Have The Paramedics at the Door: 1992's Board review of proposed Superior Court civil rule changes was interesting for the manner in which a number of rules changes beloved of the plaintiff's bar were rammed through, as well as for the tense and generally surly manner in which it was done.

One of the hot items was CR 19(f), which would require joinder of a nonparty when fault is raised by a defendant in cases under RCW 4.22.070(1). Approved by the Court Rules Committee chair on a 9-9 tie vote, the rule was approved 6-4 by the Board, and published by the Supreme Court for comment in the Advance Sheets (120 Wn.2d i, iii-iv, January 6, 1993). In September the Supreme Court sent back a question: What is, or should



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be, the consequence for failure to join a nonparty? The Rules Committee sent the Board fairly heated majority and minority reports. After some debate over whether the entire rule should be reconsidered, or just the answer to the question the Court posed, the Board tabled it for the next meeting. Proponents and opponents will be invited.

A Salutary Openness, Or Conviction By Accusation? The Board considered a rewritten Title 11 of the Rules of Lawyer Discipline submitted by WSBA disciplinary counsel Lee Ripley. Its preamble declares,

> It is Washington State Bar Association policy that disciplinary information shall be public information subject to the restrictions set forth below. In general, records of disciplinary proceedings shall be public information after a lawyer responds or has a reasonable opportunity to respond to a grievance.

Lawyers would have ten days to respond to a grievance before the matter would become public.

Dennis Harwick told the Board the experience of other states with open disciplinary records has been that the media takes little interest in the actual content of most grievances. "All they want to write about is the cover-up when they are denied access," he said. "Lawyers have no protection as it is," Jan Peterson reminded the Board. "A grievant can go to the press before filing a complaint." The Board tabled the proposal to July for circulation and comment.

CLEaning House: The Board approved the mission statement of the CLE Department adopted after the recent CLE Planning Retreat (*Bar News*, May 1994, page 20). The mission is to deliver high quality CLE that imparts knowledge, reaffirms values, and enhances skills, in a self-supporting, accessible and reasonably priced manner. Goals and objectives flowing from that include reaching 50 percent of the Bar each year by 1998, continuing to offer skills training for new lawyers, expanding the definition of CLE to include nonlegal topics that allow attorneys to maintain high competence in their work (things like stress management and computer skills) better use of technology, increase program offerings outside King County, and increase publications offerings and frequency of updates.

Everyone thought this was a fine set of goals except Governor Mike Larson, in whose view it wasn't a consensus of those at the CLE retreat because he didn't personally agree with them. An observer cautioned the Board that this sounded like direct competition with other CLE providers, which could be A Very Bad Thing, as Sellar & Yeatman would say. A Surfeit of CLE, tsk, tsk. Funny how, when it comes to CLE market share and profit, other Bar groups always want to be the Walrus and the Carpenter, with WSBA as the oysters. The Board approved the CLE mission statement and goals, with Larson dissenting.

Every Revolution Leaves Behind the Slime of New Bureaucracy, Kafka wrote, and in that light it's no surprise that the WSBA Governance Task Force, made up of representatives of various bar-related interest groups, has what co-chair Wayne Blair called a "significant feeling" for the creation of a WSBA House of Delegates made up of representatives of various Bar-related interest groups. Whether they will supplant, or merely supplement, the Board of Governors awaits further revelation, as does the intriguing question of who'll foot the bill. Friends of the *Bar News* will also, doubtless, wait, breath bated, for news of what the Task Force thinks should be done with the magazine, having opined that it isn't an effective communications vehicle and its deadlines are too long. Why are *Bar News* deadlines so long? To cope with the product of the Task Force on Governance, which, without prior notice, dropped three articles totaling fourteen pages in place of the promised one article late on the afternoon of

deadline day for the June issue, and left a message asking that space be held for a fourth, which would be several days late. In fact, it never showed up at all. Meanwhile, on the questions of whether WSBA should be a mandatory or voluntary bar, a regulatory agency or a discretionary programs agency, or whether dues should be split between mandatory and discretionary functions, Blair said there is no real support for any of those options. Who'd have thought we'd all live to see the revival of the Edsel?

Ballot Advice, Legislation and Legal Services: At the request of the WSBA Civil Rights Committee, the Board voted to oppose Initiatives 608 and 610 in the fall elections. WSBA Legislative Liaison John Fattorini reported, by telephone from Olympia, on the end results of the 1994 legislative session and made some predictions of the mischief to come in 1995. Evergreen Legal Services Director Ada Shen-Jaffe and Spokane Legal Services Director Jim Bamberger gave their annual report on the state of legal services in Washington.

Now, Now, Be Nice: The Board received some recommendations from the Court Congestion and Improvement Committee for guidelines for courtroom decorum and practice by lawyers and, after a long stretch of self-indulgent comment about how rules with any teeth to them would cramp their many and varied litigating styles, sent the guidelines back for the Committee to develop something less presumptuous.

We Had Funds, Funds, Funds 'Til the Sections Took the Surplus Away: Dennis Harwick told the Board the budget is showing strong numbers halfway through the fiscal year, but that surplus will drop at year's end, when surpluses accrued by the sections are transferred over to them, and when a new rainy-day fund for the CLE Department—approved by the Board at this meeting—goes into effect. The Board also approved the hiring of one lawyer to serve as counsel for the Disciplinary Board.

Nothing In This Hand, Nothing Up My Sleeve . . . : In other money matters, the Board denied a request from the Family Law Section for $4,800 they claimed was theirs but denied them. They said they'd found out at the end of the last fiscal year they'd run a surplus, but then the fiscal year ended and the money was transferred before they could figure out how to spend it. They wanted an appropriation from the General Fund for two ill-defined and poorly costed-out ideas. Ah, the Board said, there was no administrative charge assessed last year. Had there been, there would have been no surplus. Nice try. The answer is no, but everyone thought the Section's representative did a fine job pleading a thin case.

A Certain Chintziness Noted Among the Depositories: At the request of representatives of the Legal Foundation of Washington, the Board passed a resolution encouraging "lawyers and law firms to negotiate the best possible net interest rates on their IOLTA accounts" and authorizing WSBA "officers and staff to work with and support the Legal Foundation in promoting and negotiating higher net interest rates on IOLTA accounts." Foundation Board member Kevin Kelly told the Board if six Washington banks had paid 2% and charged no service fees on their IOLTA accounts, the Legal Foundation would have raised an additional $840,000 this year.

Tell The Legislature the Taxpayers Are Subsidizing It. That'll Get Their Attention: The Board also agreed to ask the Supreme Court to return for further consideration proposed amendments to CRLJ 3 and CRLJ 4(b), which would allow initial service of district court complaints without payment of a filing fee. Emily Gordon, Spokane County Law Librarian, told the Board the county law librarians are concerned that collection agencies will use this option in great volume, significantly reducing fee income to law libraries. Waxing indignant that the Court Rules Committee hadn't twigged to this complication when they passed on the rule, the Board decided the committee should have another chance to get it right. ***Next meeting:*** June 17-18 in Vancouver, Washington.

Notices of Interest to Bar Members

WSBA Nondisciplinary Notices

Interim Suspension: Seattle lawyer **Richard Brent Daniel** (WSBA #12309, admitted 1982) was ordered suspended from the practice of law pursuant to RLD 3.1 pending the outcome of disciplinary proceedings by Supreme Court order entered March 16, 1994.

NOTE: Interim suspension is pursuant to RLD Title 3 and is not a disciplinary sanction. [March 29, 1994]

WSBA Disciplinary Notices

Suspended: Alaska lawyer **Roger W. Carlson** (WSBA #7158, admitted 1976) has been ordered suspended for a period of three years by the Washington Supreme Court. The suspension is reciprocal discipline based on a September 10, 1993, order of the Supreme Court of Alaska imposing a three-year suspension for Carlson's intentional failure to perform legal services for which he was retained, neglecting legal matters entrusted to him, intentionally misrepresenting the status of a legal matter and making false statements, withdrawing from a legal matter without promptly refunding fees not earned, failing to provide full and fair disclosure of all facts and circumstances relating to a grievance, communicating with a party without prior consent and without other legal authorization, and negotiating a settlement on behalf of a client in knowing disregard of a suspension order from the Supreme Court of Alaska. [March 24, 1994]

Disbarred: Pursuant to a stipulation, Seattle lawyer **Jeffrey D. Spence** (WSBA #4598, admitted 1972) was disbarred by order of the Supreme Court on March 9, 1994, effective immediately.

The disbarment arose from Spence's conduct while serving as the court-appointed guardian in six separate cases. While serving as guardian, he failed to keep adequate records and failed to timely file guardianship reports, in violation of RPC 1.1(i), RPC 1.1, and RPC 1.14(b)(3). He also failed to perform his duties as a guardian in a timely manner, in violation of RLD 1.1(i) and RPC 1.3. He disbursed unearned guardianship funds to himself without court authorization and without permission from his wards. He stipulated that he either misappropriated funds in violation of RLD 1.1(a), RLD 1.1(i), RPC 8.4(b) and RPC 8.4(c), or he borrowed funds without their informed consent in violation of RLD 1.1(i), RPC 1.4(b), RPC 1.8(a) and RPC 1.14(a). Spence admitted he submitted incomplete, inaccurate and misleading guardianship reports in violation of RLD 1.1(1), RPC 3.3(a)(1), RPC 3.3(a)(4), RPC 3.3(f), RPC 8.4(c) and RPC 8.4(d). At various times during the Bar Association's investigation, he failed to cooperate with that investigation, in violation of RLD 1.1(j) and RLD 2.8(a)(i).

In addition to ordering Spence's disbarment from the practice of law in this state, the Supreme Court ordered that he pay costs and expenses of $750. Further, Spence must pay restitution to his former wards before he may be reinstated to the practice of law in Washington. [April 4, 1994]

Public Notices

Is Your Court User-friendly? A Correction:

The American Judicature Society has announced its news release, "Is Your Court User-Friendly?" (*Bar News*, April 1994, page 43) contains an incorrect fax number via which individuals may make

suggestions for making courts more oriented to their users. The correct fax number is (312) 558-9175.

U.S. Department of Transportation: alcohol misuse prevention:

The U.S. Department of transportation published final rules establishing alcohol misuse prevention programs for employers and employees governed by five of its operating administrations (FAA, FHWA, FRA, FTA, and RSPA). These regulations cover over seven million employees in airline, railroad, trucking, mass transit, pipeline and maritime vessel industries. Most of these regulations are in response to the Omnibus Transportation Employee Testing Act of 1991 and are intended to enhance the overall safety of the transportation industry. For a commentary on the Act, see "New Horizons in the Arena of Drug Testing," *Bar News*, August 1993, pages 20-21.

Seattle Comprehensive Plan Final EIS Available in Electronic Form:

The Final Environmental Impact Statement of Seattle's Comprehensive Plan is available to the public in electronic form through the Seattle Public Library's Internet connection. The public can access the EIS electronically at branch libraries and via modem. To connect via modem, dial (206) 386-4140 and follow the on-screen instructions to the Library's main menu. Select Internet connection and connect to the Environmental Green Gopher. The Final EIS is found in the "What's New" section. For more information on connecting to the Seattle Public Library's Quest Computer, call the Library Help Desk at (206) 386-4134.

New Bulletin Board Database System Introduced by Association of Legal Administrators:

The Association of Legal Administrators has introduced a Bulletin Board System (BBS) using CompuServe which enables members to gain direct automated access to information related to ALA and business management in legal organizations. The BBS, listed under "Assn of Legal Admin," is a section in the Court Reporters Forum on CompuServe and contains message, library and conference room areas. For more information on the BBS, contact ALA at (708) 816-1212.

Free ABA CLE Catalogue:

The free American Bar Association *Skills Training Catalogue* of hundreds of CLE materials designed for in-house skill training and self-study is available from the ABA at (800) 964-4CLE (4253). Subject areas include advocacy skills, discovery and trial prep, trying cases in a variety of specific areas of the law, legal practice skills, ethics and professionalism, and law office management.

In re RCW 19.52.120(1): Legal Interest Rate ("Usury Rate"):

The average coupon equivalent bond yield from the first auction of 26 week treasury bills in May 1994 is 4.57 %. ***The maximum allowable interest rate permissible for June 1994 is therefore 12 %.***

See page 48 of this issue for a complete 10-year table.

Public forum on access to justice issues:

Washington State Paralegal Association invites attorneys, legislators, paralegals, judges and educators to join an open discussion facilitated by Ken Schram of KOMO Television, Saturday, June 4, 9 a.m. to 12 noon at the Holiday Inn Crown Plaza in downtown Seattle.

Wheels of Justice

Join WSTLA in breaking the chain of violence in our communities by participating in a family fun ride along Lake Washington during Bicycle Sunday.

Proceeds benefit Childhaven and 24 other therapeutic-care centers across the state which practice early intervention to stop abuse and crime.

Cyclists receive a Wheels of Justice T-shirt at check-in.

Bicycle rodeo/demonstration/picnic at Seward park following.

Sunday June 19
1-4 p.m.
43 Avenue South and Lake Washington Boulevard

Children 12 and under can ride for a $10 donation.

All others can participate with a $25 contribution.

All donations are tax-deductible.

Volunteers also needed to help out during the event.

Call WSTLA at (206) 464-1011/ (800 732-9251

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King County Bar Association CLE (206) 340-2579
Northwestern School of Law of Lewis & Clark College (503) 768-6642
National Business Institute, Inc. (715) 835-7909
National Institute of Trial Advocacy (NITA) (800) 225-6482. BBS registration, messages, etc.: Set communication program to 8 bits, no parity, 1 stop bit, then call (219) 234-7348.
Spokane County Bar Association (509) 623-2665
Tacoma-Pierce County Bar Association (206) 383-3432
University of Washington School of Law (UW CLE) (206) 543-0059/(800) CLE-UNIV
Washington Association of Prosecuting Attorneys (WAPA) (206) 727-8202
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June 1994

3 Seattle: Biotechnology Conference. *Sponsored by* UW CLE.

3 Seattle: Rules as Tools. *Sponsored by* WSTLA.

3-4 Seattle: Washington State Paralegal Association 19th Annual Convention. *For information:* (800) 288-9772.

4 Seattle: Public Forum on Access to Justice Issues. *Sponsored by* Washington State Paralegal Association. *Contact:* (800) 288-9772.

3-5 Yakima: WSBA Real Property, Probate & Trust Section Midyear.

10 Spokane: Spokane County Bar Association Annual Meeting. For information: (509) 623-2665.

10 Seattle: Trusts. *Sponsored by* WSBA CLE.

10 Tacoma: Bankruptcy. *Sponsored by* TPCBA. *Contact:* (206) 272-8871.

10-12 Bellevue: WSBA Family Law Section Midyear Meeting.

10 Resolutions for WSBA Annual Meeting due by 5 p.m. at WSBA offices. See complete notice on page 56.

11 Tacoma: Nuts & Bolts of the Courthouse Tour—Everything Any New Lawyer Needs to Know. *Sponsored by* TPCBA. *Contact:* (206) 272-8871.

15 Deadline for August 1994 *Bar News*.

15 Nominations due, Treat Award for Excellence. *Sponsored by* National College of Probate Judges (see "Digest," *Bar News*, May 1994, page 39).

17 Spokane: Annual Spokane County Bar Association Golf Tournament. *For information:* (509) 623-2665.

17 Seattle: Limited Liability Companies. *Sponsored by* WSBA CLE.

17 Olympia: Trusts. *Sponsored by* WSBA CLE.

17-27 Seattle: Northwest Regional Trial Advocacy Program. *Sponsored by* NITA.

17-18 Vancouver, WA: WSBA Board of Governors Meeting.

24-25 Chelan: WSBA Litigation Section Midyear Meeting.

24 Spokane: Limited Liability Companies. *Sponsored by* WSBA CLE.

July 1994

12-Aug. 14 U.W. CASRIP Summer Patent Law Institute. *Sponsored by* UW CLE.

15 Deadline for September 1994 *Bar News*.

15 Seattle: Living Trusts/Trustees. *Sponsored by* WSBA CLE.

22 Seattle: Motions Practice. *Sponsored by* WSBA CLE.

25-26 Summer Estate Planning Institute. *Sponsored by* UW CLE.

29 Seattle: Sexual Harassment. *Sponsored by* WSBA CLE.

29 Spokane: Motions Practice. *Sponsored by* WSBA CLE.

29-30 Ocean Shores: WSBA Board of Governors meeting.

Sign up for the WSBA Speakers Bureau. Call Beth Greenhill (206) 727-8213.

COMMITTEE APPOINTMENT OPPORTUNITIES FOR WSBA MEMBERS

The Board of Governors of the Washington State Bar is called upon to make appointments to various boards, commissions and committees listed below. These vacancies are in addition to those on standing committees of the WSBA, for which a separate mailing goes out to each member annually. Some time frames for application are shorter than others, as a result of the need to start this service at some point in time and the desire to include as many openings as possible. Over time, all openings will be listed at least three months ahead of Board action.

Members are encouraged to apply for any and all positions that are of interest. Direct applications to Dennis P. Harwick, Executive Director, WSBA, 500 Westin Building, 2001 Sixth Avenue, Seattle, WA 98121-2599, or to members' representatives on the Board of Governors. Members of the Board of Governors, the congressional or other districts they represent, and their city of residence are listed on the masthead of the *Bar News*.

Board for Judicial Administration (BJA): One Seat

(Call for applicants-September; Board action-November)

The term of Ronald M. Gould (Seattle) expires December 31, 1994. There is no set term (terms coincide with the term of office of each member, most of whom are judges), but the Board prefers that individuals serve two to three years for continuity. Meetings expenses are paid by the BJA. For a description of the BJA, see Board of Judicial Administration Rules (BJAR) in the Supreme Court's Rules of General Application.

Continuing Legal Education (CLE) Board: Three Seats

(Call of applicants-June; Board action-July)

The three-year terms of Ernest G. Allen (nonlawyer member nominated by WSBA, Pasco), Peter H. Arkison (Bellingham) and Dillon Jackson (Seattle) expire September 30, 1994. Members are nominated by the WSBA Board of Governors to the Supreme Court, which makes the appointments. Meeting expenses are paid by the WSBA.

Legal Foundation of Washington Board of Trustees: Two Seats

(Call for applicants-September; Board action-November)

The two-year terms of Rebecca Baker (Republic) and William P. Bergsten (Tacoma) expire December 31, 1994. The Foundation manages and disburses the interest earned on lawyers' pooled trust accounts (IOLTA) legal assistance and education programs in Washington. A knowledge of, and interest in, access to justice for low-income persons and a willingness to devote the time required to carry out the Foundation's duties. The Board meets five to six times per year for full-day meetings. Committee meetings may require additional time. Meeting expenses are paid by the Foundation. The open terms begin January 1, 1994, and end December 31, 1995. Trustees are eligible for appointment to one additional term, for a total of four years' service.

WSBA GOVERNANCE TASK FORCE COMMITTEE REPORTS

President/President-elect Subcommittee
Preliminary Report

by **Lisa L. Lowe**, *Chair*

The President/President-elect Subcommittee (Subcommittee), consisting of Ruth Walsh McIntyre, Greg Dallaire, Brian Stiles, Joe Nappi, Jr. and Alicia Lowe decided that before we could make any recommendations as to the authority and election processes of the WSBA president/president-elect, we needed to:

(1) educate ourselves with the present authority and election process of the WSBA President;
(2) interview
  (a) past, present and immediate future presidents of the WSBA,
  (b) members of the WSBA Presidential Search Committee,
  (c) past nominees of the presidential search process,
  (d) local bar presidents,
  (e) specialty interest groups and the Washington Young Lawyers Division, and
  (f) various mandatory state bar associations; and
(3) assess the present processes involving the president and president-elect.

Each Subcommittee member was responsible for contacting a particular group or groups and then reporting back to the Subcommittee.

After completing the process above, the Subcommittee had the following discussions:

What Should be the Authority of the President?

The WSBA structure is a "weak president, strong board" model. Presently, the president is not allowed to vote but speaks as the voice of the Bar Association. The president does appoint Board committees and special task forces on issues of importance, but the appointments must be approved by the entire Board.

Greg Dallaire concluded that if we want a more cohesive and visible sense of direction, we should consider increasing the strength of the president. Greg recommends a power to vote, to make all committee appointments, and to veto.

Ruth Walsh McIntyre recommended the president have a veto power and the power to make committee appointments without approval of the Governors.

Governor Joe Nappi believes our present system works and that WSBA members are not pushing for a change. Joe would not recommend that the president have a vote. He would agree with the president's being allowed to appoint all unfunded committee positions without Board approval. Joe supports the president's current right to vote to break or create a tie.

Brian Stiles recommended the president have a right to vote.

Lisa Lowe felt it was extremely important that the president be empowered to the extent necessary to accomplish some policy goal of interest during the year of tenure, including the right to make ***all*** committee appointments without approval of the Board.

What Should be the Term of the President?

There was a unanimous recommendation that the president's term be one year.

How Should the President be Elected?

Ruth Walsh McIntyre reported that all those she spoke to felt that it would be positive to have a full membership vote. However, the expense of election and concerns of increasing diversity hindered them from coming out in favor of such an election. Many would like to find a way to make a statewide election more viable.

Joe Nappi felt there was a necessity of expanding the process, but did not agree that a statewide election would be ideal. He said the Presidential Search Committee process was clumsy, and he wanted to see a more open and longer process with active searches for diverse candidates.

Greg Dallaire said he had started out supporting a statewide election. He has since changed his mind. He stated his concern for uninformed and disinterested members voting without sufficient knowledge of the qualifications of the candidates. He also felt that he would prefer the Bar take the money from what it would cost to subsidize an election and help defer the expenses of the president. Greg added that he would support a qualification requirement that a candidate have a "prior significant involvement in the WSBA activities" instead of the current, more restricted requirement of prior board service. Greg recommended the Presidential Search Committee be expanded to include members of local bar associations, bar groups representing women and lawyers of color and a representative from the Young Lawyers Division.

Lisa Lowe stated that she would like to see the president elected on a broader base than is now implemented and that the best option would be a statewide election. She noted the same concerns of expense, diversity and a disinterested membership voting. She suggested there might be ways to limit the expenses of candidacy. Even if the president were elected statewide, Lisa agreed that there should be some body similar to the Presidential Search Committee. She would broaden the Committee as well. She would defer to Ruth as to whether or not a lay member would be necessary. Lisa also agreed with Joe that the process should be longer and that the Committee should take an active role in finding qualified candidates.

Brian Stiles reported that local bar leaders felt that the election of the president should remain with the Board. Again, a concern of cost and a disinterested membership not involved in the process were listed as reasons.

All members of the Subcommittee

agreed that rotation of residency of the president should continue, no matter what the selection process.

Should the President Vote?

Greg Dallaire supported a right to vote, as did Brian Stiles. Joe Nappi did not support a vote except to break a tie or to create one. Ruth Walsh McIntyre did not support a vote, but she did support a veto right. Lisa Lowe did not think the right to vote important, especially if the president is empowered as she suggested.

Should There be a President-elect?

All members were unanimous in finding that there should be a president-elect.

How and When Should the President-elect be Selected?

See item No. 3 as to how the president-elect should be selected.

As to when, there was a majority view that the position should begin at the same time as the new president is seated. Joe Nappi felt that asking a person to devote that kind of time was onerous and unduly burdensome. Joe suggested that the president-elect should be in office in time to sit as a fourth member of the Budget and Audit Committee, which begins its process in February.

What Should be the Authority of the President-elect?

There was a consensus of the members that the president-elect should sit on the Budget and Audit Committee, the Long-range Planning Committee, select committee chairs and the unfunded committee members, and perform other tasks delegated to him or her by the president.

Should the President-Elect Vote?

Ruth Walsh McIntyre was undecided as she felt it depended on whether or not there was a house of delegates.

Greg Dallaire thought that as the president-elect seems to be out among the members, it made no sense to discourage participation in the debate by not allowing the president-elect to vote.

Joe Nappi expressed a concern for people out of the King County area. He pointed out that if both president and president-elect were allowed to vote, one of those people would be from King County, where there is already (some feel) too much representation.

Brian Stiles did not think it necessary for the president-elect to vote.

Lisa Lowe felt that if the president-elect's position were for any less than one year, it would not be appropriate for him or her to vote.

If There Were to be a Strong House of Delegates, Would you Change any of Your Answers?

There was a consensus among those with an opinion that if there were a House of Delegates, they would recommend there still be a search committee, but that the vote be put to the House instead of the Governors. They replied that the selection process was all that would be changed by the existence of a House of Delegates.

House of Delegates Subcommittee Report

by **Lori Moland Riordan**, *Chair*

The House of Delegates Subcommittee (Subcommittee) was charged with examining whether a representative assembly should be added to the Washington Bar's governance structure. In considering this issue, the Subcommittee attempted to answer several questions: If a House of Delegates ("HOD") is to be recommended, how should it be structured; what should be its authority; who or what organizations should be represented; how should representatives be selected; should representation be limited to a set term; should there be representatives of sections, committees, local bars, other bars, in the House of Delegates; and should decisions of the House of Delegates be advisory or binding?

The experiences of other state bars and other organizations which have representative assemblies were considered in trying to answer these questions. The state bars reviewed were Illinois, Kentucky, Michigan, Georgia (which, contrary to the indication in the 1991 ABA governance survey, turned out not to have a representative assembly), Nebraska, Oklahoma, Louisiana, and California. The subcommittee also considered the recent experience in Oregon, where a bill to add a House of Delegates died in committee in the state legislature, despite the fact that a 2-to-1 majority of bar members had voted by initiative to take this bill to the legislature. Other organizations reviewed for their governance structure were the American Bar Association, the Washington Medical and Dental associations, and the Washington Legislature. The Subcommittee found a wide variety of structures and functions within the groups studied.

The Subcommittee also examined what goals the task force was seeking to accomplish in considering a HOD and concluded that inclusiveness of membership participation and separation of the powers of the Board of Governors were the primary foci.

Of some concern to the Subcommittee members was the size of the membership of the Washington Bar and how to accomplish inclusion of all groups within a HOD without creating an unwieldy, bureaucratic monster. Keeping the number of delegates to a minimum, however, could ultimately make the HOD subject to the same criticism felt by the Board of Governors, that it is too homogenous, too establishment, and impossible to break into from the outside.

Also considered was the potential separation of the functions of the current Board of Governors and placement of policy-making responsibility in the hands of a larger and, theoretically, more representative group of Association members. In particular, a HOD might be a good intermediary between having the Governors setting policy and a cumbersome and inefficient referendum process.

The Subcommittee will continue its study of these issues by selecting different models of HODs and describing how each of those models might be implemented in Washington. Included in the topics considered will be what groups the delegates would be drawn from, the number of delegates, and what functions the HOD would fulfill. The Subcommittee will provide detailed information on the proposed models to the Subcommittee on Finance, so that they may report on the potential costs of each of the models.

Costs, Revenue and Budgets Subcommittee Preliminary Report

by **Gordon A. McHenry, Jr.**
Chair

The Costs, Revenue and Budgets Subcommittee (Subcommittee) determined at our first meeting that we would focus on tasks #1 and #2 below. Later, we added task #3.

1. Analysis of the budgeting process currently used by the WSBA;

2. probable changes to the budgeting process likely to result from forms of governance other than the status quo, if any, recommended by the Task Force; and

3. analysis of the budget impact of the current WSBA programs and functions which are "mandatory."

Budgeting Process

In order to accomplish this task, the Subcommittee interviewed Pat Dieken, WSBA director of administration/controller; interviewed Governor Jim Handmacher, who is a member of the WSBA's Budget and Audit Committee (BAC); obtained and reviewed copies of the Association's budgets for five (5) years (1990-1994); and reviewed the WSBA Annual Report for 1993.

The WSBA's Fiscal Year is October 1-September 30. The BAC, appointed yearly by the WSBA president, is responsible for the budget process. It exists by tradition in that it is not specified to exist in the bylaws, nor is the treasurer required to carry out his/her duties with the assistance of a committee.

Typically, the BAC has three members from the Board of Governors (one for each class), the executive director, and an ex officio member, attorney-CPA Brian Kelly of the Vander Stoep, Remund and Kelly Firm. The senior member of the BAC serves as its chair and is also the treasurer of the WSBA. Currently, there are four Governors serving on the BAC; this is an anomaly due to the creation of the new 9th District. Additionally, Pat Dieken attends all meetings of the BAC. (She and Dennis Harwick provide staff support to the BAC.) The BAC usually meets at the WSBA offices in Seattle; otherwise, meetings are held in conjunction with, and at the location of, the Board of Governors meetings.

The WSBA budgeting process begins a cycle annually in the latter portion of the first quarter. At this time, Harwick and Dieken give the WSBA staff directors, the YLD, sections, and standing committees notice of the budget schedule and general directions to the parameters for preparing their respective budgets. Proposed budgets are then received, compiled and analyzed by staff and then the BAC. Redrafting occurs, and the Board reviews the draft budget on at least two occasions with a final vote occurring during the third quarter.

The Subcommittee determined that input and participation by WSBA members is quite limited. When the budget is an agenda item, the public has notice and an opportunity to listen and provide limited input. The BAC meetings are, of course, open to WSBA members and the public. Neither Pat nor Jim could recall a person attending a BAC meeting other than members of the BAC. Besides receipt of draft budgets, the only other consistent input is from the annual audit conducted by independent auditors.

The Subcommittee found that the budget reports in the Harwick/Dieken era are quite detailed yet easy to read (in significant contrast to the pre-Harwick/Dieken era). Importantly, it is easy to ascertain which program/functions generate revenue in excess of cost (profit) and which ones do not break even (are "subsidized"). The Subcommittee noted with approval the significant amount of data contained in the report pertaining to the amount and allocation of overhead/indirect expenses per program/function.

The Subcommittee also analyzed the WSBA Annual Report that is published in the *Washington State Bar News*. The Subcommittee concluded that, in contrast to the budget report, the Annual Report was insufficient to adequately explain the budget and fiscal health of the WSBA.

Recommendations

• The BAC should be expanded to include more members. Specifically, the president-elect should be appointed by the president to serve as a regular member of the BAC.

• The WSBA should take affirmative action to publicize the existence, purpose and scope of the BAC to WSBA members. The WSBA should encourage input into the BAC's tasks in terms of both strategic policy and tactical tasks.

• The budget documents should continue to contain the detail (and, if appropriate, increased detail) as is contained in the FY 1993 and FY 1994 budget reports. We further recommend that the "Narrative" contained in the FY 1994 budget report be included as regular data in future budget reports.

• The "Budget Summary" of the adopted budget should be published in the same manner as the annual report; i.e., as soon as possible after budget adoption, in the *Washington State Bar News*.

• Additional study should be undertaken by the Board to validate the continuing need for Brian Kelly's de facto membership and service to the BAC. Consideration should be given to factors such as the cost of his participation (if any); whether or not there is a duplication in contribution, since both Kelly and Dieken are CPAs; the potential for misperception of exclusiveness and/or undue influence since he is the only non-Governor and nonstaff member on the Committee. Finally, if through such an analysis the Board determines that he should continue to serve, consideration should then be given to formally expanding the BAC to include a member from the Bar at large.

The Impact to the Budgeting Process Resulting From Alternate Forms of Governance

The Subcommittee, with assistance from the WSBA staff, will analyze any such implications if and when the Task Force has deliberated to the point of making a draft recommended change to the current form of governance.

"Mandatory" Programs and Functions Presently Conducted by the WSBA

Based upon the budget categories contained in the FY 1994 budget, the Subcommittee believes that the following programs and functions probably fall into the category of mandatory/regulatory. The functions with asterisks (**) are those which based upon the current budget do not break even:

Admissions/Bar Exam
Audits**(not broken down between random and "for cause")
Discipline**
Leadership**
Mandatory CLE**
Membership Records/Licensing**
(Reserve Allocation)**

The Subcommittee includes this information because it has constituted a significant portion of the Subcommittee and Task Force deliberations. We are not prepared at this time to make any recommendations on this issue. We do observe that it is very difficult to identify what is mandatory v. discretionary on a consistent basis (perhaps akin to knowing it when one sees it).

APPRECIATING JUDGMENT LIENS

by **Kurt Becker**

A key decision last year from the Ninth Circuit may confer value on old judgments that you previously thought were worthless because the judgment debtor filed bankruptcy. *In re Chabot*, 992 F.2d 891 (9th Cir. 1993), allowed a judgment lien creditor to foreclose on the debtors' interest in the property, pay money from the judicial sale for the value of the debtors' homestead exemption, and receive the post-bankruptcy appreciation in the value of the property. This decision departs from previous law from the Ninth Circuit's Bankruptcy Appellate Panel that allowed debtors in bankruptcy to set aside such liens. *In re Galvan*, 110 B.R. 446 (Bankr. 9th Cir. 1990).

This article first revisits basics on converting a judgment to a judgment lien and on setting aside a judgment lien as a bankruptcy preference. Next, it discusses the Ninth Circuit's decision in *Chabot* and its role in a trilogy of opinions from the Ninth Circuit that deny debtors the post-bankruptcy appreciation in estate assets. It concludes by discussing the practical consequence that *Chabot* has for debtors and how *Chabot* might let your creditor clients appreciate some of those old judgments floating around in your files.

Making a Judgment Lien

There is a vital difference between a judgment and a judgment lien. A judgment means that the court ruled in your client's favor and normally states that she is entitled to some dollar amount. A judgment lien means that, in order to satisfy the judgment, she is entitled to property of the debtor to which the judgment lien attaches.

For real property, a judgment lien commences on entry of the judgment in the superior court in the county where the property is located. Wash. Rev. Code §§ 4.56.190-4.56.200(1)-(2). If the judgment is rendered in a federal district court or a superior court located in a county other than where the debtor's real property is situated, a certified abstract of the judgment must be recorded in the county where the debtor's real property is located. Wash. Rev. Code § 4.56.190-4.56.200(1). For state district court judgments, a certified transcript of a district court judgment must be filed with the county clerk in the county where real property is located. Wash. Rev. Code § 4.56.200(3)-(4). For personal property, a lien does not arise until the sheriff "levies" on the personal property. Wash. Rev. Code § 4.56.190. Judgments and judgment liens may be executed upon for ten years from date of entry of the judgment. Wash Rev. Code §§ 4.56.190, 4.56.210, 6.17.020.

Washington also has a special hurdle for those seeking to obtain a judgment lien in the value of homestead property in excess of the homestead exemption. The judgment lien in such homestead property does not arise until "the judgment creditor records the judgment with the recording officer of the county where the property is located." Wash. Rev. Code § 6.13.090. In most counties, a judgment must be recorded with the county auditor if the judgment creditor wishes to have a lien in homestead property. In King County, a judgment must be recorded with King County Records and Elections in order to become a lien in homestead property.

Washington also allows property owners to register their property under the Torrens Act. Wash. Rev. Code § 65.12.005 *et seq.* Property that is registered, so-called "Torrens Act property," is subject to an entirely separate system for recording judgments. Wash. Rev. Code § 65.12.510. This poses an extra special hurdle for registered property: judgment creditors must make sure their judgment is noted on the correct registry.

If, within the applicable bankruptcy preference period, a bankruptcy petition is filed, the judgment lien may be challenged as a preference under section 547 of the Bankruptcy Code. See, e.g., *In re Pouncey*, 59 Bankr. 615 (M.D. Ala. 1986)(avoiding as preference judgment lien that arose within 90 days of debtor's bankruptcy filing). The preference period is 90 days unless the creditor is an insider. 11 U.S.C. § 547(b)(4)(A). If the creditor is an insider, the preference period is one year, 11 U.S.C. § 547(b)(4)(B), and the one-year preference period may also apply in situations where insiders are simultaneously liable on the debt, see, e.g., *Official Unsecured Creditors' Committee of Sufolla, Inc. v. U.S. National Bank of Oregon (In re Sufolla, Inc.)*, 2 F.2d 977 (9th Cir. 1993); *Annie Loo v. Craig Martinson (In re Skywalker, Inc.)*, 155 B.R. 526 (Bankr. 9th Cir. 1993); *Levit v. Ingersoll Rand Financial Corp. (In re V.N. Deprizio Constr. Co.)*, 874 F.2d 1186 (7th Cir. 1989).

For tactical reasons, therefore, judgment lien creditors often wish to delay enforcement of their judgment lien until after the 90-day or one-year preference period runs, particularly where a debtor has real property. Scheduling a supplemental proceeding or otherwise executing on the judgment can spur the debtor to file bankruptcy. If the debtor's principal asset is real estate, the judgment lien creditor may choose to "season" the judgment lien by delaying enforcement. Waiting to enforce the judgment lien until after the bankruptcy preference period has run may make sense, depending on the circumstances of a particular situation.

If your client does decide to delay enforcing its lien for tactical reasons, be very careful. Although it usually makes sense for a creditor to decide to delay enforcement of a judgment lien, it rarely makes sense for an attorney to delay properly recording the judgment in order to obtain a lien. C.R. 62(a)'s five-day stay of enforcement of judgment does not stay recording of judgment. See *Smith v. Simonarson, Visser, Zender, Brandt and Thurston, et al.*, 56 Wash. App. 513 (1990).

Chabot

In *Chabot*, City National Bank ("CNB") had obtained summary judgment for $212,115.87 due under a demand note, and the abstract of the judgment was recorded on April 18, 1986, thereby giving rise to the judgment lien under California law. More than a year later, the debtors filed in Chapter 7, and the secured claims and homestead in the debtors' residential property were as follows:

1. First Deed of Trust	$ 86,412.42
2. Second Deed of Trust	35,540.88
3. Third Deed of Trust to Panamanian Corporation Owned by Debtors' Cousin	173,000.00
4. Debtors' Homestead Exemption (under California law)[1]	45,000.00
5. CNB Judgment Lien	241,579.08

The Chabots valued their residence at $400,000. Given the amount of secured debt ahead of CNB's judgment lien, it appeared to be out of luck. Neither CNB nor any other creditor moved in the bankruptcy case for permission to conduct a foreclosure sale of the house. The Chabots received their bankruptcy discharge on December 7, 1987, and the bankruptcy case was closed.

In September 1988, CNB filed a complaint in state court to set aside as a fraudulent transfer the deed of trust given to the Panamanian corporation controlled by the Chabots' cousin. This state court litigation ultimately changed the priority of claims to the Chabots' property. By settlement, the deed of trust to the Panamanian corporation, controlled by the Chabots' cousin, was subordinated to the judicial lien claim of CNB. The priority of the claims against the property were thus re-ordered as follows:

1. First Deed of Trust	$ 86,412.42
2. Second Deed of Trust	35,540.88
3. Debtor's Homestead Exemption (under California law)	45,000.00
4. CNB Judgment Lien	241,579.08
5. Subordinate Deed of Trust to Panamanian corporation controlled by cousin	173,000.00

To borrow a term from racetracks, CNB would be back "in the money" if only its judgment were enforceable against the debtors' residence.

In response to the state court litigation, the Chabots moved in November 1988 to re-open the bankruptcy case and remove the state court litigation to bankruptcy court under the bankruptcy removal provision and rules. The Chabots then moved in the bankruptcy case to avoid CNB's lien pursuant to section 522(f) of the Bankruptcy Code. The bankruptcy court denied the motion to avoid the lien in May 1989, and remanded the litigation to state court. In August 1991, the district court affirmed the decision not to avoid CNB's judgment lien. In March 1993, the Ninth Circuit affirmed the district court's decision.

Section 552(f) of the Bankruptcy Code provides,

> [T]he debtor may avoid the fixing of the lien on an interest of the debtor in property *to the extent such lien impairs an exemption which the debtor would have been entitled* under [the Bankruptcy Code] if such lien is (1) a judicial lien . . . . (Emphasis added).

The debtors argued that the post-bankruptcy appreciation of the property should go to them and that the value of CNB's lien should be limited to the value as of the date of the bankruptcy petition. While the debtors' appeal was pending, the Bankruptcy Appellate Panel for the Ninth Circuit decided *In re Galvan*, 110 B.R. 446 (Bankr. 9th Cir 1990). *Galvan* favored the debtor's position, stating, "the unsecured portion of a judicial lien is properly avoided under Section 552 as it 'impairs' debtor's right to fully realize any homestead exemption and post-petition property appreciation." *Galvan*, 110 B.R. at 451-52.

Creditor CNB argued that its judicial lien did not impair in any way the debtor's $45,000 homestead exemption under California law because CNB conceded that its judicial lien was junior to CNB's homestead exemption. The Ninth Circuit accepted this argument:

> Under the plain meaning of the statute, then, an exemption is not impaired unless its amount is diminished in value. CNB's lien has no impact on the Chabots' ability to recover their $45,000 homestead exemption.

Chabot, 992 F.2d at 895. The decision in *Chabot* gave judgment creditor CNB the benefit of any increase in the value of the California property since 1987. Presumably, CNB also benefited because the debtors had continued to make payments (with some resulting reduction of principal) on the first and second deed of trust during the period from their bankruptcy filing until the Ninth Circuit's decision last spring.

Trilogy of Ninth Circuit Decisions Denying Debtors Post-petition Appreciation of Assets—but see *Hall*

The *Chabot* decision is the third in a trilogy of recent Ninth Circuit rulings that deny debtors, at least those in California, post-petition appreciation of assets. The first of the trilogy was *In re Reed*, 940 F.2d 1317 (9th Cir. 1991). In *Reed*, the debtors sought to claim, from proceeds of a post-bankruptcy sale of the debtor's residence, the appreciation of their Beverly Hills residence since their 1986 bankruptcy filing. Consistent with its later decision in the *Chabot* case, the Ninth Circuit ruled that, although the debtor was entitled to proceeds from the sale equal to his homestead exemption, the bankruptcy estate received any further appreciation of the debtor's property. *Reed*, 940 F.2d at 1323. The second part of the trilogy was *In re Hyman*, 967 F.2d 1316 (9th Cir. 1992), where the Ninth Circuit rejected an argument that the debtors were entitled to the post-petition appreciation of their California home. *Hyman*, 967 F.2d at 1321 (California statute gives debtors "$45,000 exemption at time of sale, not a $45,000 equity interest in the property.")

One pair of Washington state debtors fared better than their California counterparts in the *Reed-Hyman-Chabot* trilogy. In *In re Hall*, 1 F.3d 853 (9th Cir. 1993), the debtors claimed an exemption in their residence in their Chapter 11 proceeding. That case converted to a Chapter 7 liquidation, and the debtors again claimed a homestead exemption. Their Chapter 7 trustee objected to their $30,000 exemption claim, but the bankruptcy court overruled that objection on the ground that the unchallenged homestead exemption claim in their Chapter 11 proceeding left the residence an exempt asset in the hands of the debtors. Without so much as discussing the 1991, 1992, and 1993 decisions in *Reed*, *Hyman*[2], and *Chabot*, respectively, the Ninth Circuit awarded the Halls the post-petition appreciation in the value of their residence. *Hall*, 1 F.3d at 855.

Bankruptcy courts in the Ninth Circuit may decline to apply these rulings to the particular facts before them. See, e.g., *In re Kopstein*, 163 B.R. 573 (Bankr. N.D. Cal. 1994). Read together, however, the four decisions of the Ninth Circuit in *Reed*, *Hyman*, *Chabot*, and *Hall* reveal a strong drift toward awarding the bankruptcy estate post-petition appreciation in assets of debtors provided the debtors receive proceeds from any sale equal to the amount of any statutory exemption. Faced with another California debtor claiming the post-petition appreciation of a home in Santa Cruz, the Bankruptcy Appellate Panel late last year distinguished the decision in *Hall*, followed the decisions in *Reed* and *Hyman*, and awarded the bankruptcy estate the post-bankruptcy appreciation of a home provided the debtor received proceeds from

the sale equal to the state homestead exemption. *In re Terry Alsberg*, 161 B.R. 680 (9th Cir. 1993) ("[B]ankruptcy estate, and not the debtor, is entitled to post-petition appreciation in estate assets.").

Three Approaches by Courts

Bankruptcy courts around the country have ruled in recent months with increasing frequency on motions to reopen old bankruptcy cases and/or to avoid judgment liens. Decisions are split. Some courts follow the approach of the Ninth Circuit in *Chabot* and refuse to avoid the judicial lien, thereby giving the judgment lien creditor the appreciation in the value of the property, on grounds that the debtor's homestead exemption is not impaired. See, e.g., *Dominion Bank v. Osborne*, 1994 WL 98,026 (W.D. Va. March 9, 1994) (limiting amount of judicial lien avoided to value of $10,000 West Virginia homestead exemption); *In re Sanders*, 156 B.R. 667, 671 (D.Utah 1993); *In re Harrison*, 164 B.R. 611 (Bankr, N.D. Ill. 1994); *In re Abrahimzadeh*, 162 B.R. 676, 678-79 (Bankr. D. N.J. 1994); *In re Mershman*, 158 B.R. 698, 704 (Bankr. N.D. Ohio 1993); *In re Ward*, 157 B.R. 643 (Bankr. C.D. Ill. 1993). Other courts avoid the judment lien to the extent that the amount of the judgment lien, homestead exemption and consensual liens exceed the value of the property (presumably valued at the time the motion is filed). See, e.g., *In re Cross*, 164 B.R. 496 (Bankr. E.D. Pa. 1994); *In re Kapstein*, 163 B.R. 573 (Bankr. N.E. Ca. 1994), *In re Mennell*, 160 B.R. 524 Bankr. D. N.J. 1993). Still other courts duck the judicial lien avoidance issue entirely by ruling that the passage of time precludes re-opening the case at all. *In re Hunter*, 1994 WL 72,670 (Bankr. W.D. Ky. February 22, 1994) (refusing to re-open case to avoid judical lien seven years after debtor received bankruptcy discharge).

Implication of *Chabot* for Debtors

The harsh implication of *Chabot* for debtors is found in one of the last sentences of the Ninth Circuit's decision in that case:

> If debtors wish to realize any appreciation, they can sell the property, receive the exempt amount from the proceeds, and invest it as they see fit.

Chabot, 992 F.2d at 896. Because a judgment lien creditor may be authorized to proceed with foreclosure notwithstanding the bankruptcy filing, selling the property and moving becomes one of the only ways for debtors with judgment liens against their property to receive a truly "fresh start."

Because that appears to be the law in our circuit, counsel for debtors should take care to discuss filing bankruptcy before judgments become judgment liens. *Chabot* and cases following it makes it far more difficult to set aside a judgment after it has become a judgment lien.

Implication of *Chabot* for Creditors

The Ninth Circuit fostered the position of creditors with its decision in *Chabot* and the two other cases in the *Reed-Hyman-Chabot* trilogy. Undoubtedly, judgment liens have been obtained by various attorneys in this state on behalf of their clients. Decisions were made not to pursue a judgment lien any further once the debtor filed bankruptcy. Bankruptcy attorneys had thought that such judgment liens could be easily avoided under case law such as *Galvan*. *Chabot* now changes that calculus.

Consider a scenario where a creditor was owed money by a real estate developer with a fashionable home in Medina (or Lakewood or Spokane Hill or Edmonds). Suppose that the developer's business collapsed in 1986, the creditor obtained a judgment lien in 1987, and the debtor later filed bankruptcy. Provided that the debtor receives $30,000 as the amount of his homestead exemption under Washington law, *Chabot* says that there is nothing to stop the creditor from foreclosing on the property and realizing the appreciation of the property that may have occurred.

It may be worth reviewing your clients' files to determine what old judgments you may have. Your creditor clients will no doubt appreciate the changing law in this area.

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[1] In Washington, a debtor's homestead exemption is limited to $30,000. Wash. Rev. Code § 6.13.030.

[2] The *Hyman* decision was cited by the Ninth Circuit panel in *Hall* for a different proposition than the postpetition appreciation issue. However, the *Hyman* decision with respect to postpetition appreciation was not discussed in *Hall*. As of March 30, 1994, the Ninth Circuit had not ruled on a pending motion for reconsideration *en banc* of its decision in *Hall*.

* * *

Kurt Becker *practices insolvency, business reorganizations, and bankruptcy with Perkins Coie. He was graduated with honors from the University of Illinois at Urbana-Champaign in 1981 and from the University of Michigan Law School in 1986.*

Average Coupon Equivalent Yields from the Auction of 26-week Treasury Bills: 1984 to Date

These are the average coupon equivalent yields from the auction of 26-week treasury bills from December 1983 to date. The highest rate of interest permissible under RCW 19.52.020(1) is computed by the addition of four percentage points or is 12% per annum, whichever is higher.

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

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

The average coupon equivalent yield from the first May 1994 auction of 26-week treasury bill applicable to the computation of the maximum allowable interest rate for June 1994 is 4.57%. According to the state treasurer's office, the maximum allowable interest rate for June 1994 is 12%. Note that when the equivalent bond yield is below 8%, the maximum interest allowable remains at 12%.

MONTH	YIELD	RATE
1984		
January	9.77%	13.77%
February	9.80%	13.80%
March	9.71%	13.71%
April	9.97%	13.97%
May	10.49%	14.49%
June	10.98%	14.98%
July	11.32%	15.32%
August	11.29%	15.29%
September	11.45%	15.45%
October	11.53%	15.53%
November	11.07%	15.07%
December	9.64%	13.64%
1985		
January	9.19	13.19%
February	8.48	12.48%
March	8.78	12.78%
April	9.54	13.54%
May	9.06	13.06%
June	8.38	12.38%
July	7.53	12.00%
August	7.44	12.00%
September	7.93	12.00%
October	7.69	12.00%
November	7.71	12.00%
December	7.69	12.00%
1986		
January	7.64%	12.00%
February	7.48%	12.00%
March	7.42%	12.00%
April	7.22%	12.00%
May	6.46%	12.00%
June	6.37%	12.00%
July	6.72%	12.00%
August	6.11%	12.00%
September	5.98%	12.00%
October	5.38%	12.00%
November	5.34%	12.00%
December	5.52%	12.00%
1987		
January	5.69%	12.00%
February	5.79%	12.00%
March	5.83%	12.00%
April	5.76%	12.00%
May	6.07%	12.00%
June	6.46%	12.00%
1987, continued		
July	6.40%	12.00%
August	5.95%	12.00%
September	6.45%	12.00%
October	6.66%	12.00%
November	7.33%	12.00%
December	6.55%	12.00%
1988		
January	6.42%	12.00%
February	6.67%	12.00%
March	6.41%	12.00%
April	6.20%	12.00%
May	6.21%	12.00%
June	6.41%	12.00%
July	7.05%	12.00%
August	7.04%	12.00%
September	7.52%	12.00%
October	7.79%	12.00%
November	7.86%	12.00%
December	8.13%	12.83%
1989		
January	8.73%	12.73%
February	8.86%	12.86%
March	9.04%	13.04%
April	9.18%	13.18%
May	9.38%	13.38%
June	9.16%	13.96%
July	8.44%	12.44%
August	8.05%	12.05%
September	8.12%	12.12%
October	8.31%	12.31%
November	8.36%	12.36%
December	7.89%	12.00%
1990		
January	7.69%	12.00%
February	7.93%	12.00%
March	8.15%	12.15%
April	8.22%	12.22%
May	8.24%	12.24%
June	8.28%	12.28%
July	8.03%	12.03%
August	8.01%	12.01%
September	7.56%	12.00%
October	7.75%	12.00%
November	7.59%	12.00%
December	7.41%	12.00%
1991		
January	7.31%	12.00%
February	6.82%	12.99%
March	6.91%	12.00%
April	6.36%	12.00%
May	6 06%	12.00%
June	5.87%	12.00%
July	5.98%	12.00%
August	5.98%	12.00%
September	5.85%	12.00%
October	5.63%	12.00%
November	5.30%	12.00%
December	5.00%	12.00%
1992		
January	4.56%	12.00%
February	4.00%	12.00%
March	4.08%	12.00%
April	4.28%	12.00%
May	4.16%	12.00%
June	3.91%	12.00%
July	3.84%	12.00%
August	3.42%	12.00%
September	3.40%	12.00%
October	3.00%	12.00%
November	2.86%	12.00%
December	3.37%	12.00%
1993		
January	3.57%	12.00%
February	3.38%	12.00%
March	3.19%	12.00%
April	3.14%	12.00%
May	3.13%	12.00%
June	3.07%	12.00%
July	3.32%	12.00%
August	3.19%	12.00%
September	3.35%	12.00%
October	3.12%	12.00%
November	3.17%	12.00%
December	3.35%	12.00%
1994		
January	3.37%	12.00%
February	3.39%	12.00%
March	3.51%	12.00%
April	3.88%	12.00%
May	4.16%	12.00%
June	4.57%	12.00%

How Can a CPA Provide Litigation Support?

*by the **Litigation Services Committee**, Washington Society of CPAs (WSCPA)*

Explosive growth has taken place in the area of litigation support provided to attorneys by CPAs during the last several years: business valuations, damage calculations, forensic skills, government contract consulting and marital litigation, all of which involve business, tax and accounting issues.

The WSCPA formed its Litigation Services Committee several years ago to both keep track of the explosive growth of litigation services and sponsor an annual seminar for CPAs working in the area; this allows them to provide practice aids to other CPAs, to track regulations, statutes, case law, and ethics, and to provide a round table for general discussion among CPA practitioners in the area.

—Joseph L. Lawrence

Business Valuations

Since the late 1970s, such valuations have become extremely commonplace in marital dissolutions where the marital community has an interest in a closely held business and/or professional practice. Valuations are also frequently made in the area of employee stock ownership trusts and plans, partnership and/or corporate dissolutions, buy-sell agreements, estate planning, and/or estate or gift tax purposes, mergers and acquisitions and purchases and sales of businesses. The courts, in areas like marital dissolution, have often said that it does not matter whether or not a business or professional practice is marketable, but the business may have a value, which value should be arrived at by expert testimony. The CPA can establish and critique valuations, suggest types of documents and information necessary on which to base such valuation, and generally help in the discovery, the educational and the trial processes of the case.

—James Erickson, C. Donald Smith, & Joseph L. Lawrence

Damage Calculations

Damage calculations are usually involved with business interruption, construction claims and economic-loss cases.

For example, you may have a client whose business is damaged and/or interrupted by a peril such as fire, wind, flood, or theft, and/or product liability, intentional torts and inverse condemnation. The vast majority of the cases involving business interruption are the result of an insured peril, although insurance carriers are sometimes not involved. A CPA can document, quantify and present losses, as well as appraise and/or referee in appraisal/arbitration hearings. The insurance company itself may retain a CPA to measure the same damages.

Construction claims arise from a myriad of production and scheduling problems and are based on a legal theory of recovery. Once it has been asserted, it is then the CPAs role to quantify the financial impact. Often, the work must be done in conjunction with that of an engineer. The contractor is usually seeking reimbursement for the escalation of costs that were outside of his or her control and, in the case of a sub-contractor asserting damages, the result of an action (or lack of necessary act) by the owner.

Types of recovery theory include: delay, disruption, acceleration, differing site conditions, loss of efficiency, changes in scope, termination, and payment delay. Types of escalated costs include: labor, equipment, material, general conditions, field office overhead, home office overhead, interest/cost of capital, and lost profits.

Economic-loss cases may also include the valuation of intellectual property and intangible assets.

—C. Donald Smith & James Erickson

Forensic Accounting

It is not uncommon, nowadays, for questions to arise regarding the analysis of financial statements, fraud and white-collar crimes. CPAs provide consultations, investigations and accounting services relative to criminal and civil tax issues and tax controversy, fraud, white-collar crime, net worth and other indirect methods of proving income, asset tracing, and preparation of delinquent tax returns using indirect methods of determining income, the analysis of financial statements in relating the numbers to other numbers on the financial statement, industry norms, and historical experience.

—Fred J. Adams & Lawrence Siminski

Government Contract Consultants

Specialized CPAs provide services to attorneys in the government contract area which include preparation of contractor cost proposals for terminated contracts, contractor claim or change proposals, contract close-out requirements, contractually required reports, advice on all aspects of government contract administration and auditing, review of contractor compliance systems (internal controls) relative to specific government regulations, pre-audit reviews to minimize the impact of a government audit, and assistance in litigation negotiations and training workshops.

—Ronald L. Haworth

Marital Litigation

CPAs have become instrumental in assisting attorneys to interpret and understand the wide-ranging issues of property valuation and division, taxation, the calculation of income and expenses for purposes of maintenance, child support and other economic issues. In fact, it has been found that most issues involved in a marital dissolution are those of economics, accounting, income/expense and taxation. A CPA can both analyze documentation and accompany an attorney to settlement negotiations to explain economic and/or tax issues; the CPA can provide expert testimony in trial/arbitration and can assist in future budget-related needs of the attorney's client.

—Joseph L. Lawrence

HEALTHFUL AGING: A

The tragedy of life is not death, but

by **Geri Marr Burdman**, *Ph.D.*

Aging is a worldwide phenomenon with important implications for all of us; demographic transitions point to it as the most critical international health issue of our times. A person plucked from the first half of the century and set down in today's world would be struck not only by the sheer number of persons over 65—and, indeed, over 75—but by their visibility and impact on society.

We are seeing dramatic shifts in the health status and needs of both men and women throughout the world. Health is largely a product of experience, lifestyle, culture and genetic factors. Its dynamic nature is reflected in the World Health Organizations' definition:

> "Health is a state of physical, mental and social well-being and not merely the absence of disease."

In the long run, we shape our lives and we shape ourselves. The process never ends . . . . And the choices we make are ultimately our own responsibility.

Eleanor Roosevelt

While the concepts of disease prevention and health promotion are centuries old, only in recent years have we seen a dramatic resurgence of interest in prevention programs.

People are deeply interested in improving their health at *all ages*. The mind-body-spirit connection, the need for personal satisfaction and a sense of purpose in relation to total health are receiving increased attention.

Within the last few years, self-help groups have proliferated, including ones for weight control, smoking cessation, stress control, alcohol cessation, spiritual growth and help with loss and grief. It is estimated that several different types of support groups are active in the United States alone; most are expanding worldwide.

The self-care/self-help movement dramatically points out the need to take an active role in maintaining or improving personal health throughout the lifespan.

Although heredity may increase risk for certain diseases, it is the interaction between our total environment and genetic background that determines our state of health. There is increasing evidence that health is strongly influenced by physical, social, economic and family environments. Personal health habits play an enormously important role in the development, as well as the prevention, of many diseases and injuries.

Most of today's serious health problems are related to personal lifestyle and health habits: excessive stress, smoking, drinking, poor nutrition, misuse of medications and/or careless driving. According to the Surgeon General, of the top ten causes of mortality in the United States, at least seven could be substantially reduced if persons at risk adhered to the following five health habits:

- dietary improvement
- smoking cessation
- adequate exercise
- reduced alcohol intake
- hypertension control

A vast potential capacity for change exists within every human being, regardless of age. The human mind is powerful beyond measure for disciplining the body and achieving wholeness.

We are fast realizing that good health is not something that can be purchased at the corner pharmacy. Keeping the body and mind in optimal condition, well into our later years, is largely a personal responsibility—a lifelong quest in which lifestyle and health habits make all the difference.

Given the mounting evidence that many major illnesses—including cardiovascular diseases and some forms of cancer—are preventable, there is every reason to emphasize a strategy of health promotion and disease prevention throughout the lifespan. At each stage of life, different steps can be taken to maximize well-being. The individual plays an enormously important role in influencing the aging process. The ultimate goal, of course, is to live an independent and fulfilled life unencumbered by preventable illness.

We all have capacities, talents, directions, missions, callings . . . The task is, if we are willing to take it seriously, to help ourselves to be all that we are in potentiality . . . .

A. Maslow

The three pillars of health promotion—nutrition, physical activity and stress management—are especially important in the aging process. The importance of eating nutritious food in appropriate quantities and limiting high fat- and calorie-laden foods is, of course, critically important.

Regular physical activity is another important ingredient of healthful aging. Exercise can help the body not only to maintain, repair and improve itself, but also to cope with stress.

In addition to physical conditioning, relaxation and meditation, a variety of other activities are important to managing stress. Besides relieving tension, they hold the potential for self-regulation of the body's autonomic systems and even for the enhancement of the immune system.

If we tune in to our strengths and limitations and avoid habits that are detrimental, achieving optimal health becomes a more attainable goal. The personal quest of wellness is worthy of effort at any stage of the life cycle.

Some self-care practices require large investments of time, effort and planning; others are relatively simple, such as the use of preventive imagery. Preventive imagery involves picturing what is happening inside the body and noting any areas of tension or tightness.

Imagery and creative visualization have a long and varied history in healing traditions throughout the world. Most uses of

Our remedies oft in

what we let die within us while we live.

Norman Cousins

imagery in the self-care movement involve techniques of relaxation, pain control, and autonomic self-regulation.

The human imagination may be one of the most useful therapeutic tools available to us. The techniques of creative visualization are myriad; their essence is to visualize the self whole and well—as one wishes to be—and to focus on that potential reality.

Learn to distinguish when to submit and when to fight—knowing this will preserve and lengthen your life.

Hans Seyle

Middle and later life are often accompanied by losses: status, dreams, social supports and loved ones. These, coupled with negative stereotypes of aging, can contribute to high levels of stress and tension.

Hans Seyle, whose landmark work several decades ago led us to a better understanding of the impact of stress on our lives, emphasized that stress can be either good or bad, helpful or hurtful. Seyle distinguished between eustress and distress and advised:

> Don't try to avoid stress, but master it and channel it into the form of eustress rather than distress; find the occupation or activity that is pleasant for you and that you are good at. If you are poor at something and continuously are humiliated by failure, obviously that is negative. On the other hand, if you find purposeful activity that enhances your self-esteem and sense of mastery, that is excellent.

When we are no longer able to change a situation—we're challenged to change ourselves.

Viktor Frankl

The work of Viktor Frankl also has a profound and timely message for today. He speaks of alienation, the sense of estrangement, of not belonging. This often is characterized as a loss of interest and lack of initiative that can be attributed to an "existential vacuum"—a feeling of meaninglessness or inner emptiness.

In our society, alienation probably takes its greatest toll among adolescents and people at middle and later life. Frankl postulates that a search for meaning is a basic motivational factor in all human behavior. It is one aspect of "being human"—reaching out for a meaning to fulfill or being connected to something or someone other than self. Pleasure and power may come as byproducts, but they cannot be the prime motivational factors in finding meaning in life.

According to Frankl, meaning in life can be discovered in three ways: by doing a deed, by experiencing a value or even through suffering.

"Doing a deed" refers to an accomplishment deemed of personal value and set as a goal. An example is community service. Reaching out and helping someone can give both giver and receiver a sense of security and connectedness that cushions against the many frustrations and hurts in life.

"Loving" refers to gaining full awareness of something, such as a work of art or nature, or a deep and profound mutual commitment with another person.

In the midst of winter, I finally learned that there was in me an Invincible Summer.

Albert Camus

A third way to find meaning in life is "through suffering." In facing a fate that cannot be changed—loss of family, friends, work or other serious loss, for example, or an incurable disease, one is given an ultimate opportunity to actualize the highest value, to fulfill the deepest meaning—that of suffering. What matters, above all, is the attitude one takes toward suffering—how one accepts life's circumstances.

Old age and the wear of time teach many things.

Sophocles

Change is an inevitable and constant occurrence in our lives. Learning to confront the issues and to understand the process of growth from life's transition experiences can provide us with a springboard to a more purposeful future, regardless of our age or circumstances.

People who seem to be happiest and healthiest at any age are those connected with others by mutual need and a sense of identity. They are active and engaged in life and generally share some common characteristics:

- an acceptance of responsibility for self and the ability to formulate realistic goals;
- a realistic sense of, and respect for, self;
- flexibility and resilience and the capacity to accept joy as well as sorrow;
- trust in other human beings and the expectation that this is a reciprocal process;
- the ability to give love and to consider the interests of others;
- the ability to receive love;
- a sense of community and responsibility toward neighbors and fellow humans;
- an understanding of the cycle of life; and
- an acceptance of death as a stage of life.

* * *

***Geri Marr Burdman** will be the trainer at the LAP peer counselor training session on October 5, 1994.*

ourselves do lie. *Shakespeare*

THE JUDICIARY

Spokane County Superior Court Judge **Kathleen O'Connor** was the recipient of the Myra Bradwell Award at Gonzaga University in April. The award, named for a 19th century Illinois lawyer and editor, is given annually by the Gonzaga Law School's Women's Law Caucus and honors an outstanding woman graduate of the law school. The same week, U.S. Supreme Court Justice **Antonin Scalia** gave the Law School's 23rd Annual William O. Douglas Lecture.

EAST KING COUNTY REPORT

by **MARIJEAN E. MOSCHETTO**

Although there are no monthly membership meetings during the summer for the East King County Bar Association, there will be plenty of activities.

June 24, 1994, is the date for the annual EKCBA cruise leaving at Coulon Park in the early evening. Our usual festivities include dinner, dancing and cruising around Lake Washington. This year, by special arrangement, the entertainment includes the induction of the 1994-1995 officers of those local party animals, South King County Bar Association. I have heard quite a bit about the celebrations that occur at their inductions (last year featured that inveterate jokester, **Andy Weiner**, who is rumored to get even better after he's had a few) but have never actually been there. **Mike Salazar** will be handing over the reins to **Jane Rhodes**. (Party animals and reins, get it?) Advance reservations are required, call the EKCBA office at (206) 637-3097 for details.

July features the first leg of the Suburban King County Bar Association Golf Challenge by playing in South King County Bar Association's golf tournament in the latter half of the month. Entry into the Challenge requires membership in EKCBA and ability to play in both SoKCBA's tournament and EKCBA's in August. As of this writing the tentative date is July 29, but the location for South's tournament is yet to be set; check announcements in the EKCBA newsletter. We are looking for players with the determination to win the cup back for the Eastside! (Either that or reverse ringers to join SoKCBA and bring down their scores.) Contact captain **Alex Wirt** through the EKCBA office, (206) 637-3097.

August brings our own EKCBA Golf Tournament which is also the second leg of the Golf Challenge. Every year the tournament camaraderie gets better and so does the course. President **Val Hoff** will be driving the first ball—keep up those lessons, Val. We are hoping to form

*This page: L to R: Washington attorney **Ying Xi Fu**, Stoel Rives Boley Jones & Grey, **Xiao-Bao Miao**, Deputy Bureau Chief, Shanghai Bureau of Justice, **Joyce Noonan**, Deputy Director, Trade Development Alliance of Greater Seattle. Opposite page: Washington attorney **Alex Cai**, managing partner, Shanghai Pacific Law Firm. April 25, the WSBA,Stoel Rives Boley Jones & Grey hosted a delegation of Chinese lawyers in Seattle, the first of several cities in the U.S. they are visiting to learn the role that lawyers and the organized bar play in our system of justice. During a cultural exchange, discussions ranged from the function of*

photos by M.E. St. Clair

our Judicial branch of government and the role played by the State Bar Association and its members to the legal system of China and the changes currently taking place in the role of lawyers and the bar within that system.

a women's division this year and issue a special request for women golfers to attend. Eastside Legal Assistance Program will also be kicking off its annual raffle, tentatively set for August 18 at Carnation, featuring this year's grand prize of airfare and accommodations for a trip to Mexico. Be sure to check the EKCBA newsletter, or call tournament director Alex Wirt through the EKCBA office at (206) 637-3097.

LAW FUND

On May 6, Spokane Legal Services Center dedicated its new office building in memory of **Jack R. Dean**, past WSBA president and founding president of LAW Fund. The building was dedicated as the Jack R. Dean Center for Legal Services.

(See story page 24 of this issue.)

During the next few months, a special LAW Fund campaign will be coordinated in Spokane County and around the state in honor and memory of Jack, for his tireless dedication toward the mandate for equal access to justice under law.

The campaign will center around the theme, "Double Your Dollars for Dean," and will encourage supporters of LAW Fund to double their previous contributions. Lawyers and law firms which have not participated in the LAW Fund annual campaigns in the past will be invited to participate as well.

Congratulations to LAW Fund Board member **John T. Powers, Jr.**, for his recent certification in business bankruptcy law by the American Bankruptcy Board of Certification. The ABBC is a Washington, D.C. based nonprofit organization sponsored by the American Bankruptcy Institute. ABBC certification standards—accredited by the ABBC—are designed to recognize attorneys who are experts in the bankruptcy field.

For more information on LAW Fund, please write LAW Fund, 1326 Fifth Avenue, Suite 815, Seattle, WA 98101, or call (206) 623-5261.

OPWPLICCB REPORT (VENERABLE AND HONORED SENIOR PRACTITIONERS IN THE CHELAN/DOUGLAS COUNTY AREA - *Editor*)

by **CHARLES W. CONE**

The spring meeting of the OPBA was convened at noon, March 24, 1994, at O'Reilly's Sports Bar and Grill in East Wenatchee. Ten members were present.

It was announced that long-time Cashmere lawyer **LeRoy LaVigne**, a member of the OPBA, died March 10, 1994. He was 72 years old and practiced law in Cashmere for decades. He was a gentleman and a gentle man who was a friend and colleague at the Bar.

Lyle (Butch) Higgins, who practiced law in Chelan from 1940 through 1977, died March 28, 1994. He served his country in World War II, the legal profession during his entire adult life, and his community throughout his life.

The business meeting for the organization focused on a possible libel suit against the *Washington State Bar News*. A recent news item, a copy of which is enclosed, revealed that a 60-year-old Tigard, Oregon, man won a $370,000 federal jury award after being called an "old geezer." This same appellation has been used by the *Bar News* in reporting the activities of our association.

It appeared to the group that a lawsuit against the *Bar News* for libel might result in a sizeable verdict, which would salve the wounded psyches of the members and enhance our retirement comfort.

The following committees were appointed to pursue this litigation:

(1) **Ed Engst** and **Earl Foster** will be in charge of pleadings;

(2) **Jon Phelps** and **Jim Lynch** will be in charge of pretrial motions and venue, jurisdiction and statute of limitations questions;

(3) **Bernice Bachrach** and **Lowell Sperline** will brief questions of damages;

(4) **Bob Hensel** will be appointed in charge of judge-shopping;

(5) new member **Frank Kuntz** will be in charge of discovery; and

(6) **Robert Graham** and **David Whitmore** will be in charge of collection and execution on the expected judgment.

After these discussions, Judge **Jerry Hanna** dampened the members' enthusiasm by recalling that in law school something was said about truth being an absolute defense to libel allegations. He was assigned to research this point, and the committees are to report at our June meeting, now set for June 2, the time and place to be later announced.

Election of officers was held, and **Charles Cone** was elected chair, secretary/treasurer, scrivener, amanuensis, and recording and corresponding secretary by the usual unanimous votes of all present.

The usual social hour which follows our meetings was cancelled because several of the members were napping.

(Editor's Note: Another factor not considered at the last meeting is judgment—proofness. The WSBA treasurer has referred, in print, to the Bar News *as a big money-loser. Besides, we never used the word "old.")*

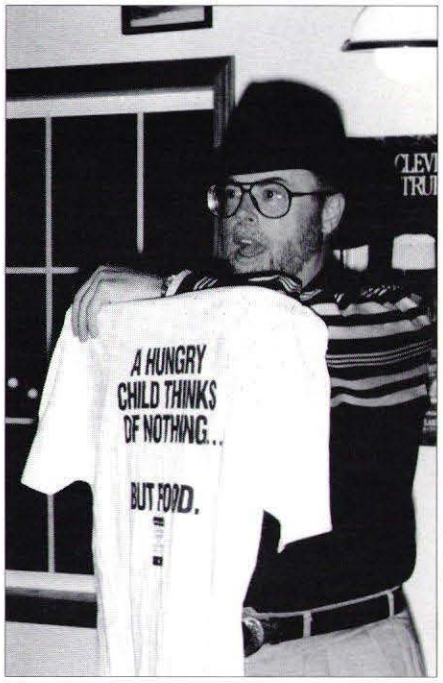

photo by M.E. St. Clair

At the WYLD Midyear in Leavenworth, ***Paul Stritmatter*** *holds up a Washington Lawyers' Campaign for Hunger Relief T-shirt. As part of the WYLD community outreach project, Midyear participants collected baby formula, children's clothing, toys and donations to purchase food, milk and safety-approved car seats, all to be distributed through Leavenworth's Community Cupboard.*

PIERCE COUNTY REPORT

by **GEORGE S. KELLEY**

Bill Barker left the Tacoma City Attorney's office in February. No announcement was made in order to avoid the retiring city attorney's curse. No one is sure how the curse came to be, but everyone is sure that it works. Two former city attorneys died within weeks of their retirements. All have had mini-parks named in their memory. **Bob Backstein** is the only known former city attorney to have survived, and he did so only by taking up employment with the Tacoma branch of a large Seattle law firm. Some folks would rather take their chances with the curse.

Bill's clever attempt to avoid the curse

Visiting judges from the new nations of Kazakhstan and Kyrgyzstan, hosted by Washington Supreme Court Justice ***Robert F. Utter****, (see* Bar News*, February 1993, page 23) were delighted to receive "Call of the WYLD" sweatshirts as souvenirs. It turns out that Jack London is favorite reading in Russian translation.*

1st row, L to R: ***Victor Malinovsky****, judge, Constitutional Court, Kazakhstan;* ***Paul Friedman****, simultaneous interpreter/translator;* ***Paul Stritmatter****, WSBA president;* ***Akylbek Matkarimov****, judge, Supreme Court, Kyrgyzstan; 2nd row, L to R:* ***Asylbek Kenesariev*** *and* ***Pavel Dryzhak****, judges, Const. Court, Kyrgyzstan;* ***Bolat Tokhmetov****, judge, Supreme Court, Kazakhstan;* ***Urdagali Ikhsanov****, judge, Const. Court, Kazakhstan;* ***Sakan Satybekov****, judge, Const. Court, Kyrgyzstan;* ***Igor Rogov****, Deputy Chairman, Const. Court, Kazakhstan;* ***Bulan Nassyrov****, Deputy Chairman, Supreme Court, Kyrgyzstan; and* ***Kelghen Kerimov****, judge, Supreme Court, Kazakhstan.*

was only partially successful. He was riding his bicycle (Bill is a veteran of many Seattle-to-Portland rides) when he was almost killed in a collision with an automobile in a Puyallup intersection. He received cuts and bruises, and his bike was terminated. If you see Barker on the street or out riding his new bicycle, do not mention his retirement. The curse may still be working, and a park named Barker sounds silly.

The 1994 version of the Young Lawyer's softball team finds **Skip Stansbury** as the new field manager in place of **Larry Couture**, who has taken on the job as general manager. Actually, it takes both these people to see that ten players show up for each game. This team has been around since the first Nixon administration. The team outlasted its former sponsor, Puget Sound National Bank, which was lost in a mega-merger with a giant East Coast banking conglomerate. The new sponsor is Columbia Bank, the new, last local bank left in these parts. Early results are hopeful in that the team's record is two rainouts and one win.

Small, Snell & Weiss, P.S., has relocated its offices to the Tacoma Mall area of Tacoma. Its former offices were located in what had become a high-crime area of a high-crime city. Driveby shootings were common. People began to refer to their offices as a firebase and their parking lot as the LZ. There are no driveby shootings at their new location as the Mall traffic is so heavy that no one can drive by.

Monte Bersante has become a partner in the Davies Pearson firm, and **Jennifer L. Simpson** has joined the firm as an associate.

The death of **Bob Rovai** should be noted. I doubt that there are many in the legal community of Pierce County who were not somehow touched by Bob's presence. He will be missed.

WASHINGTON DEFENSE TRIAL LAWYERS REPORT

by **LAURIE D. KOHLI**

The Washington Defense Trial Lawyers held their Eastern Washington Judges' Receptions in Yakima and Spokane on May 5 and 6. The Yakima event took place at one of Washington's newest golf clubs, the Apple Tree Golf Course, and the Spokane reception took place at Patsy Clark's. Both events were well attended by retired and current members of the federal and state court benches in Eastern Washington, WDTL's eastern Washington members, officers and trustees. As usual, a good time was had by all.

WDTL's Annual Meeting and Convention will take place on July 14-16 at the Delta Whistler Resort (formerly the Delta Mountain Inn); it will be chaired by WDTL president-elect **Mary Spillane**. Its theme will be civil justice reform—means to enhance and preserve the viability of the civil justice system into the 21st Century. The convention speakers will be, among others, former Washington Supreme Court Chief Justice **Keith Callow** and **Robert N. Sayler**, chair of the American Bar Association's Section of Litigation. Callow will recount his personal experiences in helping the government of Estonia establish its new judicial system following the dissolution of the former Soviet Union. Sayler will address the ABA's efforts to facilitate and support judicial reform activities and ways Washington state and WDTL members can effectuate needed improvements in the civil-justice system.

The Delta Whistler Resort features rooms with fireplaces, kitchens and whirlpool baths; it offers tennis, championship golf, biking, hiking, an outdoor pool, outdoor and indoor Jacuzzis and fully equipped exercise facilities. Those interested in attending the convention, which is limited to WDTL members, their significant others and their families, should call WDTL's executive director, Nora Tabler at (206) 233-2930.

WASHINGTON WOMEN LAWYERS REPORT

by **ANNE BREMNER**

WWL's State Board of Directors met March 10, 1994. **Tom Fitzpatrick**, Washington State Delegate to the American Bar Association, gave a presentation on ABA committees and sections available for women lawyers. Both the incoming ABA president and leader of the House of Delegates are women (the first time ever).

The ABA is committed to diversity, and Fitzpatrick suggested that persons interested in ABA contact WWL or Fitzpatrick directly.

Petrea Reilly reported she was on her way to Spokane for a gender bias seminar. Washington Supreme Court Justice **Barbara Madsen** and federal judge **John Coughenour** were among the scheduled speakers and great attendance was expected. WSBA president-elect **Ron Gould** seeks WWL assistance in a WSBA project on gender bias policies regarding part-time work schedules for women.

Tiffanie Kilmer, WWL's executive director, had a baby girl, **Mackenzie Kyle**. Congratulations!

WWL president **Kathy Cooper Franklin** is working with WSBA president **Paul Stritmatter** to invite minority and specialty bar associations to send representatives to WSBA Board meetings and give presentations on their organizations. Kathy was also invited by Washington Chief Justice **James Andersen** to attend a meeting on pro bono work through Evergreen Legal Services.

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 Annual Business Meeting, which will be held this year on Friday, September 9, 1994, beginning at 2:30 p.m. at the Seattle Sheraton in Seattle.

Resolutions must be filed with the executive director at least ninety (90) days before the Annual Meeting (by 5 p.m. on Friday, June 10, 1994) 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 Friday, September 2, 1994, beginning at 1:30 p.m. at the offices of the WSBA (500 Westin Building, 2001 Sixth Avenue, Seattle). Proponents and opponents of resolutions are urged to attend the hearing or to present their views in written form for consideration by the Committee.

Proposed resolutions will be published in the July 1994 *Bar News*.

The members of the WSBA Resolutions Committee are: John G. Schultz, chair; David D. Hoff; Gary D. Gayton; Jon C. Iverson; James T. Johnson; Jill R. Kurtz; Edward N. Lange; Teresa M. Morris; John M. Riley, III; Stanley D. Tate; Phillip L. Thom and Ted D. Zylstra.

Stella Pitts announced that the King County Chapter held a Judicial Appreciation Luncheon on May 4. Several awards were given.

Carol Murphy and **Nancy Krier** of the Capitol Chapter announced that they hosted a March 22 luncheon with Judge **Paula Casey** of the Thurston County Superior Court. The program focused on professionalism. On April 21, the chapter conducted a professional-appearance workshop. A CLE is also being organized on domestic violence.

YAKIMA COUNTY REPORT
by **GARY MCGLOUGHLEN**

This spring, the winds shifted attorneys faster than winds blew **Doug Peter**'s sailboat across the waves. The biggest surprise was the reduction in force of the Gavin firm, one of the oldest continuing firms in central Washington. Still holding to the tiller, as of press time, were **Bob Redman** and **Homer Crollard**, who will maintain the firm's current address until they find a new slip to berth their practice. **Stan Pratt** is now in sole practice at 105 N. Third Street, Yakima, 98901, (509) 453-9135. **Scott Beyer** is housed with Menke, Jackson & Beyer, 1400 Summitview, Suite 100, Yakima, 98902, (509) 575-0313; **West Campbell** can be reached at PO Box 1641, Yakima, 98907, and **Tap Menard** at PO Box 673, Yakima,98907, until their boat docks; **Susan Harrel** went north to Ellensburg and Lathrop, Winbauer, Harrel & Slothower, 201 W. Seventh Ave, Ellensburg, 98926, (509) 925-6916; and **Walt Robinson** can be found at home, 415 N. 52nd Ave., Yakima, 98908. Best wishes to all graduates of the Gavin organization.

Changing lifestyle found **Doug Haynes** leaving the Yakima prosecutor's office for the bright lights of Louisville, Kentucky, and what he calls home. Seventeen years away from the southern lifestyle convinced Doug that it was better to enjoy life than work at it. Too bad Washington State Bar does not have reciprocity with other states. Doug had to take the KY Bar exam, even though KY recognizes attorneys from 40 other states for admission without the full exam.

There is some continuity in Yakima, as shown by the Velikanje, Moore & Shore Law Offices, which will be celebrating their 85th, yes 85th, year this June. **Fred**, **George** and **Bob Velikanje** cover the three current generations of Velikanjes in the office. Congratulations to a terrific group of attorneys.

By the time this gets to print, the Yakima Bar Picnic should be history. 'Nuff said that last year, all who attended had a ball of a time. Good food, fellowship and the proper lay of the cards. Who can say more?

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MISCELLANEOUS

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"Move to Strike!" (II)

More awkward courtroom moments and member recollections
Response to the last collection of oddments from readers was, well . . . more of them.

Better than not being remembered at all: From Tacoma, Samuel W. Fancher recalled "the only thing I am known for from my 24 years of practicing in Spokane." Prior to the no-fault divorce laws, a wife is testifying in the Superior Court for Spokane County as to her husband's requirements:

The witness: "At night—every night—he required sex. In the morning it was the same thing. He worked as a painter at the _____ plant about 18 miles from home. Instead of taking his lunch like any other man would, he drove home and demanded sex before lunch. He wouldn't even wait to clean the paint off his hands."

CROSS EXAMINATION:

Defense counsel: I have no questions.

The Court (now deceased, but then well-known for an active interest in such matters): I want you to pursue this matter further.

Defense counsel: Well . . . did you really consider his sex demands excessive?

The witness: I don't know about you, but I thought they were.

That sinking feeling: Seattle lawyer Jan Eric Peterson sent along an account of his "all-time favorite tale from the transcripts, although I do not have the official transcript for what will become obvious reasons."

"In this case," Peterson reports, "my partner and I and associated co-counsel represented a very severely injured man in a hotly contested liability case. The man's two adult daughters were being deposed as they were going to testify on the issues of the damages to their father, and as to his character—minimizing his penchant for alcohol. Co-counsel was supposed to have prepared these witnesses for their depositions. We suspected we were in trouble when these two substantial women walked in in their pedal-pushers and flip-flops, plunked themselves down, and stared vacantly around the room. The oath was administered, and opposing counsel asked one her name. She handled that one well enough. But counsel's next question was, 'Please state your residence address.' The witness's eyes narrowed with suspicion at this tricky question and a long silence ensued. Counsel caught on and restated the question: 'Where do you live?' Her eyes brightened and then she frowned, 'Well....' Another long pause ensued. 'I could show you,' she said. When she started counting her fingers in response to a question about her birth date, we put away our note pads and started amending our interrogatory answers. Fortunately, our client's claim wasn't that he was brain-damaged. Some days just don't turn out to be as good as you'd hoped they would."

That floating feeling: From out of state comes the "All-Time Favorite Criminal Defense" of Paul H. Buchanan, Jr., former chief judge of the Indiana Court of Appeals, from the February 1994 issue of *Res Gestae*, the Indiana State Bar magazine, just because we liked it:

"The mayor of a northern Indiana city is charged with theft and diversion of city property.

"His defense was that he came home late one night and found that vandals had built a swimming pool in his back yard."

Time keeps on running, running, running/Into the future . . . . Civil Procedure, not noted as a gold mine of wit, nevertheless turns up the occasional gem, like this pleading caption from a case in the Washington Court of Appeals, Division I, preserved by WSBA general counsel Robert Welden: MOTION TO ENLARGE TIME TO MOVE THE KING COUNTY SUPERIOR COURT TO SHORTEN TIME TO HEAR A MOTION TO ENLARGE TIME TO MOVE TO EXTEND TIME TO MOVE FOR AN INDIGENCY ORDER AND FILE NOTICE OF APPEAL.

Coming Attractions: Robert C. St. Louis says, "Beware the Man From Out-of-Town," and Wayne C. Booth, Sr. recalls watching a bulldozer, next month in this space. As always, reader contributions are welcomed.

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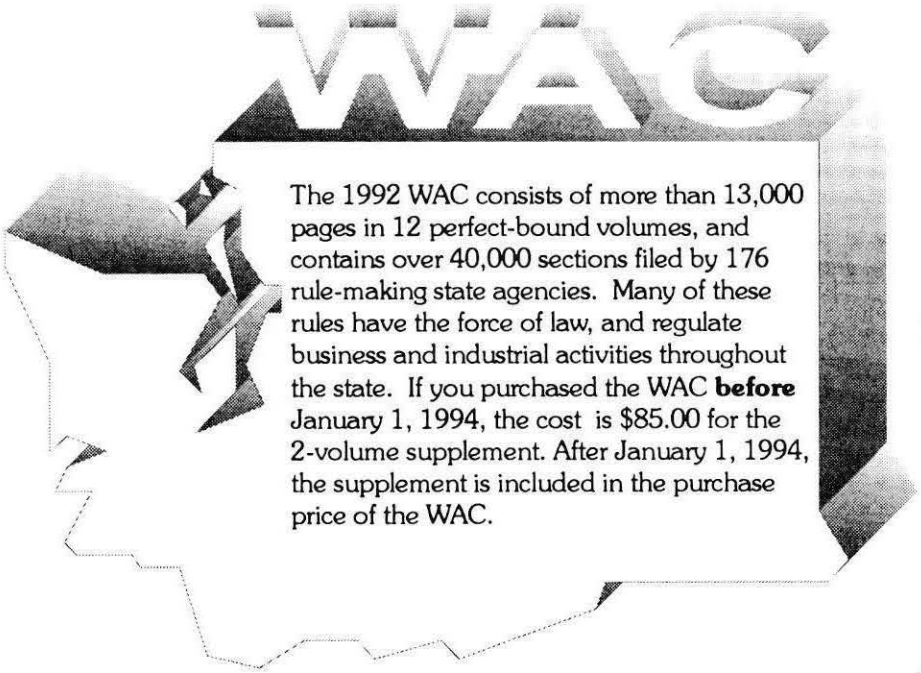

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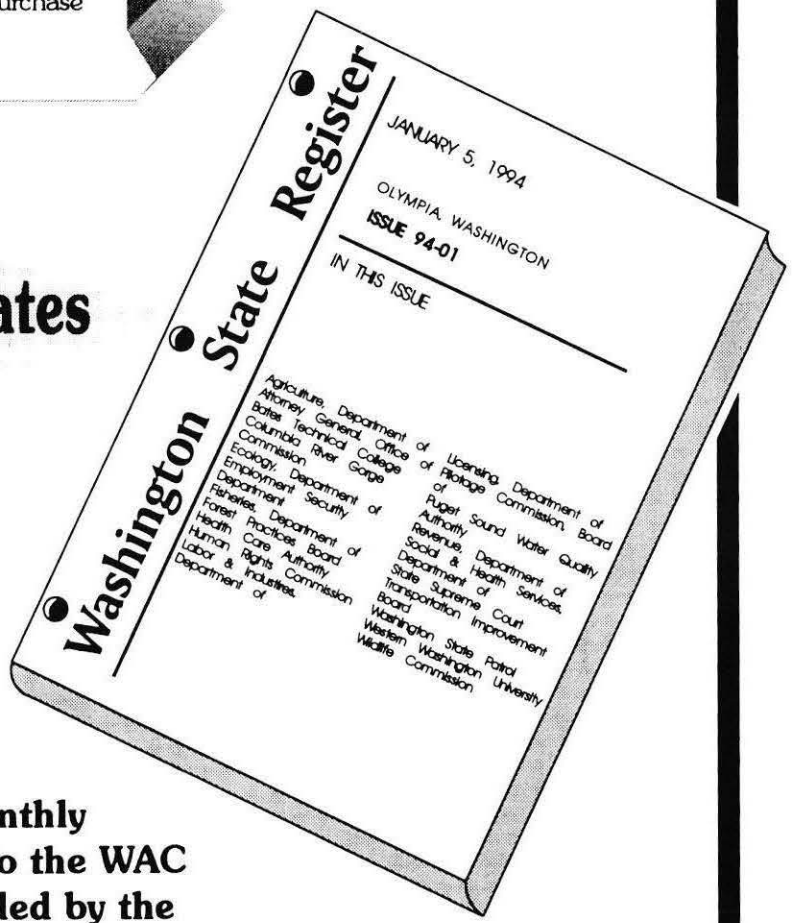

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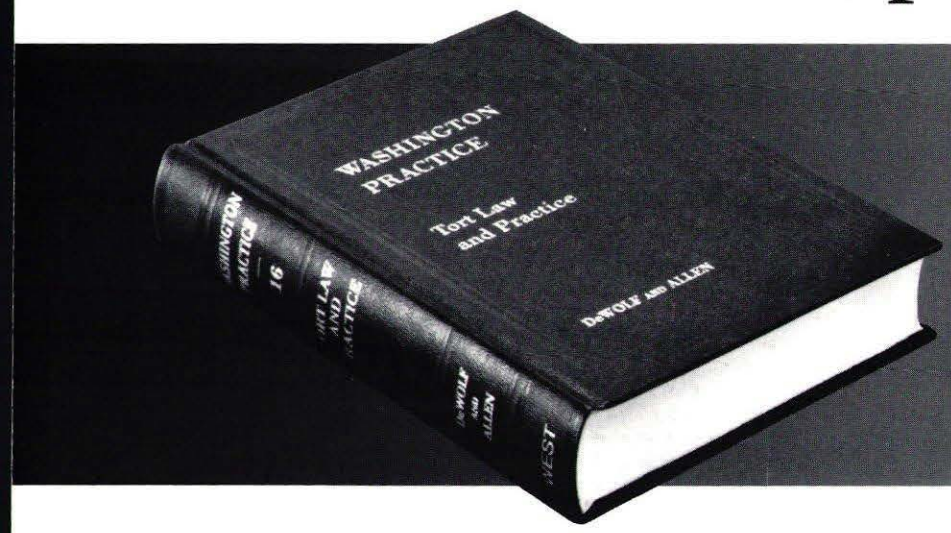

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