

Washington State **Bar**
News

Vol. 48, No. 7, July 1994

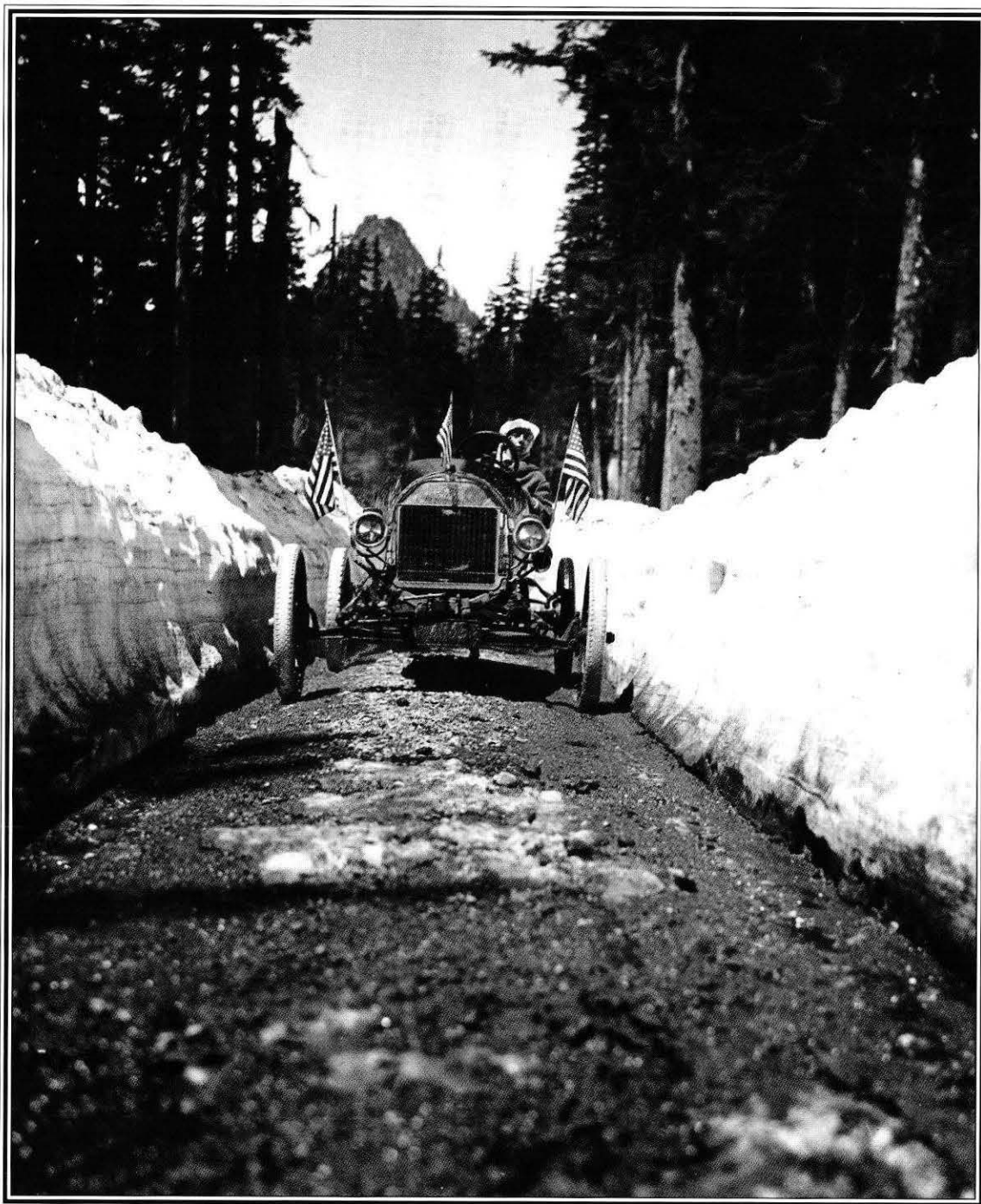


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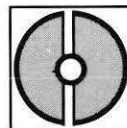
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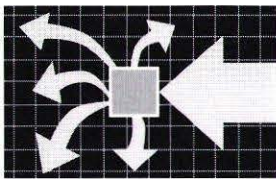
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ART CREDITS

Snoqualmie Pass on the Fourth of July; 1914 photo of his father
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Published by
 WASHINGTON STATE BAR ASSOCIATION
 500 WESTIN BUILDING 2001 SIXTH AVENUE
 SEATTLE, WA 98121-2599

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Washington State Bar News is published monthly by the Washington State Bar Association, 500 Westin Building, 2001 6th Avenue, Seattle, WA 98121-2599. Second-class postage is pending in Seattle, WA. \$6.70 of a regular member's dues is used for a one-year subscription. The annual subscription rate for inactive members is \$12. Nonmember subscription rate is \$24 a year.

POSTMASTER: Send changes of address to Washington State Bar News, 500 Westin Building, 2001 6th Avenue, Seattle, WA 98121-2599.



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DEPARTMENTS

Letters: More on the topics of the day: UW law school placement office policies; gun control; law practice in the Pacific islands; the advantages of getting CLE credit without having to leave your office; WSBA staff unionization; that old devil Client Security Program; child support exemptions under federal tax law; and the elbow-jabbing, generally indecorous nature of the "Letters to the Editor" section. 5

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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.

In Defense of the UW Law Placement Office

Editor:

We could not rest easy without responding to Ms. Hurley's letter ("Letters," *Bar News*, May 1994, page 7). We take great exception to her unfair assessment of the University of Washington School of Law's Careers Office and especially her comments on Tony Bastone, the law school's director of career services. Please note the following points:

1) Prior to Tony Bastone's engagement as director of career services, students and alumni of the law school were not in receipt of very active "career services." They received very little feedback and minimal direction and information. This was even more so in the case of the law school's alumni. Mr. Bastone completely overhauled this operation and has provided consistent, enthusiastic, creative and very effective career services to both students and alumni. His behavior and attitude has especially been an inspiration to us, since we graduated without the benefit of his input.

Tony Bastone spends time with students and alumni, provides intensive resumé and cover letter review, and even works evenings and weekends to assist those who cannot come to see him during regular business hours. He organizes helpful seminars and plays an active and vital role in introducing students and alumni to prospective employers.

2) Ms. Hurley makes much of the "one-on-one" reciprocity program currently in place at the law school. Ms. Hurley could have obtained a letter from her law school indicating that they would assist a UW law student/graduate in the future if the UW law school would assist their student/graduate right now. This would allow her to use the full extent of career services available.

3) Ms. Hurley conveys the impression that she is being deprived of any form of contact with the law school's career services office. In fact, non-UW law graduates like her can subscribe to the *Green*

Sheets. Law students at UW pay fees and in return receive tuition and services like the career services office. Ms. Hurley states that because she is a taxpayer she should be allowed to use the law school's career services. Just because Ms. Hurley is a taxpayer, should this allow her automatic access to law school classes as well as career services?

4) Ms. Hurley refers to the law school's reciprocity policy as amounting to "mean-

spiritedness." She should be aware that most law schools endorse this same policy and do not open their doors or even job binders generously to all and sundry. Why should UW be condemned for adopting that policy? Willamette and UPS both have a reciprocity policy, while Gonzaga has even more limited access. UW adopted this policy essentially out of necessity: non-UW law students were taking full advantage of their "open-door policy."

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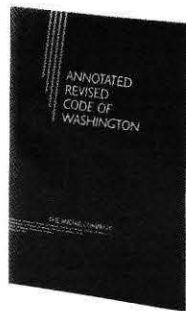
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while UW law students were receiving no assistance at other law schools.

5) The vast majority of job postings at UW are aimed at students/graduates who are at entry level or have up to five years' experience. Prospective employers generally post notices at UW because they are looking for responses from UW students and alumni. In the past six months we have only seen one posting for an attorney with ten years' experience. The place for an experienced attorney like Ms. Hurley to look is at the Washington State Bar Association office.

6) Ms. Hurley contends that most job postings are "stale and closed" by the time they are published in the *Green Sheets*. In our experience this is not true. In many cases, the job postings stay on the *Green Sheets* and in the law school jobs binder for months at a time.

We sympathize with Ms. Hurley and others in her position. We rely on Tony Bastone and his career services office, and we are very aware of the fact that outside the boundaries of our own law school careers office there is a closed-door policy at the law schools all around us.

HELENA KOLTONOWSKA
SHAHINA PIYARALI
Seattle

More on Gun Control

Editor:

At first, I was tempted to chide Mr. Ziegler ("Letters," *Bar News*, May 1994, page 7) for his Charles Bronsonesque views on using guns to protect home and family. I had assumed that most thinking people had realized by now that such notions were little more than idle ego daydreams, molded by TV and movie scenes which often give the appearance that violent criminals can be gloriously and heroically taken out by pistol-wielding Joe Citizens.


Then I decided that, like on abortion and other life/death issues, our polarization on gun control represents the smoke rising from the fires of (at least) two other distant camps—fires which can scarcely be smothered by the efforts of the others.

Considering where these camps began their travels, they are perfectly right in their various ways of viewing the world (if "being right" is any consolation). Mr. Z is absolutely right. The kinds of fears he experiences about the threats to the safety

of his family are undeniably real. And those fears sternly demand that he protect his loved ones by any means at hand, including revolver violence—*mano a mano*.

But what Mr. Z may have had (or will have) in his life is not what I want in mine. Paradoxically, that which we most fear often visits us: the grim productions of repeated conscious and unconscious apprehensions. "What we resist persists."

Certainly this sounds fanciful and airy-fairy to those of us who are schooled in scientific reasoning and satisfied with only 19th century notions of mechanical, "billiard ball" causation. But the modern world defies simplistic, reductionist views. Quantum physics is teaching us that all "realities" are subjective—some realities only seem more real because they are shared by more people. Would-be "victims," then, have responsibilities,



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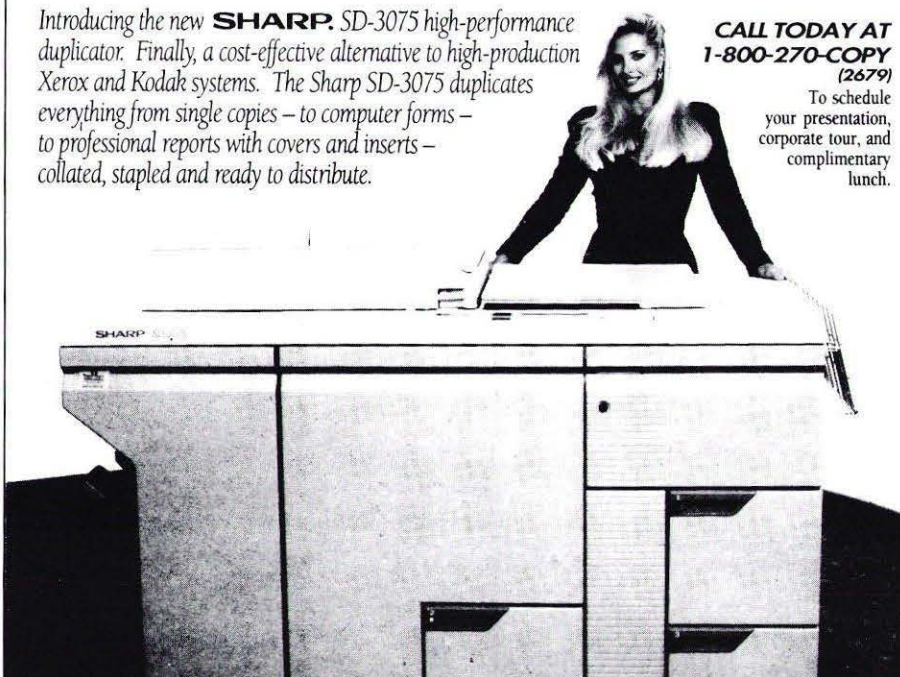
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too.

If one wishes to live in the fresh air of personal safety, taking control of one's fears becomes crucial. The wise among us give high priority to creating a healthy inner environment by regularly praying and meditating for peace and/or how one wants life to unfold, for example; by engaging in dream work, and/or dealing with one's parental issues, by working for the good of the many, and by persistently avoiding negative thoughts and exposures to TV and media violence, and so on. As fears gradually subside, a safe and supportive world emerges—at least for those who don't desire the exciting dramas of the other camp.

If you must dread something, Mr. Z, dread not what's stalking outside your circled Conestoga, but what is stalking within it—and take first aim at those brutes close at hand.

J. BRADFORD DOYLE
Seattle

Editor:

At a time when violence, intended and unintended, from the use of guns is on an upward spiral, it is dismaying to read the

vituperative letters which assailed Commissioner Jack Richey's story, "The Right to Bear Arms," (February 1994 *Bar News*).

The most disturbing part of some of the letters was the assertion or implication that the Second Amendment to the federal constitution gives individuals a right to possess firearms as distinguished from members of a state militia, now the National Guard.

The contrary repeatedly has been held since the U.S. Supreme Court's last exposition of that subject in *U.S. v. Miller*, 307 U.S. 174 (1939), authored by that starry-eyed liberal Justice McReynolds. A recent comprehensive review is found in *U.S. v. Hale*, 978 F.2d 1016 (8th Cir. 1992), where the court noted:

Since the *Miller* decision, no federal court has found any individual's possession of a military weapon to be "reasonably related to a well-regulated militia."

987 F.2d at 1020.

Cases interpreting the Second Amendment are annotated in "Federal Constitutional Right to Bear Arms," 37 A.L.R. Fed. 696 (1978).

While our state constitutional provision, article 1, section 24, is couched in terms of an individual's right to bear arms in defense of himself, our courts from early times have held that this provision is subject to reasonable legislative restrictions. *Second Amendment Foundation v. Redmond*, 35 Wn. App. 583, 668 P.2d 596 (1983).

Treating legislative limitations of the individual's right to possess deadly weapons as an infringement on our Bill of Rights is historically and legally insupportable.

Commissioner Richey's moving article highlighted the type of tragedy which occurs repeatedly when guns are kept even for well-intentioned purposes. I thank him for his courage in bearding the NRA and its zealous supporters.

HOWARD P. PRUZAN
Seattle

Editor:

I, like many others of my acquaintance, continue to wonder why Commissioner Richey was allowed to use my money to inflict his soap opera propaganda upon the membership. The use of the pages of

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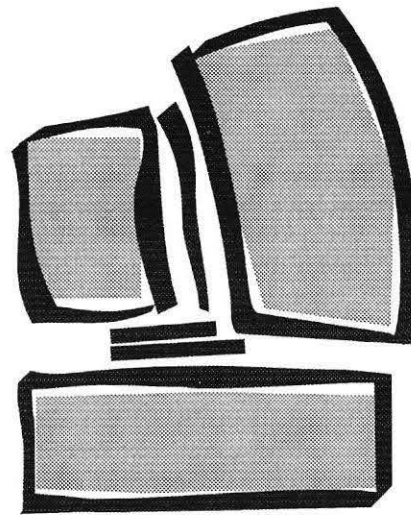
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LAWYERS' LEGAL RESEARCH

the *Bar News* ought to be confined to *news* and opinion, not melodrama.

My second point regarding this piece of dreck is its title. Is Commissioner Richey ignorant of our state constitutional provision regarding firearms, or has he intentionally referenced the much weaker language of the federal constitution to bluster his position? Article 1, section 24 of the Declaration of Rights states, "The right of the individual citizen to bear arms in defense of himself, or the State shall not be impaired"

The central character of this passion play is not the gun. It is the irresponsible boob who pulled the trigger.

PAUL H. REILLY
Mount Vernon

More on Pacific Practice

Editor:

I enjoyed reading Jim Parsons' article, "Do They Have Laws in the South Pacific?" It was cute, well-written, concise and, for the most part, factual. On the other hand, Mr. Parsons seemed to be mired in the myths that in the Northern Marianas the government is funky; life is idyllic; nobody works hard; and everyone lives for golf, snorkeling, picnicking or jetting off to Bali.

Mr. Parsons took his job, apparently, as a lark—a brief sojourn in the "South Pacific." He landed a government position with "no working late, on weekends, or very hard at other times." Two years later, having collected a few anecdotes, he went back home. On Saipan, "another vacationing attorney" is an unflattering cliché describing such assistant attorneys general. Mr. Parson's article confirms this characterization.

I have lived and practiced law in the Northern Marianas Islands for more than 15 years. I have been in private practice. My work has been like that of any general practitioner in a small town—overwhelming. Most of my colleagues in private practice here work late into the night and on weekends. Like busy professionals in Seattle, we play on rare and chosen moments.

Private attorneys on Saipan labor hard, under difficult circumstances, in substandard facilities, assisted by secretaries who learned English as a second language, trying to make an Anglo-American legal system work in a mishmash of cultures—Asian, Island and American—amidst a

cacophony of different Asian and island languages, in a place with virtually no history of order or stability and where indigenous traditions have been shattered by colonization, disease and war for three centuries. Our legal system has been administered inconsistently by expatriates, such as Mr. Parsons, who have come and gone through the revolving door of government service since the end of World

War II. Such pampered visitors may well write us off and walk away—they don't have to live here. During their brief tenure they issue their opinions, rulings and regulations as if from an ivory tower. We who have made our homes and careers in Saipan often regard the "vacationing attorneys" as part of the problem.

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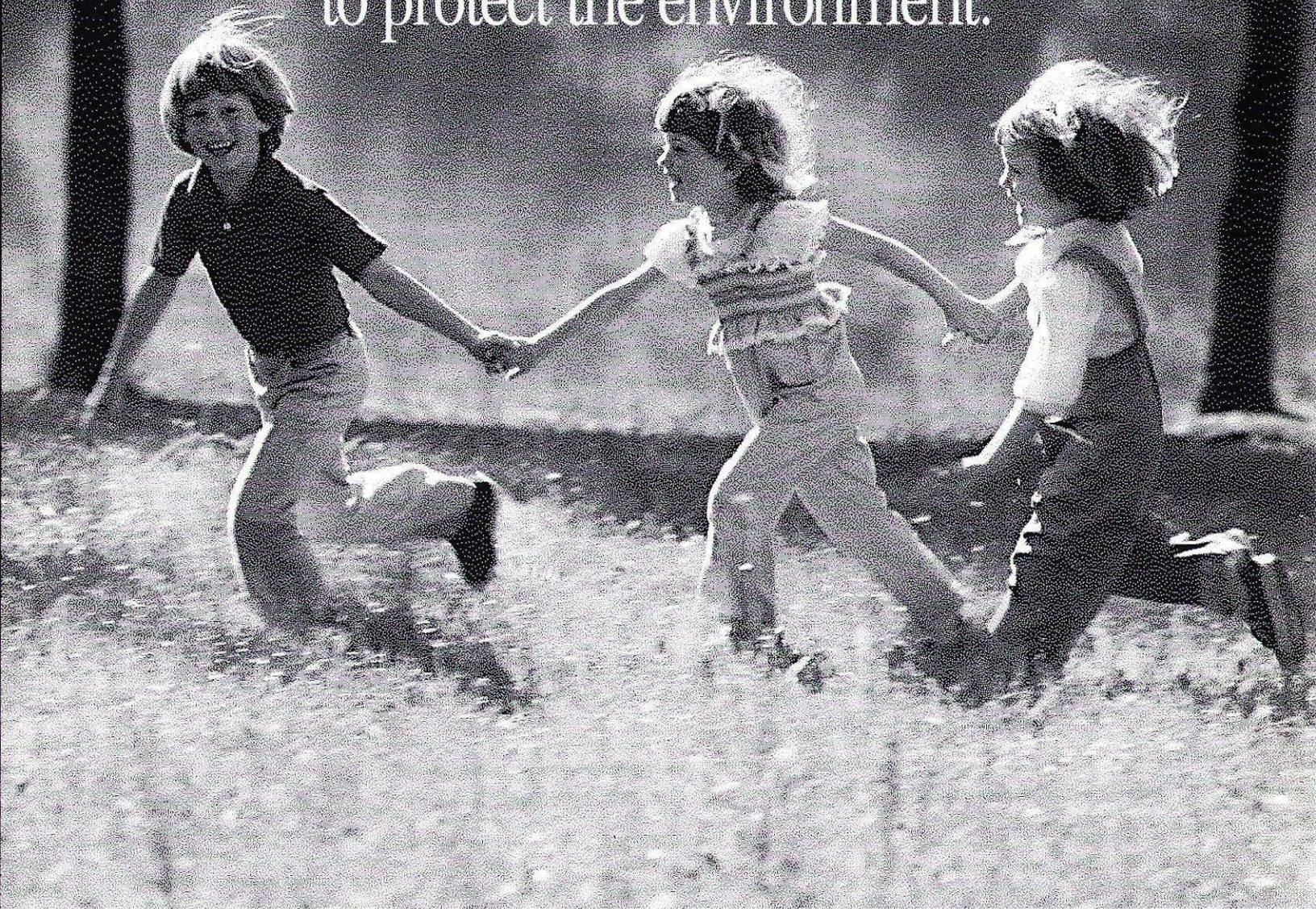
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CLE From the Comfort of Your Office

Editor:

Did you know that you can now sit in your office listening to a CLE lecture on your speakerphone and not only receive CLE credits, but ask questions and participate in the CLE? I am writing to enthusiastically endorse a new program recently initiated by the Bar Association's CLE Department called VIA-CLE. I attended the WSBA's Employment Law Institute by conference telephone and was able to pick the topics and the lectures. I even asked one of the speakers, Kelby Fletcher, a question about employment law, which he answered. I wasn't particularly happy with the answer, but knowing Kelby, I am certain it was correct.

This telephonic presentation was every bit as clear and as compelling as if I had been attending in person; however, to my mind it had a number of additional advantages. First, the materials arrived ahead of time so I could look at them in advance. Next, I had no lost time. I picked the topics that interested me, called in for those topics, and the rest of the time was in the office to take care of business as usual. Frankly, I found I was less distracted than in the usual CLE situation, where you are always worried about calls being missed, clients with questions that need answers and the like. In this case, my secretary was able to advise clients that I was in a meeting for 45 minutes and could and did return the calls shortly thereafter from my own office with access to any necessary files.

The CLE Board has accredited this program. Each time you call in for a segment, you provide your Bar Association number and are given credit only for the portions you actually attend. To ask a question, you simply push a button on your touch tone phone, and an operator asks you for the question, which is then handed to the speaker at the appropriate time.

I am told that this is not an inexpensive process, so VIA-CLE registrants must pay a bit more than those attending in person. There is no question that the efficiencies of attending in your own office more than make up for the slight increase in cost. For those who avoid travel time and expense, the savings are even greater. I think these types of innovative programs should be encouraged

because they allow all of us to have easier access to quality CLE presentations, and that should help to make us better lawyers and better represent our clients.

I encourage all of you to take advantage of this new innovation by the Washington State Bar Association. I believe that you will find, as I did, that it takes some of the pain out of attending CLEs.

J.J. LEARY, JR.
Seattle

Unionization

Editor:

I am really embarrassed that the Board of Governors has decided to litigate the issue of whether or not to unionize. It does not matter *at all* to me whether the legislation in question violates the separation of powers. What does matter is that it is absolutely wrong to contest the right of Bar Association employees to unionize. If it required this legislation to force

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us into doing the right thing, then so be it.

WILLIAM R. McCANN
Sedro Woolley

More on the Client Security Program

Editor:

Robert Welden has urged those of the Bar who agree with his belief in the need for a client "security" fund to write to the Supreme Court supporting proposed APR 15 (*March 1994 Bar News*, page 36). I do not agree with his belief, but I am writing

the Court anyway.

The passage of such a rule establishing such a fund *would be ill-advised*. It would give the citizenry an unwarranted sense of security which would reduce their vigilance: the only true guarantor of the safety of their funds.

Such a fund would provide the last-ditch moral rationalization for the member of our profession whose judgment has become so clouded that he or she considers defalcation: a rationalization without which many such confused law-

yers might not succumb to the invalid perception that a choice of such behavior exists.

These effects would be real, they would occur *and they would decrease the security of client funds while increasing the incidence of defalcation*. Compare, for example, the impact of the creation of FSLIC and the attendant total loss of concern on behalf of depositors as to the handling of their funds.

The Bar should rejoice with, and remind, the rest of our citizenry that our organization is made up of people just like them, that we have a particular area of expertise but that we are susceptible to the same human failings as others. We should remind them that, as in all cases where trust is to be given, great care must be exercised. Forewarned is forearmed and so armed our potential clients might just take as much care in choosing their lawyer as they do in buying a car. They might even attend to the performance of their lawyer as closely as they do to the car just purchased.

DAVID M. ABERCROMBIE
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On Child Exemptions Under Federal Tax Law

Editor:

Daniel M. Warner has written a thoughtful article on judicial allocation of federal income tax exemptions in Washington state. I believe that several issues raised by the article merit further comment.

1. *Divorcing Parent Versus Unmarried Parents*

Federal law states that the residential parent (the "custodial" parent, in federal tax jargon) is entitled to the exemption unless that parent waives it. On its face, the law does not permit state court allocation. Mr. Warner justifies RCW 26.09.050, which attempts to give Washington courts power to make such an allocation, by stating that the automatic award provided by federal law "would not inure to the welfare of the children." This argument is substantially weakened by the law's provision for allocation only when married parents are divorcing. The law has no provision for an allocation between parents who have never been married, when child support is established administratively, or in conjunction with a parentage action. If, in this statute, the state of Washington is asserting a lesser interest in the children of never-married parents than it does in the chil-

dren of divorced parents, it may well be void on equal-protection grounds. *Trimble v. Gordon*, 430 U.S. 762 (1977).

2. The True Economic Value of the Exemption

Mr. Warner assumes that "there is economic sense in awarding the exemption only to the parent with the larger income," presumably meaning that it always makes economic sense to minimize the combined amount of taxes that the separate households of the two parents will pay. It overlooks the point that an additional \$200 in net income may be of greater marginal value to a household with child with an income of \$10,000 a year than a larger sum might be to a household without child with an income of \$60,000 a year.

In addition, because of the way Washington's child support schedules work, the increase in child support that the custodial parent receives as a result of the allocation of the exemption to the noncustodial parent may be less than the additional taxes that parent must pay. For example, assume a divorced father is the custodial parent of one 12-year-old child and makes \$845.83 per month, or \$10,150 per year. The divorced mother makes \$5,000 per month, or \$60,000 per year.

If *father* takes the exemption for the child: (1) mother pays \$665.74 per month in child support; (2) father owes no federal income taxes for the year (he takes the standard head-of-household deduction of \$5,450, a personal exemption of \$2,350 for himself, and a \$2,350 exemption for the child, for a total of \$10,150 of deductions from income. Father is also entitled to an earned income credit of \$1,434, which he will receive from the federal government); and (3) mother owes \$12,270 in federal income taxes if she takes the standard deduction and one exemption for herself.

If *mother* takes the exemption for the child: (1) mother pays \$672.17 per month child support, which is \$89.16 more per year than if she didn't have the exemption; (2) father owes \$351 for federal income taxes for the year on the \$2,350 of his income no longer sheltered by the exemption for the child (hence, his earned income credit is reduced by this amount); and (3) mother owes \$11,610 in federal income taxes if she takes the standard deduction and two exemptions, which is a \$660 benefit to her compared to the outcome of the scenario above.

In the second scenario, most of the tax

benefit remains with the mother and is not passed along to the child. Moreover, the low-earning household, in which the child resides, suffers a reduction of income greater than the increase in child support. It is hard to imagine how this would inure to the benefit of the children.

3. Use of the Exemption As a Bargaining Chip

The exemption is of no benefit to a parent with one child and any amount of income up to \$7,800 per year because one's taxable income cannot be reduced below zero (before the operative effect of the earned income credit). If the noncustodial parent can benefit from the exemption, the obvious outcome is for that parent to "purchase" it from the custodial parent in dissolution negotiations, say, by a deviation upward in the amount of child support to be paid. Giving the court the power to allocate the exemption over the custodial parent's objection strips him or her of a valuable—and salable—asset in the dissolution, one of the few that the disadvantaged party may have available.

Those poor custodial parents who most need the modest sums of money that the exemption can bring are in the least position to enforce the rights that the law clearly gives them. The best course of action would be for the Legislature to remove all reference to the allocation of tax exemptions from RCW 26.09.050.

RUTH LAURA EDLUND
Bellevue

A Vote in Favor of the Past

Editor:

The letter from David Abercrombie, which you titled, "Bring Back the Good Old Days, Damn It!" (*Bar News*, May 1994) says it all.

BOB NORTHCOTT
Yakima

A Little Decorum, Please, for Once

Editor:

The letters in the May *Bar News* confirmed my opinion that this is the most interesting and best-written section of the publication. Nevertheless, as a retiring bar leader, I do feel moved to comment about the aspersions cast on the motivations of those who serve on the Board of Governors.

Let's give these people a break. There is no slight personal advantage that can possibly be hypothesized as the motivation for these folks to seek bar leadership. Invariably, they agreed to serve because someone else suggested they had a responsibility to the profession to do so. Disagreement on policy issues is fair game, but let's leave personal attacks out of it. "Don't shoot the piano player; he's doing the best he can."

MARY ALICE THEILER
Seattle

(The author is outgoing president of the King County Bar Association).

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TAKE A GREATER INTEREST IN OUR INTEREST

by **Paul L. Stritmatter**
WSBA President

The adoption of programs for interest on lawyer trust accounts (IOLTA) continues to dramatically affect the concept of access to justice for low-income people in the civil-law area. Our IOLTA program has been in place since 1985, and it has earned in excess of \$23,000,000, which has been used to support so many worthwhile projects for access to justice. Distributed by the Legal Foundation of Washington, IOLTA funds are critical in assuring the continued operation of the federally funded legal-service programs and the 23 volunteer attorney programs supported by local bar associations in this state. Law-related education and alternative dispute resolution programs also benefit from the grants. We can do more to significantly increase the funding from the IOLTA program if each of us takes a few minutes to review the practices of our own banks and ask for fair treatment on IOLTA accounts.

The income to the Legal Foundation of Washington grew each year until 1991, when it declined steeply as earnings on IOLTA accounts fell. Some banks reduced the "net earnings" paid to IOLTA by more than was justified by the downturn in interest rates. Under the IOLTA rules, banks can deduct maintenance charges from the interest rate on IOLTA accounts. These can include both a maintenance fee and charges per check and deposit. Thus, the net earnings received by the Legal Foundation are a function of both the interest rates banks pay on IOLTA accounts and their service charges.

The dramatic reduction in net earnings resulted in halving the income of the Foundation, forcing it to make substantial cuts in grants to legal-service and voluntary legal-service programs.

There is a significant difference between banks in their rates and charges. One need only note that the net return certain banks are paying on IOLTA accounts is far less than what the same banks pay on personal-interest-bearing checking accounts. Many banks pay lawyers a higher rate on personal checking accounts than on IOLTA accounts. Other banks make interest-bearing checking accounts available without service charges to lawyers who maintain a minimum balance at certain levels, but levy significant service charges on IOLTA accounts, even if they maintain large balances. Because the whole concept of IOLTA is a numbers game (i.e., combining small amounts of trust funds to create a large pool of funds which earn meaningful interest), this manipulation of the numbers by banks results in losses to the legal-service and voluntary legal-service programs the Foundation serves.

The lawyers of this state currently have approximately 5,417 IOLTA accounts in 121 different banks. Fifty-three of the banks, representing 4,267 accounts, charge service fees; the rest do not. The average monthly ending balance of those accounts is \$147,049,113, with average monthly gross interest of \$208,320 which is an annualized average rate of 1.7 percent. If all IOLTA accounts earned no less than 2.5 percent interest, the income to the Foundation would increase by \$1,522,000 per year.

THE BOARD OF GOVERNORS HEREBY:

ENCOURAGES LAWYERS AND LAW FIRMS TO NEGOTIATE THE BEST POSSIBLE NET INTEREST RATES ON THEIR IOLTA ACCOUNTS;

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AUTHORIZES THE OFFICERS AND STAFF OF THE W.S.B.A. TO WORK WITH AND SUPPORT THE LEGAL FOUNDATION IN PROMOTING AND NEGOTIATING HIGHER NET INTEREST RATES ON IOLTA ACCOUNTS.

Average monthly total service fees on IOLTA accounts are \$38,195, an average per month of more than \$7 per account, which also equates to an average of nearly 17 percent of the gross interest. With a reduction in fees to a flat rate of \$5 per month per account, the Legal Foundation of Washington would have increased income of \$133,320 per year. Obviously, if banks waived fees on IOLTA accounts entirely, as they do on many other accounts, the net revenues to the Legal Foundation would be much greater.

Some banks have been much friendlier than others. First Interstate Bank, with IOLTA accounts averaging \$16,000,000 per month in 477 accounts, pays four percent interest on them. If First Interstate had all IOLTA accounts, the Foundation would gain more than \$2,900,000 per year. Washington Mutual, with an average balance of \$1,100,000 per month in 98 accounts, pays two percent interest but charges no fees whatsoever. Others are not at all friendly. One bank pays interest at a rate as low as 1.11 percent. Another bank pays only 1.48 percent interest and, in addition, charges an average of \$24.21 per month in service fees.

Most banks treat their IOLTA accounts as a unit within, but separate from, their NOW checking products. As a result, the IOLTA accounts are paid the lowest rates whether or not an account could, due to size of daily balance or minimal activity, qualify for some other type of account with a higher rate. IOLTA accounts have also been declared ineligible for such activities as overnight investment sweep, a fact which further separates IOLTA accounts from the norm.

We need to compliment banks like First Interstate and Washington Mutual for their handling of IOLTA accounts. Far too many banks discriminate against IOLTA accounts in both the low interest they pay and the high service charges they impose. Not all of us are aware of our banks' schedules of rates and charges or of our own ability to influence our banks on these issues. Certainly, we can and should affect the policies of banks in their interest rates and charges on IOLTA accounts. I am not asking that we receive special preference; I simply ask that



Paul L. Stritmatter

IOLTA accounts receive the same consideration as other accounts. Credit unions customarily pay a higher interest rate and can be used for IOLTA accounts. As long as the lawyer or law firm is a member of the credit union, an IOLTA account can be established. Our bar association has its own credit union, and we could all make use of that institution in order to increase net interest on our IOLTA accounts.

I personally was well-received by our firm's bank, and I gained a substantial increase in the interest rate on our IOLTA account after making a request two years ago. This is something that we can all do, and as a result we can have a significant impact on the net interest on IOLTA accounts and the ability of the Legal Foundation of Washington to support legal-service programs. One of our members did much more. Ken Davidson approached U.S. Bank and convinced them to drop their monthly service charge from \$10 to \$5 on not only his own account, but on all of their IOLTA accounts. Ken's initiative will mean an additional \$42,000 per year in net interest to IOLTA from U.S. Bank. U.S. Bank is also to be commended for its willingness to reconsider its policy on service fees. In May the Board of Governors passed the resolution you see boxed on the upper right of page 16.

Please take a few minutes to see what your bank is doing, and let's bring all of these accounts in line with current market conditions. Ask for an increased interest rate on your trust account, equal to what is paid on other accounts. Ask the bank to waive the fees on your account. If we all act, we can make a real difference.

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REBATE FOR CERTAIN LEGISLATIVE ACTIVITIES . . .

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

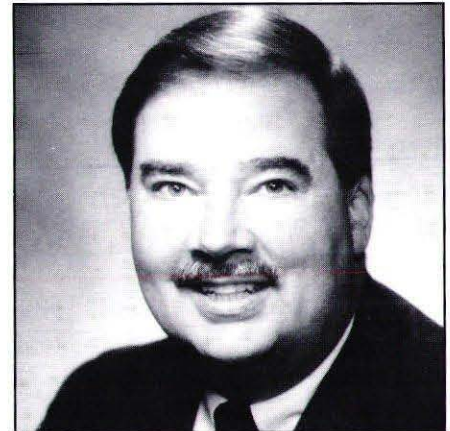
Each year the Washington State Bar Association provides its members with an opportunity to ask for a rebate of fees used for political or ideological activities when those activities are *not* reasonably related to legal ethics, regulation of the legal profession, or improving the quality of legal services.¹

This column constitutes notice of the positions taken by the WSBA during the recent legislative session and a listing of whether or not a pro rata rebate of bar dues is available to WSBA members who disagree with the position taken by the WSBA. The chart on the following page shows the WSBA position, whether the issue is subject to rebate, the percentage of the WSBA legislative staff's time attributable to that issue, and the pro rata amount subject to rebate, if any.

To apply for a rebate, please file a written request with my office within 45 days of receiving the July 1994 issue of

Bar News, detailing the position(s) to which you object so that an appropriate rebate can be calculated. Send rebate requests to: WSBA Executive Director, 500 Westin Building, 2001 Sixth Avenue, Seattle, WA 98121-2599. If you have a question about a specific legislative position, please contact John Fattorini at the WSBA Olympia office by calling (206) 943-9977.

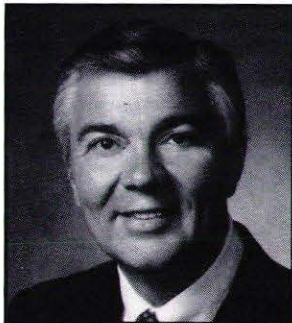
The rebate was calculated by taking the entire budget of the WSBA's legislative office in Olympia for the WSBA's fiscal year '94 (\$167,936), plus a portion of the WSBA's overhead expenses in Seattle attributable to its legislative efforts (\$3,900), for a total of \$171,836. That amount was divided by the number of active members the WSBA had at the time of the legislative session (18,225 as of 4-1-94) to arrive at the amount of each member's fee attributable to legislative activities (\$9.43 per member). That \$9.43 was then apportioned by the percentage of time spent by the WSBA legislative staff on each issue or position, e.g., if a



Dennis P. Harwick

member objected to the WSBA's position on a piece of legislation that took five percent of the legislative staff's time, that member would receive a rebate of 47 cents (five percent of \$9.43). If a member disagrees with the method used to calculate the amount of the rebate, the dispute over the methodology used will be submitted to an impartial arbitrator and the amount in dispute will be escrowed pending resolution of the dispute.

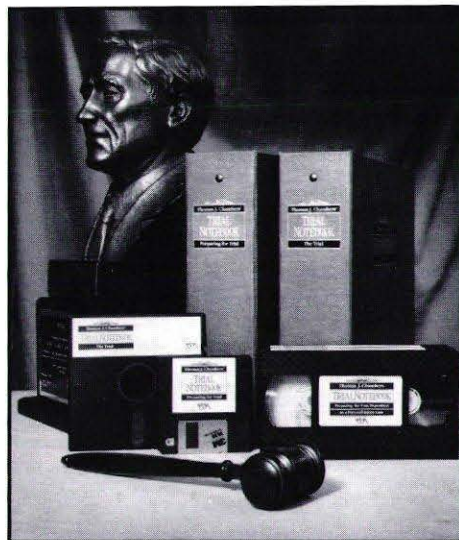
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Bill Number — WSBA Position		Eligible for Refund?	% of Legislative Expense	Amount subject to Refund
HB 2641	Opposed legislation, on the basis of separation of powers, repealing the 1993 amendment to RCW 41.56.020 (which acknowledged the separation of powers among the branches of government) and defining WSBA employees as public employees for purposes of PERC jurisdiction over collective bargaining.	yes	17.5%	\$1.65
HB 2216	Supported legislation to have all Social Security payments made in respect to retirement or death treated the same as payments made with respect to disability.	yes	1.5%	.14
HB 2215	Supported legislation that requires the Department of Retirement System to honor the designation of a spouse or ex-spouse as a survivor beneficiary in a dissolution order filed with the DRS.	yes	1.5%	.14
SB 6005	Supported annual update of Internal Revenue Code references in Titles 11 and 83 of the RCW	yes	1.5%	.14
SB 6004	Supported clarification of distribution of money earned during the administration of a decedent's estate.	yes	1.5%	.14
HB 2270	Supported reforming statutes facilitating the use of nonprobate assets by Washington citizens and modernizing Washington's law of wills.	yes	2.5%	.24
HB 1235	Supported the creation of a new business entity pursuant to the Limited Liability Company Act.	yes	5.0%	.47
HB 1443	Supported legislation prohibiting discrimination on the basis of sexual orientation.	yes	1.5%	.14
SB 5992	Opposed, on the basis of separation of powers, legislation that would subject the judiciary to performance audits by the state auditor.	yes	1.0%	.09
SB 6244	Supported funding for additional judges for the Court of Appeals, Division II	no	1.0%	--,--
HB 2374	Supported a Sentencing Guideline bill that provided for non-incarcerative punishment options for nonviolent offenders.	yes	1.0%	.09
HB 2375	Supported a Sentencing Guideline bill providing for treatment-oriented sentences for offenders convicted of the manufacture, delivery, or possession with intent to deliver a narcotic.	yes	1.0%	.09
SB 6006	Supported a provision allowing the Supreme Court, by rule, to provide for an increase in fines, penalties, and assessments to fund the Judicial Information System.	no	1.5%	--,--
Monitoring of Legislation		no	30.0%	--,--
Judicial Relations		no	7.0%	--,--
General Administration		no	25.0%	--,--
TOTAL Available for Refund			100 %	\$3.33

... AND AN EXPLANATION OF THE WSBA'S OPPOSITION TO THE "UNION" BILL

A number of people have objected to the WSBA's opposition to legislation proposed by the union that wants to organize the WSBA's employees. *The WSBA has not opposed the union legislation on antiunion ideological grounds.* Rather, the WSBA has consistently opposed the legislation on the grounds that it is a

violation of the constitutional premise of separation of powers for the legislature to invade the province of the Supreme Court, of which the WSBA is an extension.²

The WSBA Challenges the Constitutionality of Union Legislation: At the time this column is being written, the Board of Governors has authorized the filing of a law suit challenging the constitutionality of HB 2641 (the union legisla-

tion passed this spring). This lawsuit, like the WSBA's opposition during the legislative session, is based on the separation of powers issue. The firm of Davis Wright Tremaine has agreed to represent the WSBA in this lawsuit without charge.

If you have any questions about this legal challenge, please contact me or your representative on the Board of Governors.

¹*Keller v. State Bar of California* [110 S.Ct. 2228 (1990)].

²*Graham v. Washington State Bar Association* [86 Wn.2d 624 (1973)].

JUDICIAL CAMPAIGN SPEECH IN WASHINGTON

by Thomas More Kellenberg

In Washington, as in other states which choose judges by election, two principles of constitutional dimension collide: freedom of speech and due process of law. Although candidates for elected office should be free to express their views on all matters of interest to the electorate, stated most simply, impartial justice requires a judge to decide cases in accordance with the rule of law rather than with campaign promises.

Washington has attempted to reconcile these two principles with Code of Judicial Conduct Canon 7(B)(1)(c): it prohibits candidates for judicial office from "announc[ing] their views" on certain matters. This rule is enforced in proceedings brought before the Commission on Judicial Conduct.

Recently, however, in *Buckley v. Illinois Judicial Inquiry Board*, the Seventh Circuit Court of Appeals struck down as unconstitutional a similar rule in the state of Illinois. Judge Richard Posner wrote that because the rule "reaches far beyond speech that could reasonably be interpreted as committing the candidate in a way that would compromise his impartiality," it unduly infringed the free-speech rights of judicial candidates. Deciding a similar First Amendment challenge to Pennsylvania's canon, the Third Circuit Court of Appeals held, in *Stretton v. Disciplinary Board*, that the rule was constitutional *only* if it extended to "those issues that are likely to come before the court."

This article addresses judicial campaign speech in Washington in light of the opinions in *Stretton* and *Buckley*. Although the Washington Supreme Court is currently considering amending Canon 7, the version proposed by the Washington State Bar Association (WSBA) Code of Judicial Conduct Task Force retains existing restrictions on speech, held to be unconstitutional in those federal cases.

Washington Decisions

The American Bar Association (ABA)

adopted its Code of Judicial Conduct on August 16, 1972. With this Code, the ABA sought "to reconcile the perceived need for an elected judiciary with the general desire for a judiciary of unquestioned integrity, independence and impartiality." Since then, 47 states have substantially adopted the 1972 Code, and all but 11 have adopted Canon 7(B), which regulates the campaign conduct of judges and lawyers seeking judicial office. Washington adopted the Code of Judicial Conduct in 1974.

Since then, the Washington Supreme Court has had several occasions to address the constitutionality of Canon 7(B)'s restrictions on freedom of speech. The Court has held in those cases that although free-speech guaranties apply in disciplinary cases arising under the Canon, those guaranties extend only to "fair comment on judicial qualifications." Unlike the *Stretton* and *Buckley* courts, Washington's has decided that "[t]he State's interest in protecting the good reputation of the judiciary" outweighs a candidate's First Amendment rights to speak freely on other matters.

1. *In re Donohoe*, 90 Wn.2d 173, 580 P.2d 1093 (1978)

The Washington Supreme Court first addressed Canon 7(B)'s restrictions on free speech in *Donohoe*. In 1974, Marie M. Donohoe ran unsuccessfully against Keith M. Callow, then an incumbent on Division I of the Court of Appeals. One year later, Donohoe ran unsuccessfully against James A. Andersen, who had been appointed to the same court.

In her two appellate campaigns, Donohoe issued paid political advertisements that contained false statements of fact. Among those statements was the incorrect assertion that "since its inception, Division I of the Court of Appeals has never reversed the trial judge if the appellant was represented by a woman." Donohoe, herself, had obtained a reversal from that division by a panel on which Callow sat.

A bar complaint was lodged against Donohoe. Following a hearing, the disci-

plinary board imposed a censure and two reprimands for Donohoe's conduct. On appeal, the Washington Supreme Court affirmed, holding that while "a person does not surrender freedom of expression rights when becoming a licensed attorney," the First Amendment does not "protect one who utters a statement with knowledge of its falsity, even in the context of a judicial campaign."

Recognizing the conflicting principles of free speech and impartial justice in judicial campaigns, the Court stated:

We are dealing with a delicate balancing of rights involving the public, the incumbent judge, and the lawyer candidate for judicial office. On the one hand the courts, as an institution, are entitled to the respect due to the *office* because the acceptance of judicial decisions ultimately depends upon the citizens' belief in the integrity and impartiality of the courts. On the other hand, the members of the judiciary are subject to legitimate and accurate criticism and evaluation.

The Court then set forth the breadth of permissible discourse in judicial campaigns:

A candidate for judicial office has a right to challenge an incumbent judge's ability, decisions and judicial conduct, but it must be done fairly, accurately and upon facts, not false representations. The voters are entitled to a fair statement and evaluation of the qualifications of the candidates.

Consequently, although "qualifications" are open to discussion in judicial elections—including a candidate's "ability," "decisions" and "judicial conduct"—the Court ruled that the First Amendment does not protect judicial candidates' right to "announce their views" on other matters.

2. *In re Kaiser*, 111 Wn.2d 275, 759 P.2d 392 (1988)

The Court next addressed Canon 7(B) in a case involving a 1986 district court election. Judge James C. Kaiser of the Northeast District Court in King County faced a challenge from William Roarty, a Seattle city attorney primarily handling driving-while-intoxicated (DWI) prosecutions. During the course of his campaign against Roarty, Kaiser made several statements which later became the basis for a complaint brought by the Commission on Judicial Conduct. They included:

Bearing in mind the nonpartisan position a judge must maintain while on the bench, it may be useful for you to know that Judge Kaiser's family have been lifelong Democrats. Indeed, Judge Kaiser has doorbelled for Democrats in the past. Although he is precluded by law from participating in partisan politics, his opponent has not been under this restriction and therefore may have provided you with a better opportunity to know him.

Kaiser is "Toughest On Drunk Driving . . ."

Judge Kaiser's opponent, Will Roarty, receives the majority of his financial contributions from drunk driving defense attorneys. These lawyers do not want a tough, nonsense judge like Judge Kaiser.

Judge Kaiser is tough on drunk driving . . . Will Roarty, the opponent, receives the majority of his financial support from drunk driving defense attorneys, whose primary interests are getting their clients off.

Based upon these and similar statements, the Commission recommended that Kaiser be censured.

On appeal, the Supreme Court affirmed in part and reversed in part. In analyzing Kaiser's constitutional challenge to Canon 7(B)'s speech restrictions, the Court cited the holding in *Donohoe* that "free speech guarantees do apply in disciplinary cases." The Court then recognized that, under the First Amendment, a judicial candidate "is subject to discipline only where the disciplinary rule serves a compelling state

The rule was "so narrowly drafted and strictly applied that the compelling state interest is served without unnecessarily burdening the exercise of free speech."

"[U]nless the election is to be a pure popularity contest based on name recognition alone, the only legitimate area for debate is the relative qualifications of the candidates. In our view the health, work habits, experience and ability of the candidates are all matters of legitimate concern to the electorate who must make the choice."

interest and where the rule is drawn and applied in a narrowly tailored fashion."

In evaluating the first prong of the test, the Court held that "[t]he State's interest in protecting the good reputation of the judiciary is compelling, as every court which considers the issue has recognized."

Ours is an era in which members of the judiciary often are called upon to adjudicate cases squarely presenting hotly contested social or political issues. The state's interest in ensuring that judges be and appear to be neither antagonistic nor beholden to any interest, party, or person is entitled to the greatest respect.

The Court also held that the rule was "so narrowly drafted and strictly applied that the compelling state interest is served without unnecessarily burdening the exercise of free speech." Because the rule "permit[s] a broad range of fair comment on judicial qualifications," the Court stated, "the Canons relating to judicial campaigns can and do meet constitutional requirements."

[The] candidate for nonjudicial office is free to announce his stand on the issues he must pass upon in office, and to pledge his vote on those

issues; the judicial candidate is forbidden to enter this customary campaign arena. Hence, unless the election is to be a pure popularity contest based on name recognition alone, the only legitimate area for debate is the relative qualifications of the candidates. In our view the health, work habits, experience and ability of the candidates are all matters of legitimate concern to the electorate who must make the choice.

The Court reiterated that a candidate's qualifications, and only those qualifications, are open to discussion in judicial campaigns. Because each of Kaiser's "statements of party affiliation, statements regarding the motives of Roarty's attorney supporters and promises to be tough on DWI offenders" did not relate to Kaiser's or Roarty's qualifications, those statements were not constitutionally protected.

3. *In re Stoker*, 118 Wn.2d 782, 827 P.2d 986 (1992).

The Court most recently addressed the constitutionality of Canon 7(B)'s free-speech restrictions in *Stoker*. On January 15, 1991, a statement of charges against Judge Fred J. Stoker of the Clark County District Court was filed with the Commission on Judicial Conduct. The statement asserted that Stoker displayed campaign materials in both the Democratic and Republican party booths at the Clark County fair, in violation of the Code of Judicial Conduct. The statement also claimed that he "rented space at a Democratic Committee booth and personally appeared at the booth to campaign for re-election."

After a hearing, the Commission held that Stoker had violated the Code of Judicial Conduct by campaigning from, posting his signs in, and placing his campaign literature within the two parties' booths. On appeal, the Supreme Court reversed the Commission and dismissed the charges against him. The Court held "[w]hile the Code of Judicial Conduct prohibits *partisan* activities, there is no similar prohibition of *bipartisan* activities where the judicial candidate is operating under the constraints of Canon 7 of the Code of Judicial Conduct."

In addressing, once again, the constitutionality of Canon 7's restrictions on free



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speech, the Court, curiously, stated that *Donohoe* stood for the proposition that "free speech guaranties *do not* apply in discipline cases." [emphasis added] In fact, the *Donohoe* court explicitly held just the opposite, as the Court later noted in *Kaiser*. The Court reiterated, however, that the Canon's restrictions on free speech were valid only to the extent that they "serve[d] a compelling state interest and where the rule is drawn and applied in a narrowly tailored fashion."

Stretton and Buckley

Two cases decided by the United States Courts of Appeal for the Third and Seventh Circuits put into question the constitutional viability of Washington's decisions regarding judicial campaign speech.

1. *Stretton v. Disciplinary Bd.*, 944 F.2d 137, 144 (3d Cir. 1991)

In *Stretton*, the U.S. Court of Appeals for the Third Circuit held that Canon 7(B)(1)(c) of Pennsylvania's Code of Judicial Conduct met First Amendment standards only if its speech prohibitions were limited to "issues that are likely to come before the court."

While acknowledging that the Canon served a compelling state interest, the Court held that the restrictions on judicial campaign speech could be upheld only if given a "narrow construction." Because "prejudging an issue is the evil that the Canon is designed to avoid," its reach must be "limited to situations in which the candidate's speech pertains to matters that may come before the court for resolution."

The Court listed a number of issues lying outside the scope of the rule, including:

- (a) the need for the election of judges with an "activist" view, and the obligation of judges at every level of the judicial system to look at societal changes when ruling on challenges to existing law;
- (b) criminal sentencing and the rights of victims of crime;
- (c) "reasonable doubt" and how [a judge] would apply that standard as an elected judge;
- (d) the need to more closely scrutinize the work of [lower court judges];
- (e) the need for various changes in judicial administration including the jury se-

lection process;

(f) the need for greater sensitivity toward hiring minority lawyers and law clerks;

(g) [a candidate's] qualifications and those of [an] opponent as well as a perceived need for a woman judge; and

(h) the importance of the right to privacy as a basic constitutional right.

Canon 7 can withstand First Amendment scrutiny, the Court concluded, only if a judicial candidate is allowed to discuss the enumerated issues. Such a reading of Canon 7 "does not violate the First Amendment because the limitation does not unnecessarily curtail protected speech, but does serve a compelling state interest."

2. *Buckley v. Illinois Judicial Inquiry Bd.*, 997 F.2d 224 (7th Cir. 1993)

More recently, in *Buckley v. Illinois Judicial Inquiry Bd.*, the U.S. Court of Appeals for the Seventh Circuit struck down an Illinois statute, substantially similar to Washington's Canon 7(B)(1)(c), regulating the speech of candidates for Illinois judicial office.

Writing for the Court, Judge Richard Posner first recognized that

[j]ustice under law is as fundamental a part of the Western political tradition as democratic self-government and is historically more deeply rooted, having been essentially uncontested within the mainstream of the tradition since at least Cicero's time.

He also recognized,

only a fanatic would suppose that . . . the principle of freedom of speech should be held to entitle a candidate for judicial office to promise to vote for one side or another in a particular case or class of cases.

The Court held, however, that while the Canon deals effectively with those stated interests, in so doing it "gags the judicial candidate" in violation of the First Amendment.

He can say nothing in public about his judicial philosophy; he cannot, for example, pledge himself to be a strict constructionist, or for that matter a legal realist. He cannot

promise a better shake for indigent litigants or harried employers. He cannot criticize *Roe v. Wade*. He cannot express his views about substantive due process, economic rights, search and seizure, the war on drugs, the use of excessive force by the police, the conditions of the prisons, or products liability—or for that matter about laissez-faire economics, race relations, the civil war in Yugoslavia, or the proper direction of health-care reform. All these are disputed legal or political issues.

The rule thus reaches far beyond speech that could reasonably be interpreted as committing the candidate in a way that would compromise his impartiality should he be successful in the election.

The Court concluded,

[T]he fact that some of the statements forbidden by the rule, notably promises to rule in particular ways in particular cases or types of case, are within the state's regulatory power cannot save the rule.

A statute that forbids privileged speech "is not saved by the fact that it also forbids unprivileged speech and could in application be confined to the latter."

Commentary

Canon 7(B)(1)(c) of the Code of Judicial Conduct was intended to balance freedom of speech and due process of law in judicial campaigns. Although the competing principles are easily recited, an appropriate balance between the two is not so easily struck.

The Seventh Circuit's opinion in *Buckley* correctly recognizes Canon 7's overbreadth. The Washington Supreme Court implicitly recognized the same in *Kaiser*, noting,

Canons relating to judicial campaigns can and do meet constitutional requirements if they are construed to permit a broad range of fair comment on judicial qualifications.

Where the Seventh Circuit erred, however, was in refusing to judicially narrow the Canon, to trim unconstitutional branches from its constitutional trunk. Although it stated that the Canon served a "strong" state interest, the Court held

that it was not authorized "to make such changes . . . as might be necessary to render it constitutional."

In fact, as the Third Circuit recognized in *Stretton*, constitutional jurisprudence not only authorizes—but requires—that "every reasonable construction be resorted to, in order to save a statute from unconstitutionality." Consequently, while recognizing Canon 7's First Amendment harm, the *Buckley* court failed to apply the correct constitutional remedy.

Conversely, while the Washington Supreme Court has applied the correct constitutional remedy to Canon 7 by adopting a narrowing construction, it has failed adequately to recognize the extent of Canon 7's First Amendment infirmity. In broadly interpreting the state interest served by Canon 7 to include "protecting the good reputation of the judiciary," the Court mistakenly narrows the scope of speech permitted by the rule to "the relative qualifications of the candidates."

What the Washington decisions fail to recognize is that "protecting the good reputation of the judiciary" is an interest served by all the canons taken together. That general interest is far too broad to be served by any one canon, much less one tailored to judicial campaign activity. Moreover, that interest alone cannot justify censoring discussion of all but a candidate's qualifications.

Rather, as the court correctly noted in *Stretton*, the precise interest served by Canon 7(B)(1)(c) is to ensure that a judicial candidate's campaign statements do not leave the impression that cases are "prejudged rather than adjudicated through a proper application of the law to facts impartially determined." That precise interest is adequately protected by an interpretation of Canon 7 which allows for discussion of matters other than a candidate's qualifications. This interpretation permits general discussion of a candidate's judicial philosophy; constitutional law, including the right of privacy; racial and gender composition of the bench and bar; criminal sentencing and the rights of victims of crime; judicial administration, including court congestion and delay; and any other matter except those likely to "come before the court for resolution." Such a reading of Canon 7 strikes an appropriate balance because it serves the state's compelling interest in an impartial judiciary while, at

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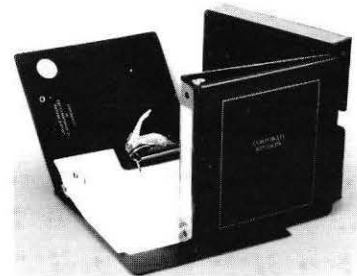
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because it serves the state's compelling interest in an impartial judiciary while, at the same time, protecting the judicial candidate's First Amendment guaranties. That reading also prohibits either pledges of future conduct or promises to rule in particular cases, which concerned the court in *Buckley*.

Conclusion

As Justice Thurgood Marshall noted in *Arnett v. Kennedy*, 416 U.S. 134 (1974), where a law arguably proscribes both

protected and unprotected speech, its sanction "hangs over [people's] heads like a sword of Damocles," the cost of which in great part "is that it hangs—not that it drops." In Washington, that sword hangs over the heads of judicial candidates who discuss more than their qualifications and the qualifications of their opponents. After *Stretton* and *Buckley*, the Washington Supreme Court—a court that both wields the sword and is subject to its penalty—is well-advised to reexamine its burden.

* * *

Thomas More Kellenberg is an attorney with the Seattle office of Perkins Coie. He has been a member of the WSBA Court Congestion and Improvement Committee since 1992. He gratefully acknowledges the comments and insights of David J. Burman, who chairs the firm's litigation department and whose grasp of constitutional and election law is much greater than his own.

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CONTRACT LITIGATION POST-*BERG* V. *HUDES*MAN: DID YOUR BLACK & WHITE CONTRACT TURN A LIGHTER SHADE OF PALE? PART 2 OF 2

The June *Bar News* carried Part 1 of this article:
**How *Berg v. Hudesman* Did and Did Not Change Washington Contract Law and
The Appellate Court's Attempt to Bring Order Out of Chaos.**

by Steven A. Reisler

Berg v. Hudesman and Insurance Contracts

Contracts are everywhere and insurance contracts are among those most frequently interpreted by the courts. As of this writing, there are at least four published post-*Berg* opinions dealing with insurance contract interpretation: *McDonald v. State Farm*, 119 Wn.2d 724, 837 P.2d 1000 (1992) (homeowners coverage), *City of Everett v. American Empire Surplus Lines Ins. Co.*, 64 Wn. App. 83, 823 P.2d 1112 (Div. 1 1991) (E & O policy), *Underwriters Subscribing to Lloyd's Insurance Cert. No. 80520 v. Magi, Inc.*, 790 F. Supp. 1043 (E.D. Wash. 1991) (commercial coverage), and *Denny's v. Security Union Title Ins.*, 71 Wn. App. 194, ___ P.2d ___ (Div. 1 1993). Although these cases cite *Berg*, they produced results which probably would have been the same even under the prior rules of interpretation.

McDonald related to exclusionary language in a homeowner's insurance policy. The homeowners sued State Farm for breach of contract for failing to pay damages when the home's foundation gave way. The Supreme Court reversed the Court of Appeals and reinstated the Superior Court's summary judgment in favor of the insurer. Although under *Berg*, extrinsic evidence is always admissible to determine the context of a contract regardless whether the contract is or is not ambiguous, the Supreme Court in *McDonald* examined the insurance exclusion to determine whether it was ambiguous. 119 Wn.2d at 733. Loosely citing to *Berg*, the court wrote in the main:

The focal question is whether the exclusionary language of the policy is ambiguous. This question requires us to interpret the policy's exclusionary language and provisions. . . . Thus, if an insurance policy's exclusionary language is ambiguous, the legal effect of such ambiguity is to find the exclusionary language ineffective. [In this case], we find no ambiguity in the policy's exclusionary language.

119 Wn.2d at 733
(citations omitted)

If there is a conflict between *McDonald* and *Berg* in their analysis of "ambiguity," it is more an apparent conflict than a real one. Although extrinsic evidence is admissible under *Berg* to understand the context of any contract (including insurance agreements), that extrinsic evidence still cannot be used to import a meaning contrary to what is clearly written. Thus, if exclusionary language in an insurance policy is not ambiguous—that is, it is susceptible of only one reasonable meaning—then there is nothing useful the extrinsic evidence brings to the debate at all.

By contrast, the court of appeals in *Everett v. American Empire*, *supra*, used extrinsic evidence (the declaration of the insurance company's senior vice-president and underwriter) to set the context for the policy's exclusionary language. This extrinsic evidence supported the insurer's position of denying coverage and was a basis for the court's affirmation of the superior court's summary judgment in favor of the insurer on a wrongful death declaratory judgment action. 64 Wn. App. at 88.

In *Denny's v. Security Union Title Ins.*, *supra*, the Court analyzed *Berg* in the context of the coverage intended by a title insurance policy. Observing,

[T]he *Berg* decision was intended to reconcile previous inconsistent case precedent and provide a uniform guideline for contract interpretation,

Division 1 of the Court of Appeals nevertheless found that *Berg* did not obviate the parol evidence rule as it would apply to insurance contracts. 71 Wn. App. at 201.

However, to the extent an insurance policy provision was susceptible to different reasonable interpretations, then that policy provision would be inherently ambiguous and subject to a determination of the contracting parties' intent. *Id.* at 209. If, after examining the extrinsic evidence, the contract provision remains ambiguous, then the court will construe insurance contract language in favor of the insured, which is consistent with prior case law and rules of insurance contract rules of interpretation. *Id.* at 209-210.

On the other hand, in *Lynott v. Nat'l Union Fire Ins. Co.*, 123 Wn.2d 678, ___ P.2d ___ (1994), the Washington Supreme Court cited ambiguous language in an exclusionary clause of a directors' and officers' liability policy as the basis for negating the efficacy of the clause. Rather than analyze the parties' mutual intent, the Court applied the rule that if exclusionary language in an insurance policy is ambiguous, then there is no need for further debate because the exclusionary language is simply ineffective.

In all fairness, the Court in *Lynott* found that there really was no "mutual intent" of the disputing parties concerning the contested language. Typical of what happens in most insurance policies, the parties never negotiated or, for that matter even discussed the exclusionary language. It was simply "there," part of the contract. *Id.* at 685. Thus, the Court saw no point in considering the insurance

company's "unilateral or subjective purposes and intentions about the meaning of what is written . . ." *Id.* at 684.

What You Meant, What You Knew and What You Did: Litigation About Settlement Agreements and Releases

In two published post-*Berg* cases dealing with settlement agreements, the courts have referred to the context rule but left intact preexisting policies favoring settlements and releases.

The earlier case, *Baker v. Winger*, 63 Wn. App. 819, 822 P.2d 315 (Div. 1 1992), involves a highly convoluted fact pattern resulting in the loss of the settling defendants' rights of contribution from another party. For the purposes of this discussion, the significance of *Baker* is that the court used the context rule articulated in *Berg* to infer what the parties meant in their oral, on the record, settlement agreement. Thus, almost by reading between the lines, the court reviewed the context of the settlement agreement, *inferred the intent* of the settling parties and ruled accordingly. 63 Wn. App. at 823.

On the other hand, in *Nationwide Mutual v. Watson*, 120 Wn.2d 178, 840 P.2d 851 (1992), the court reviewed and then rejected extrinsic evidence offered to contradict the language of a general release. Specifically, the Supreme Court reversed the Court of Appeals and reinstated the Superior Court's summary judgment in favor of the insurer. 120 Wn.2d at 195.

The issue in this case was the breadth of a general release and whether the parties meant it to encompass PIP benefits as well as UIM benefits. Although the insurer and the claimant asserted different "intentions" when each signed the general release, the court returned again to the fact that the plain meaning of the words in the release were not ambiguous. *Id.* at 189. The release covered "any and all claims . . . of any kind or nature whatsoever . . ." and although the parties ". . . may have had different subjective intentions, . . . the words employed in the general release signed by respondent on December 14, 1987, clearly constitute a release of all claims." *Id.* Interestingly, although the extrinsic evidence in this case was not admitted to

change the clear meaning of the release agreement, the extrinsic evidence explained the context of the release agreement and, undoubtedly, helped the court arrive at the "just" decision it reached.

Real Estate Contracts In The Post-Berg World

The *Berg* case involved real property as do a large number of reported post-*Berg* opinions. Several of these cases have been mentioned in the preceding discussion: *Wells Trust v. Grand Central Sauna and Hot Tub Co. of Seattle*, 62 Wn. App. 593, 815 P.2d 284 (Div. 1 1991) (commercial landlord-tenant dispute regarding abandonment of premises); *Vacova Company v. Farrell*, 62 Wn. App. 386, 814 P.2d 255 (Div. 1 1991) (payment of promissory note related to earnest money agreement); *Homeowners Ass'n v. Witrak*, 61 Wn. App. 177, 810 P.2d 27 (Div. 1 1991) (interpretation of restrictive covenant). A clutch of 1992 appellate decisions, however, show that at least in the realm of real property, the decision has increased the courts' latitude for "doing justice," while decreasing the predictability of the courts' deci-

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sions.

The following three cases were each decided by a different division of the Court of Appeals, each with a different twist. In *Voorde Poorte v. Evans*, 66 Inn. App. 358, 832 P.2d 105 (Div. 3 1992), the court affirmed the Superior Court's partial summary judgment in favor of the buyer of a mobile home destroyed by fire. The purchase and sale agreement provided that if, prior to closing, the property was destroyed by fire, then the buyers could back out of the deal—a fairly standard real estate purchase agreement provision. Prior to closing, the buyers took possession of the mobile home, moved employees into it and reconnected electrical service. While the buyer's employees were lunching in the mobile home, an electrical fire started in the kitchen and destroyed the mobile home. The buyer then terminated his purchase agreement and the sellers sued for breach of contract (among other causes of action not relevant to this discussion).

In the *Voorde Poorte* case, the parties did not dispute the language of the contract which placed the risk of loss with the sellers. What the parties disputed was

whether the sellers had consented to the buyers' pre-closing possession of the mobile home and the legal effect of early possession. 66 Wn. App. at 362. Without any reference to *Berg*, the court affirmed the partial summary judgment in favor of the buyer:

If a contract is unambiguous, summary judgment is proper even if the parties dispute the legal effect of a certain provision. Interpretation of an unambiguous contract is a question of law.

Id. at 362 (citations omitted).

Reading between the lines, the *Voorde Poorte* case does not consider extrinsic evidence, *a la Berg*, because there could be no possible "intent" memorialized in the written agreement except that which it unambiguously states. In other words, because there was no dispute about the unambiguous language of the contract itself, the issue could be resolved as a matter of law without reference to extrinsic evidence.

Consider, on the other hand, *Honan v. Ristorante Italia, Inc.*, 66 Wn. App. 262,

832 P.2d 89 (Div. 2 1992). In this case, Division 2 of the Court of Appeals considered a sale of restaurant equipment on an installment contract. After the buyer fell in arrears, the seller attempted a "self-help" remedy by changing the locks on the restaurant to prevent the buyer from removing equipment. The seller eventually sued the buyer—that is, the individual and the corporate entity with which seller believed he had been dealing (which, of course, was not identified as the buyer in the contract documents).

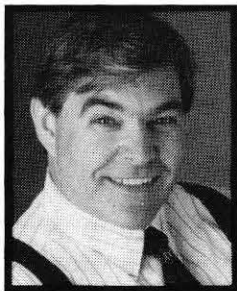
The superior court applied the statute of frauds, refused to consider any oral agreements outside the scope of the fully integrated written contract documents, and dismissed the seller's claims in large measure. The court of appeals reversed and remanded the case for trial. 66 Wn. App. at 273. Citing *Berg*, the court in *Honan* held that extrinsic evidence, including testimony about the side oral agreements of the parties, should have been considered by the Superior Court in order to determine the intent of the parties. *Id.* at 271. Contrasted with the *Voorde Poorte* case discussed, *supra*, *Honan* was a case in which the meaning of the con-

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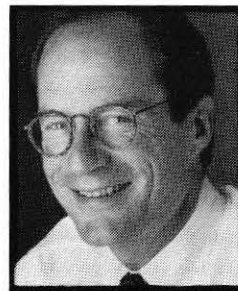
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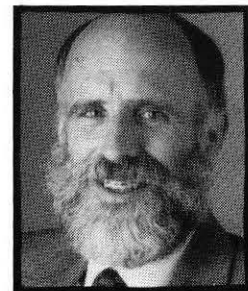
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tract language itself was disputed; hence, the court's consideration of extrinsic evidence.

The third real estate case of this group is *Parry v. Hewitt*, 68 Wn. App. 664, ___ P.2d ___, 1993 WL 25566 (Div. 1 1992). In *Parry*, the court considered whether a mobile home was a "trailer" as defined by a restrictive covenant in a residential subdivision. The specific language of the restrictive covenant prohibited placing on the property any "structure of a temporary character, trailer, basement, tent, shack, garage, barn or any other outbuilding . . ." 68 Wn. App. at 665. The superior court concluded that the mobile home was a "trailer" as defined by the restrictive covenant and granted partial summary judgment against the mobile home owners on that issue. The Court of Appeals reversed. Moreover, it then granted judgment for defendants finding that the mobile home was *not* a "trailer" prohibited by the restrictive covenant. Citing *Berg* and (among other testimony) the affidavit of the attorney who drafted the restrictive covenant, the Court of Appeals concluded that the "obvious intent of the parties . . . was to assure the attractiveness and permanence of the homes in the subdivision." *Id.* at 668. This, the court concluded, meant that whereas "eyesores and junk such as old travel trailers" were excluded from the subdivision, modern manufactured homes were never meant to be excluded. *Id.* at

669.

The main theme of these three post-*Berg* real estate related cases, therefore, is the court's interest in "rejecting interpretations that are unreasonable and imprudent and accepting those which make the contract reasonable and just." *Homeowners Ass'n v. Witrak*, 61 Wn. App. at 181 paraphrasing *Berg*, 115 Wn.2d at 672. For lawyers and clients involved in real estate transactions, the knowledge that "justice" will be done in the post-*Berg* world must be very comforting. However, as the three cases discussed in this section demonstrate by their disparate results, the comfort of "justice" being done sometimes comes at the expense of *knowing* with any degree of reasonable certainty how (or whether) a court will use extrinsic evidence to resolve a contract dispute.

The Choice of Laws Clause to the Rescue?

Parties who reside in different states, or who engage in interstate commerce, frequently include a choice of laws clause in their written agreements. Generally, Washington courts will enforce a choice of laws clause so long as its application does not offend the forum state's fundamental public policy and there is a substantial relationship with the state whose law was chosen. *McGill v. Hill*, 31 Wn. App. 542, 547, 644 P.2d 680 (Div. 1 1982). Although each contracting party

normally wants to choose its own state's laws to construe the contract, it may be worthwhile to choose the *other state's* laws if the parties want to ensure that the contract is interpreted by more traditional techniques than those described in *Berg*.

For example, in *Truck Center Corp. v. General Motors Corp.*, 67 Wn. App. 539, 837 P.2d 631 (Div. 1 1992), the court interpreted a General Motors dealer sales and service agreement which was expressly governed by Michigan state law. 67 Wn. App. at 544. Unlike Washington law post-*Berg*, Michigan law provides that extrinsic evidence relating to the intent of the parties is admissible *only when the contract terms are so ambiguous that the parties' intent cannot be discerned from the contract itself*. The court of appeals in *Truck Center* appreciated the significance of this difference by foot-noting the contrasting, broader use of extrinsic evidence adopted in *Berg*. 67 Wn. App. at 544, f.n. 3 & 4. Therefore, applying Michigan's laws and restricting its analysis to the language of the contract itself, the court in *Truck Center* held in General Motor's favor and affirmed the Superior Court's order on summary judgment.

A related, but more radical, issue is whether residents of Washington who enter into a Washington contract with no connection with a foreign jurisdiction can expressly designate another state's laws to interpret the contract. The *Restatement (Second) of Conflicts of Law* § 187 states that the parties should be able to choose any law they wish to interpret their contract, provided no public policy of the forum state is violated and there is some relationship with the chosen state law. In dictum and in a footnote, the court in *Truck Center* commented that "no public policy is violated by application of Michigan law." *Id.* at 544, f.n. 3. In the absence of *any* significant contacts with the state of the chosen law, however, it is very possible that a court will vitiate the choice of laws clause. However, more out of curiosity than knowledge, we invite *some other lawyer* to risk this theory with *someone else's clients*.

Discussion, Hoots and Mud-slinging

Although when first published *Berg* engendered much concern in the business community, the courts' application of *Berg* has not been as radical as feared. So

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long as extrinsic evidence is admitted primarily to illuminate the context of a written contract to understand the parties' intent, properly and fairly drafted contracts are not likely to be gutted by the courts. The *Berg* approach to contract interpretation, however, is not the only one available. As discussed in the *Truck Center* case in the preceding section, some states, like Michigan, *only admit extrinsic evidence if the intent of the parties cannot be understood simply by reading the language of the contract itself.*

There is some sentiment in Washington to modify the approach and move closer to Michigan's model. Thus, in *Swanson v. Liquid Air Corp.*, 118 Wn.2d 512, 826 P.2d 664 (1992), J. Anderson wrote a concurring opinion, joined by J. Dolliver, in which he expressed the following thoughts:

My concern is that the majority's broad characterization of *Berg* will upset the finality of unambiguous integrated written contracts and require every contract dispute to be determined by the trier of fact only after a full trial.

When the case arises where a written integrated contract is clear and unambiguous on its face, I would hold that extrinsic evidence is not admissible. Certainty of contract depends on parties being bound to their clearly drafted written contracts.

118 Wn.2d at 550.

J. Anderson's comments certainly resonate in the business community. It would not surprise this author if, either over time or in a particular test case selected by the Supreme Court, the broad interpretative rules of *Berg* are trimmed back. In any event, time and the advance sheets will show whether *Berg* was the final word in contract analysis in Washington or if it was simply the latest stage in the process of evolution.

* * *

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.

Selected post-*Berg* Cases

Insurance

McDonald v. State Farm Fire and Casualty Co., 119 Wn.2d 724, 837 P.2d 1000 (1992) (homeowners coverage)

Underwriters Subscribing to Lloyd's Insurance Cert. No. 80520 v. Magi, Inc., 700 F. Supp. 1043 (E.D. Wash. 1991) (commercial coverage)

City of Everett v. American Empire Surplus Lines Ins. Co., 64 Wn. App. 83, 823 P.2d 1112 (1991) (E & O policy)

Denny's v. Security Union Title Ins., 71 Wn. App. 194, ___ P.2d ___ (Div. 1 1993) (title insurance)

Real Estate

Harris v. Ski Park Farms, Inc., 120 Wn.2d 727, 844 P.2d 1006 (1993) (easements)

Parry v. Hewitt, 68 Wn. App. 664, ___ P.2d ___, 1993 WL 25566 (1992) (restrictive covenants)

Berg v. Hudesman, 115 Wn.2d 657, 801 P.2d 222 (1990) (lease)

Honan v. Ristorante Italia, Inc., 66 Wn. App. 262, 832 P.2d 89 (1992), review denied by 120 Wn.2d 1009, 841 P.2d 47 (1992) (restaurant rental)

Watkins v. Restorative Care Center, Inc., 66 Wn. App. 178, 831 P.2d 1085 (Div. 1 1992), review denied by 120 Wn.2d 1007, 841 P.2d 47 (1992) (lease)

Burgeson v. Columbia Producers Inc., 60 Wn. App. 363, 803 P.2d 838 (Div. 3 1991), review denied by 116 Wn.2d 1033, 813 P.2d 583 (1991) (farm development)

Vacova Company v. Farrell, 62 Wn. App. 386, 814 P.2d 255 (Div. 1 1991) (earnest money agent)

Wells Trust v. Grand Central Sauna and Hot Tub Co. of Seattle, 62 Wn. App. 593, 815 P.2d 284 (Div. 1 1991) (landlord-tenant)

Homeowners Ass'n v. Witrak, 61 Wn. App. 177, 810 P.2d 27 (Div. 1 1991), review denied by 117 Wn.2d 1013, 816 P.2d 1224 (1991) (restrictive covenants)

Voorde Poorte v. Evans, 66 Wn. App. 358, 832 P.2d 105 (Div. 3 1992) (fire damage to property before closing)

Syrovoy v. Alpine Resources, 122 Wn.2d 544, ___ P.2d ___, (1993) (contract for timber harvest)

Settlement

Nationwide Mutual Fire Ins. Co. v. Watson, 120 Wn.2d 178, 840 P.2d 851 (1992) (re-lease)

Baker v. Winger, 63 Wn. App. 819, 822 P.2d 315 (Div. 1, 1992) (contribution)

Morris v. Maks, 69 Wn. App. 865, ___ P.2d ___ (Div. 1 1993) (settlement agreement enforced)

Perkins v. Children's Hospital, 72 Wn. App. 149, ___ P.2d ___ (Div. 1 1993) (one party's subjective intent cannot control the legal consequences of an executed written release)

Employment

Minter v. Pierce Transit, 68 Wn. App. 528, 843 P.2d 1128 (Div. 2 1993) (collective bargaining agreement)

Olympia Police Guild v. City of Olympia, 60 Wn. App. 556, 805 P.2d 245 (Div. 2 1991) (collective bargaining agreement)

Swanson v. Liquid Air Corp., 118 Wn.2d 512, 826 P.2d 664 (1992) (wrongful discharge)

General

Scott Galvanizing, Inc. v. Northwest EnviroServices, Inc., 120 Wn.2d 573, 844 P.2d 428 (1993) (indemnification agreement - hazardous waste)

Truck Center Corp. v. General Motors Corp., 67 Wn. App. 539, 837 P.2d 631 (Div. 1 1992) (dealer agreement)

Bonneville Power Admin. v. Washington Public Power Supply, 956 F.2d 1497 (9th Cir. 1992) (bonds)

In re: Marriage of Foran, 67 Wn. App. 242, 834 P.2d 1081 (1992) (prenuptial agreement)

Marriage of Pletz, 71 Wn. App. 699, ___ P.2d ___ (Div. 2 1993) (community property agreement involving post-agreement \$5 million lottery prize)

SAS America v. Inada, 71 Wn. App. 261, ___ P.2d ___ (Div. 1 1993) (enforcement of personal guaranty of security agreement)

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

Vancouver/Portland, June 17-18, 1994

Present: The president, president-elect and the Governors. *Also present:* Thomas A. Campbell (Washington Assn. of Criminal Defense Lawyers); Judge Milton Cox (Superior Court Judges' Assn.); Judge Gina Hale (Administrative Law Judges' Assn.); Lisa Lowe (Washington Women Lawyers); Dennis P. Harwick (WSBA Executive Director); Christopher Jennings (Lesbian/Gay Legal Society of Puget Sound); Jim Kaufman (Washington Assn. of Prosecuting Attorneys); Evelyn Fielding (Government Lawyers Bar Assn.); Ted Gathe (Washington State Assn. of Municipal Attorneys, Friday); Howard H. Marshack (WSBA Family Law Section); Judge James A. Noe (Washington ABA Delegation); Bill Phillips (Washington Assn. of Defense Trial Attorneys); Judge John Schultheis (Court of Appeals, Division III); Scott A. Smith (King County Bar Assn.); Lindsay T. Thompson (*Bar News* editor); Steven B. Tubbs (WSBA General Practice Section); Robert D. Welden (WSBA General Counsel) and Judy Zeider (Washington State Assn. of Municipal Attorneys, Saturday).

President's Report: President Paul Stritmatter called the meeting to order at 9:05 a.m. and welcomed liaisons present. Since the last meeting, he participated in the WSBA Governance Task Force teleconference; attended Gonzaga's law school graduation; met with the District and Municipal Court Judges' Association; attended the WSBA Bar Leaders/Volunteer Attorney Legal Services (VALS) Conference at Lake Chelan; attended a meeting of the Spokane Chapter of the Inns of Court and spoke on professionalism; co-chaired a meeting of the Task Force on Attorney Discipline; attended the Willamette University School of Law Class of 1969's 25th anniversary reunion; attended a special Board of Governors meeting to deal with personnel and litigation matters; and conducted a focus group in Vancouver the day before the Board meeting. The group was half-composed of Clark County and half-composed of Portland lawyers who are WSBA members.

President-elect Ron Gould reported he continues to work on political and financial support for the project to train high school students in mediation. He also attended the midyear meeting of the Real Property, Probate and Trust Section and encouraged them to become more active in bar affairs. He hopes to draw some of the business-related sections of the Bar closer into the fold during his term. The minutes of the May meeting were approved.

Decorum Guidelines Approved: Seattle lawyer Charles K. Wiggins appeared for the Court Congestion and Improvement Committee with a revised set of the committee's Courtroom Decorum and Practice Guidelines. The Board considered them last meeting and sent them back for some fine tuning. Wiggins noted that several lawyers who'd been critical of some of the elements of the last draft had participated actively in advising the committee, the result being a much-improved set of recommendations. He also noted that they won't have much effect unless Washington judges use them as an enforcement tool. There was some discussion over whether the guidelines should be sent to the judges' associations for comments before the Board adopted them. In the end- since they are supposed to be "living" guidelines revised over time in light of experience- the Board approved them. The guidelines and some comments on them will appear in the *Bar News* in a few months.

Another Blow to the Concept of Full-service Law Firms: Proposed lawyer discipline rule 8.4(h), which would ban sex between lawyers and their clients, came back for consideration by the Board. The proposed rule was sent up to the Supreme Court for consideration last fall. On December 22, 1993, the Court returned the rule, noting that existing rules of professional conduct covered the problem. But the

Court, noting that many bar members feel strongly about the need for such a rule, invited suggestions from the Board.

The Board referred the matter back to the Rules of Professional Conduct Committee, whose chair, Diane Fitz-Gerald, drafted a letter explaining in some detail why the rule is needed. President-elect Ron Gould, who missed what Governor Vickie Norris called "the Board's painstaking consideration of any number of bizarre sexual hypotheticals," raised some questions about what lawyers in enormous firms, who represent the corporate masters of the universe, do when some associate is off on a cruise in the far East and has a fling with a person who turns out to be a decision-maker for an affiliate of the Gigantic Conglomerate. "Do you have to run a conflict check to go on a date?" he wondered.

This led to another painstaking consideration of the language of the rule. Howard Marshack reminded the Board the Family Law Section opposes the rule because, after all, adults are adults and besides, it is sometimes hard to tell who's the victim in such relationships. "The client has considerable blackmail potential," he observed.

There was some discussion about whether the Fitz-Gerald letter went far enough in explaining why existing RPCs don't address the problem. Governor Jim Handmacher felt the Board should confer with the court informally to see more particularly what's on their minds before sending them up a response that may or may not address the Court's concerns. Vickie Norris accused some of the nay-sayers of "trying to waffle around or destroy the rule. We don't need that. We need to do whatever is required to get it passed." She moved to send the rule back to the court with the Fitz-Gerald letter and offer to send a delegation to meet with the Court and explain why the rule is important.

Then several people raised questions about whether the rule was too vague, and failed to define what sexual relations with clients are. Lisa Lowe expressed amazement that such a topic could even be raised, noting that RPC 8.4(d) proscribes "engaging in conduct prejudicial to the administration of justice." "You can't get much more vague than that."

The Board approved Norris' motion 9-2.

"Words Mean Exactly What I Say They Do, No More and No Less," Humpty Dumpty announced in Alice in Wonderland. The Board's semiotic adventures continued with a consideration of proposed Rule 8.4(g), which would prohibit various forms of harassment. The Supreme Court adopted a version of this rule last year, but returned the portion dealing with harassment in September 1993. Concerns had been raised during the comment period that the section had no limitations or parameters.

The Rules of Professional Conduct Committee redrafted the rule and brought it back for approval. The rule would have a statement of purpose explaining the reasons for the proposal, and add a new section clarifying what it was intended to do: "to use language, gestures or conduct which have no professional or lawful purpose and which are intended to denigrate, insult, single out or demean another person on the basis of sex, race, age, creed, religion, color, national origin, disability, sexual orientation or marital status, while performing professional activities." Joanna Allen of the RPC Committee, and Tom Chin of the Opportunities for Minorities in the Legal Profession Committee, presented the redrafted rule.

While the Board's members expressed their continuing support for the rule, there was a lengthy discussion about the addition of the phrase "single out" and whether it was a useful addition. Governor Vickie Norris said singling out people may not be overtly intended to harass, but it can easily have that effect. She told the Board what it was like to have a judge remark, over and over in front a jury, that the "little lady"

was back in the courtroom. Christopher Jennings agreed, telling the Board one of the lawyers he worked with told him of appearing before a judge who told the jury, "Now it's pretty unusual, but the defendant is represented by a lady lawyer..." Governor Jan Peterson said he had opposed the proposal before but supported it now, having been convinced by stories his partner, Elizabeth Bracelin, had told him about spending a career where she was frequently the only woman lawyer in the room. "She made it to the presidency of this Association, but it still bothered her that she was always being singled out as 'the woman lawyer,'" Peterson said.

A motion to keep "single out" in the text passed 8-3. The amended proposed rule was then passed unanimously and will go back to the Supreme Court for consideration.

Local News: The Board had lunch with the Clark County Bar Association, during which they heard a report by Dennis Duggan of Vancouver on the local efforts of lawyers to support Law Fund, as well as remarks by Law Fund executive director Lauren Moore on statewide efforts to raise funds for legal services. After lunch Clark County Bar Association president Jill Kurtz and Volunteer Lawyers Program president Bill Robison gave reports on the activities of their organizations.

Friday Afternoon/Saturday Morning

Work: The Board also heard reports and comments on the state of legal education from Acting Dean James Huffman of Northwestern School of Law of Lewis & Clark College in Portland; Associate Dean David Kenagy of Willamette University College of Law, and Assistant Dean Charles O'Kelley of the University of Oregon School of Law. King County Superior Court Judge James Noe gave the Board a report on his term on the Board of Governors of the ABA, now coming to an end.

The Board approved the nominations of Richard McCartan and Janet Frickelton, both of Olympia, to the Statute Law Commission. They also heard a report from their Budget & Audit Committee on the draft WSBA budget for 1994-95, and from the task forces on Governance and Professional Qualifications.

Dr. Frankenstein Meets the Empty Chair

Rule: In 1992 the Court Rules and Procedures Committee sent the Board an amendment of CR 19. It would add a subsection (f) requiring joinder of an allegedly-at-fault nonparty when such fault is raised by a defendant in cases under RCW 4.22.070(1). That's personal injury cases under the 1986 tort reform legislation.

In 1992, the proposal got out of the Court Rules Committee on a 9-9 vote, the chair voting in favor, and the Board of Governors approved it, 6-4. It was published for comments in the *Advance Sheets* (120 Wn.2d i, iii-iv, January 6, 1993). The Supreme Court sent it back last September, asking the Board to tell them what is, or should be, the consequence of failure to join a non-party under the amendment. The Board sent the matter back to the committee, which voted 22-8 in March that (1) the rule should contain no specific sanction, leaving it to the trial courts to decide what's fair in the circumstances; or (2) if there has to be one, the sanction should be that the defendant can't put on any evidence as to any nonparty the defendant didn't join as a party.

This is essentially a turf battle between the trial lawyers and the defense lawyers. The chair of the committee, Phil Arnold, gave the trial lawyers/committee majority view, replete with overhead projections, invocations of Lord Nottingham, an English judge who has been dead three centuries, and explanations of how the amendment is just a slight stretch from the "industry market share" rule of damage apportionment announced in the DES cases some years ago (see, for example, *Martin v. Abbot tabs*, 689 P.2d 368 (1984) and *Boys v. Abbott Labs*, 122 F.R.D. 583 (W.D. Wn. 1988).)

Tyna Ek gave the defense lawyers/committee minority view, which is that if this is something the 1986 tort reform legislation

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intended, how have we all gotten along for eight years without it; that it would force the defendant in a PI case to sue his own doctor if the plaintiff pointed at the doctor as a cause of injury, or defend the doctor from the charge of malpractice, and that the proposed amendment (1) provides no remedy and (2) is unconstitutional if it does provide one. The DES cases, she said, have nothing to do with this situation. She noted that Professor Lewis Orland of Gonzaga Law School opposed the rule amendment, and argued that his status as a "neutral" party and expert in the court rules field should give his views great weight. Nonsense, Arnold replied, saying *ad hominem* arguments were just a terrible thing to indulge, then launching into one himself. "Professor Orland is a fine person, but he has an ax to grind: he is anti-plaintiff."

"Where are the scholars and experts on the majority's side?" Ek asked.

The governors then weighed in, and the debate pretty much followed the usual lines. There was an argument about whether the Board would consider the question the Supreme Court posed, or take a run at the whole rule again. The President said, no, we're going to answer the question put to us, and that's all.

After two hours, Governor Jim Handmacher moved that the Board withdraw its support of 19(f) and ask the Supreme Court to consider it no further. The motion died for want of a second.

Governor Jan Peterson then moved the recommendation of the committee, that there be no sanction in the rule, or, alternately, that there be the bar on testimony as to non-joined parties if there has to be a sanction, be adopted and reported to the Supreme Court. Linda Dunn seconded it.

The motion passed 6-5, governors Blair, Dunn, Hannula, Norris, Peterson, and Toole in favor; governors Campbell, Fairhurst, Handmacher, Larson and Nappi opposed.

Then Governor Mary Fairhurst said she thought the Board needed to send a clear message to the Court. "The vote we took on their question was to answer their question," she said. "I think we need to vote on whether we think there is a need for the amendment to the rule itself."

A sense of flusterment fell upon the Board, particularly when Governor Vickie Norris agreed. "I voted as I did to answer the court's question. That's all." A squall of debate followed over whether this was a motion to reconsider disguised as something else, or Handmacher's motion, decently buried after it got no second, exhumed and revived in the most unseemly manner. Handmacher, hooking up the electrodes and scanning the skies for lightning, proposed his motion again:

"I move that the Board of Governors withdraw its support for CR 19(f) and ask the Court to discontinue proceedings to adopt it."

This time it got a second. The question was called, and the Board tied: governors Campbell, Fairhurst, Handmacher, Nappi and Norris in favor, governors Blair, Dunn, Hannula, Peterson and Toole opposed.

"Wait a minute," someone said. "That's only ten votes." The president asked Governor Mike Larson, "Are you abstaining?"

"I'm confused," Larson replied. "That's been your position all along." Governor Jan Peterson quipped. "What was the motion?", Larson asked the chair. "Would you like a quarter?" Governor Joe Nappi queried. The chair restated the motion.

A pause ensued. "I'm going to vote for it," Larson said.

President Stritmatter then announced, "I am going to vote against the motion to create a tie." "You can't do that," Governor Wayne Blair replied. General Counsel Bob Welden checked the bylaws. The president can vote in the event of a tie, but not otherwise.

So where things stand is that the Board will tell the Court (a) there's no need for the amendment, but if there is, (b)(1) there should either be no sanctions for failure to join non-parties, or (b)(2) a specific one.

"That's Round Two," Governor Peterson remarked. "The Court is going to think we've lost our minds," Governor Nappi said.

Wrap-up in Vancouver: The Board approved a resolution calling on the Washington congressional delegation to support federal legislation to give the Legal Services Corporation \$500 million in fiscal year 1995 as a step toward addressing unmet legal needs of America's poor. They approved a resolution supporting modification of 26 USC section 60501, which the IRS is currently using to require lawyers to name clients who make payments of more than \$10,000 in cash, and which places lawyers in an ethical jam (see WSBA Ethics Opinion 189 (1991), Vol 7, No. 1 *Resources*, 1994 edition, page 262).

The Board also unanimously approved a resolution opposing passage of Washington State Initiatives 608 and 610 in the fall elections. The resolution noted that the initiatives are discriminatory and prejudicial to the administration of justice as prohibited by RPC 8.4(d) and (g), would thwart access to the judicial system by prohibiting any cause of action or legal standing, including actions on the basis of discrimination, enforcement of powers of attorney, wills or child custody, to arise on behalf of any individual who is, or is perceived to be, lesbian, gay, bisexual or transgender; and that the initiatives exclude such citizens from constitutionally guaranteed rights of freedom of association, equal protection and free speech.

NEXT MEETING: July 29-30, 1994, Ocean Shores.

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Notices of Interest

WSBA Disciplinary Notices

Reprimand: Bellingham lawyer **Denise C. George** (WSBA #10749, admitted 1980) has been ordered reprimanded pursuant to a stipulation for discipline, approved January 21, 1994. The discipline is based upon her failure to communicate and keep three clients reasonably informed about the status of their cases. She also failed to promptly comply with her clients' reasonable requests for information, and she failed to act with reasonable diligence and promptness in representing her clients. [April 26, 1994]

Commission on Judicial Conduct Notices

Stipulated Admonishment: The Commission on Judicial Conduct and Hon. **Harry R. Slusher**, King County Superior Court Commissioner, stipulated to an Order of Admonishment for Slusher filed April 1, 1994. The parties agreed that on January 22, 1993, Slusher conducted a hearing in a domestic-relations case. While attorneys for both parties

were discussing settlement outside the courtroom, Slusher engaged in casual and cordial conversation in the courtroom with one of the parties for several minutes. This conversation was observed, but not participated in, by the other party. After the attorneys returned to the courtroom, Slusher heard the remaining issues and made a ruling on the matter. Although there is no evidence that he, Slusher, discussed matters concerning the ongoing proceedings, the conduct created an appearance of impropriety. He agreed to accept an admonishment as described in RCW 2.64.055 and 2.64.010(1), and the Commission's determination that his conduct constituted a violation of Canons 1, 2(A) and 3(A)(4) of the Code of Judicial Conduct, and he agreed he will exercise caution to avoid repeating the violation in the future.

David Akana, Executive Director, represented the Commission. Slusher represented himself. *In re the Matter of Commissioner Harry R. Slusher, King County Superior Court, No. 93-1518-F-43*, April 1, 1994.

Supreme Court of Washington Judicial Conduct Decisions

Removal from Office: In an *en banc* decision filed April 6, 1994, the Supreme Court of Washington removed Hon. **John G. Ritchie**, King County District Court judge, from office for making improper requests for reimbursement of travel expenses.

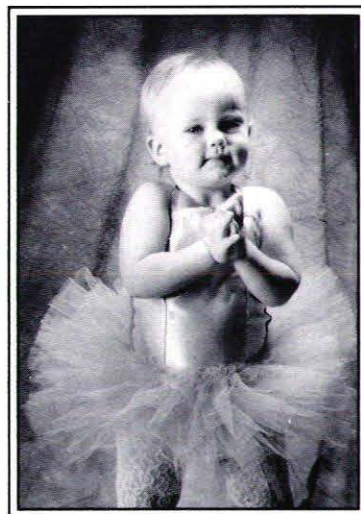
Writing for the Court, Justice Robert Utter said the Court's action arose from a complaint filed with the Commission on Judicial Conduct by a litigant displeased by the manner in which Ritchie conducted himself in handling her case. That investigation did not lead to the filing of any charges, but prompted a further investigation of Judge Ritchie's conduct in 1992. A fact-finding hearing was held in January 1993. The Commission found that in 1988, 1990 and 1991 he misrepresented the purpose of travel as being to attend a "conference" when it was uncontroverted that he attended no formal conference. On those occasions, as well as after a 1987 trip to Florida, he sought reimbursement for car and lodging expenses beyond that needed for the minimal judicial activities he was conducting. The Commission report concluded that Ritchie's claimed judicial business in connection with the trips was minimal at best and wholly incidental to the personal nature of the trips.

Following a hearing on the merits the Commission issued a report and recommendations based on its finding that his conduct violated the Canons of Judicial Conduct. The Commission unanimously recommended censure and restitution for the amounts improperly claimed for reimbursement.

On March 12, 1993, counsel for the Commission filed objections to the Commission's recommendation, arguing that he should be removed rather than sanctioned. After statements by the judge to the press that he had done nothing improper, the Commission changed its decision on August 6, 1993. A majority recommended his removal from office.

Ritchie appealed, arguing that the evidence against him was not clear, cogent nor convincing; that the Code of Judicial Conduct and statute pursuant to which he was sanctioned are too vague to provide notice of the prohibited conduct; and that

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the Commission violated its own rules of procedure and his rights under the Fourth, Fifth, and Fourteenth amendments to the United States Constitution.

The Court found that the Commission's original recommendation of censure led Ritchie to waive oral argument and submit a memorandum. "Under these circumstances, the Commission's contention that the judge waived his right to argue the Commission's proposed decision on the record is strained. The right could not be meaningfully exercised without knowledge of the sanction sought. Although the Commission should in the future abide closely with the procedural requirements set out in its regulations, any procedural deficiencies which may have occurred below are moot on this record in light of our *de novo* review," Utter wrote. The Court dismissed Ritchie's constitutional arguments as "not well-taken, insofar as they are premised on the notion that judges in disciplinary proceedings are entitled to the same rights as criminal defendants. The applicable standard is civil in nature."

While noting that its review of the case was *de novo*, Utter said the Court accords "serious consideration to the Commission's recommendation... Our concern in these proceedings is to impose a sanction appropriate to the level of culpability. The sanction must also be sufficiently severe to 'restore and maintain the dignity and honor of the position and to protect the public from any future excesses.'" The Court found Ritchie's challenge to statutes governing reimbursement of judges immaterial, since he was not found to have violated them, but the Canons of Judicial Conduct, "which hold judges to a higher standard of integrity and require avoiding even the appearance of impropriety." The Court agreed with the Commission's observation that he "engaged in a pattern of misconduct involving dishonesty for personal gain, defrauding the public and misrepresentation of facts and circumstances. "This case gives us the opportunity to clarify the circumstances under which we will consider it a violation of the Code of Judicial Conduct to request reimbursement for travel. Reimbursements for expenditures not related to a bona fide judicial business purpose are improper. The business purpose of the trip, considered

alone, must justify the expenses sought to be reimbursed." By that standard, Ritchie's conduct was improper for two reasons: the business purpose justifying the trips was incidental to nonbusiness-related activities and therefore did not justify reimbursement; and even if the business purposes had been legitimate, the few days in which the judge engaged in arguably legitimate judicial activities did not justify his requests for several weeks of car rentals and extended hotel costs.

Thomas D. Frey and Anne M. Bremner, Stafford Frey Cooper & Stewart, represented Judge Ritchie. Peter D. Byrnes and Paul R. Taylor, Byrnes & Keller, represented the Commission. *In re the Matter of the Disciplinary Proceeding against John G. Ritchie, as Judge of the King County District Court*, Case No. JD 9, April 6, 1994, — Wn.2d — (1994). Justice Dolliver did not participate in the disposition of the case. For a summary of the Commission's action giving rise to this case, see *Bar News*, October 1993, pages 30-32.

Public Notices

ABA Advertising Supplement Keeps Lawyers Updated on Frequent State Rule Changes:

Almost one-third of the states amended their State Supreme Court ethics rules governing lawyers advertising or issued opinions on the subject during 1993. Such widespread changes reflect the continued volatility and controversy surrounding this issue (See, "Exec's Report," *Bar News*, June 1994, at page 25).

In order to keep the legal community abreast of these changes, the ABA Commission on Advertising has published the 1993 Supplement to *Provision on State Codes of Professional Responsibility Governing Lawyer Advertising and Solicitation, Second Edition*, updating the 1990 second edition and the 1991 and 1992 supplements. For information on ordering, contact ABA Member Services, 750 N. Lake Shore Drive, Chicago, Illinois 60611, or call (312) 988-5522.

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Ninth Circuit Pro Se Panel Recruits Members:

Thirty-seven percent of the appeals now before the Ninth Circuit involve *pro se* litigants on one or both sides of the case. About 90 percent of those appeals are resolved by the court staff's screening panel or by a three-judge motions panel. The remainder—10 to 15 cases per month throughout the Circuit—raise legitimate issues on appeal but require a lawyer's help in presenting those issues to the court. A *pro se* panel has been established to assist in these cases.

Western District of Washington volunteer attorney panel:

The court has established a panel of volunteer attorneys who have agreed to be appointed to represent *pro se* litigants before the Ninth Circuit. Such appointments will serve both the litigant and the court, and they will provide invaluable experience to lawyers seeking appellate experience before the Ninth Circuit. Chief Judge J. Clifford Wallace has stated that he is committed to holding arguments in those cases in which an attorney is appointed to assist a *pro se* litigant. Certain out-of-pocket costs, including the cost of briefing, travel to argument, and long-distance phone calls to clients, may be reimbursed by the Ninth Circuit upon the attorney's request.

Lawyers interested in participating may contact John W. Phillips at Heller Ehrman White & McAuliff, 6100 Columbia Center, 701 Fifth Avenue, Seattle, WA 98104, (206) 447-0900.

Pierce County Superior Court :

The court has announced the availability of facsimile filing of court documents under the provisions of its General Rule 17. Documents which require filing fees

may not, however, be filed via fax. These documents include, but are not limited to, original petitions or complaints, jury demands, writs, notices of appeal, wills or petitions to modify child support. To register to file by fax, contact the court for a Fax Filing Registration form. Once registered, lawyers will be sent the required Fax Cover Sheet and the fax filing number. All fax filings must be limited to no more than 10 pages per document during normal business hours. A separate fax cover sheet must be used for each document faxed.

U.S. District Court for the Western District of Washington fax order and PACER access:

The court has issued a General Order starting a pilot program for filing documents by fax. Copies of the Court's general order of January 24, 1994, are available from the Clerk's Office.

The District Court has also announced the establishment of the PACER public information access service. The new dial-in service allows users to retrieve electronic case summaries and docket information using a modem and computer terminal. The service is available days, nights and weekends. A computer, a 9600, 2400- or 1200-baud modem and terminal emulation software are required. The cost is \$1 per minute and access will be billed quarterly. To register for PACER, contact the PACER Billing Center, P.O. Box 780549, San Antonio, TX, 78278-0549,

or call 800/ 676-6856.

Rules Committee Seeks Your Comments

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

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

The average coupon equivalent yield from the first auction of 26 week treasury bills in June 1994 is 4.7%. The **maximum allowable interest rate permissible for July 1994 is therefore 12%**.

A 10-year compilation of the average coupon equivalent yields from past auctions of 26-week treasury bills, and past maximum interest rates, appears in the June *Bar News* on page 48.

Pierce County Code Supplement:

The January 1994 Pierce County Code supplement is now available. Total cost, including postage, is \$24.10. To order, please make your check payable to Pierce County, and mail to: Pierce County Council, Attn: C. Miller, County/City Building, 930 Tacoma Ave. S., Tacoma, WA 98402. For further information, contact Cynthia Miller at (206) 596-6695.

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 Spokane County Bar Association (509) 623-2665
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 Washington State Trial Lawyers Association (WSTLA) (206) 464-1011, (800) 732-9251

July 1994

15 Deadline for September 1994 *Bar News*.

15 Portland: Criminal Law. *Sponsored by Oregon State Bar CLE/Criminal Law Section. For information:* Carolyn Wence, (503) 684-7407.

20 Deadline for proposals: Special Education Mediation. *For information:* Cathy Fromme, (206) 753-6733. See page 52, this issue.

20, 23-24, 27, 30-31: Basic Mediation Training. *Sponsored by Counterpoint*

Associates. For information: Donna Morse, (206) 684-9342.

22 Seattle: Motions Practice. *Sponsored by WSBA 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.

August 1994

1 Applications due, United King-

dom Fulbright Award in European Community Law. *Contact CIES (202) 686-7878.*

5 Seattle: Depositions. *Sponsored by WSBA CLE.*

5 Spokane: Advising the Small Business. *Sponsored by WSBA CLE.*

12 Seattle: Advising the Small Business. *Sponsored by WSBA CLE.*

15 Deadline for October 1994 *Bar News*.

19 Seattle: New Probate Code Amendments. *Sponsored by WSBA CLE.*

31 Grant applications due for Legal Foundation of Washington. *For information:* (206) 624-2536.

September 1994

7-9 Seattle: Northwest Deposition Program. *Sponsored by NITA.*

8 Seattle: WSBA Board of Governors meeting.

9 Seattle:

WSBA Annual Meeting and CLE, Sheraton Hotel.

15 Deadline for November 1994 *Bar News*.

16 Seattle: Administrative Law. *Sponsored by WSBA CLE.*

16 Seattle: Worker's Compensation Law. *Sponsored by WSBA CLE.*

16-17 SeaTac: First Annual Criminal Justice Institute. *Sponsored by WSBA CLE.*

22 Seattle: Employee Benefits. *Sponsored by WSBA CLE.*

23 Spokane: Advising the Injured Worker. *Sponsored by WSBA CLE.*

23 Seattle: Environmental Law for the Non-Environmental Lawyer. *Sponsored by WSBA CLE.*

23-25 Alderbrook: TPCBA Annual Convention. *For information:* (206) 272-8871.

30 Seattle: Water Law. *Sponsored by WSBA CLE.*

October 1994

14-15 Yakima: WSBA Board of Governors meeting.

15 Deadline for December 1994 *Bar News*.

November 1994

15 Deadline for January 1995 *Bar News*.

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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 annual mailing goes out to each member. Some timeframes 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 of interest. Applications may be directed 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 page 4 of the *Bar News*.

Board for Judicial Administration (BJA): One Seat

(Call for applicants—September; Board action—October)

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.

Legal Foundation of Washington Board of Trustees: Two Seats

(Call for applicants—September; Board action—October)

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). The funds go to support 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 commence January 1, 1994 and end December 31, 1995. Trustees are eligible for appointment to one additional term, for a total of four years' service.

Access to Justice Board (ATJ): Nine Seats

(Call for applicants—no later than July 15; Board action—July 29)

On May 18, 1994, the Washington Supreme Court filed an order creating an Access to Justice Board to serve as a mechanism for coordinating and developing policies and initiatives to enhance, improve, and strengthen access to the civil justice system for low- and moderate-income residents of the state of Washington. The Access to Justice Board will operate for two years before being re-evaluated by the Supreme Court.

The Access to Justice (ATJ) Board will consist of nine members to be nominated by the Board of Governors of the Washington State Bar Association and appointed by the Supreme Court. Five positions on the ATJ Board will represent specific groups involved with civil legal services: 1) The Washington Board for Judicial Administration, 2) the WSBA Board of Governors, 3) the Legal Founda-

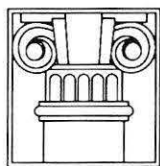
tion of Washington, 4) the federally funded legal-service programs of Washington (Evergreen Legal Services, Spokane County Legal Services, and the Puget Sound Legal Assistance Foundation), and 5) the pro bono community (volunteer legal services).

The remaining four members of the ATJ Board will be nominated on the basis of a demonstrated commitment to, and familiarity with, access-to-justice issues. The Court has specifically stated that the membership of the Board shall reflect ethnic, gender, geographic, and other diversities.

According to the court order, the ATJ Board will:

- work to secure adequate funding for civil access to justice;
- coordinate civil access to justice and foster the development of a statewide, integrated, non-duplicative, civil legal-service delivery system;
- serve as a repository of information relating to civil legal-service issues;
- develop and implement policy initiatives and criteria which enhance the availability of resources;
- develop and implement new programs designed to expand access-to-justice opportunities; and
- address existing and proposed laws and regulations which may affect meaningful access to justice.

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CLOSING IN ON DISPARITY

by **Janice E. Reha, MA, nbcc**
Kathleen A. Miller, CFP, MBA
Don P. Desonier, JD

Disparity between the economic well-being of divorcing couples is a critical problem facing Americans today. Despite career opportunities that opened up for women during the last decade, older women who enter or reenter the work force in the 1990s after dissolution of a marriage face incredible obstacles.

Statistics point out that women who maintained their careers throughout marriage experience salary discrepancies when they have chosen fields dominated by female workers, such as in education, administrative support and other services. Of those women working in male dominated occupations, few have broken through the "glass ceiling" that exists when men are favored for promotion to the best-paid positions.

Closing the gap remains a significant social problem. Treating divorcing couples equitably is a 21st century challenge for lawyers and the courts. The amount of spousal maintenance and the length of time over which such funds shall be disbursed continue to be the subjects of debate.

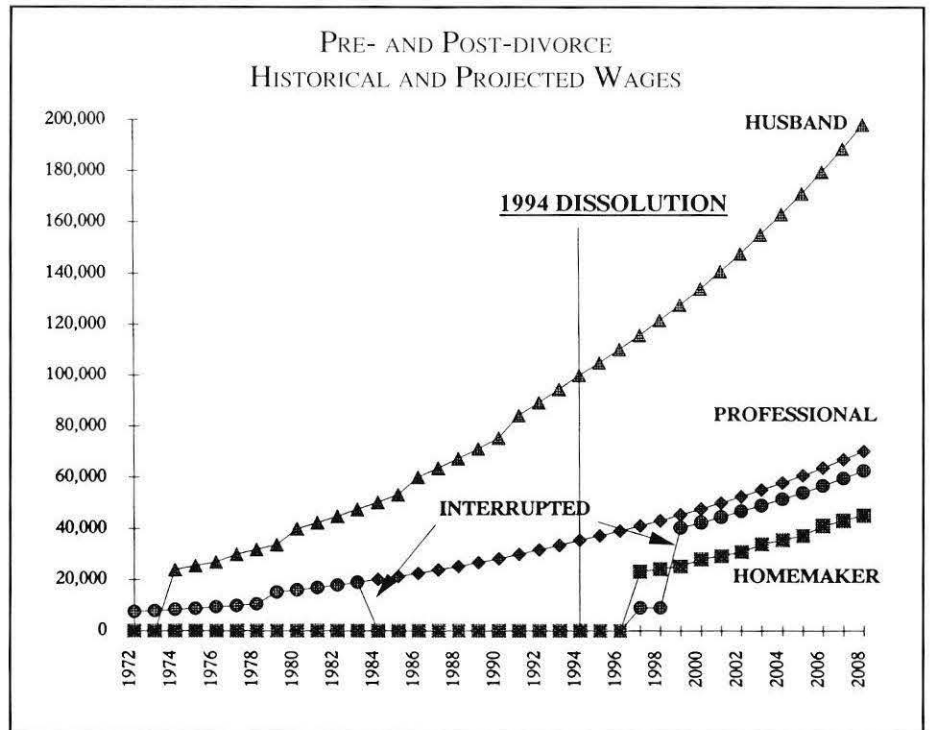
By combining expertise in divorce law, financial planning, and career development, the authors of this article examine the complexity of divorce settlements by analyzing trends, presenting guidelines and simulating models to aid divorce attorneys in the determination of equitable awards and maintenance periods.

Discussion is based on the premise that the objective of any divorce settlement is to assure that both parties *share equally in the residual economic benefits, responsibilities and losses resulting from the dissolution of the marriage contract.*

The goal is to maintain *equity of lifestyles beyond divorce—not only for the parents but also for any and all dependent children.*

This makes a singular historical baseline strategy obsolete in negotiating settlements. Each case requires relative thinking and creative solutions because of variable economic and career factors.

Looking at this goal straight-on, single dimensionally, devoid of time, change or circumstance, a 50/50 split of current assets and liabilities might seem equitable. Isn't this the premise upon which state community prop-



Husband begins his career in 1972. His wages compound at a rate of 5.87% per year except for bonuses and promotions as follows: 1977 - 10.33%; 1980 - 15.94%, 1986 - 11.33%, 1991 - 10.55%. The professional and interrupted start their careers in 1972, having an annual wage increase of 5.87%. After obtaining their "fifth year" certificate in 1979, there is a salary increase of 30%. From the date of dissolution forward, all salaries are assumed to increase at an average annual rate of 5%.

erty laws were enacted? However, if the wife stayed home during a given period of time to rear the children, the working husband might be asked to contribute a little extra to help her "catch up" to the work place in the way of job experience, training or education. Perhaps a 60/40 split would be appropriate. Fair enough. . . . Or, is it?

Even when other factors—such as layoffs, disabilities and bankruptcies—are constant, the playing field remains uneven between male and female wage earners. Divorce settlements that offer rehabilitation for women who interrupted or postponed a career during marriage are inadequate.

Compensatory strategies often used today may reimburse the spouse who didn't work full time outside the home for lost income while they recognize the value contributed to the marriage, family and other spouse's career. That is a step in the right direction. However, future consequences of career decisions made during a marriage must be considered as well. Long-term wage disparity must be addressed not only in terms of distribution of current assets and property settle-

ments but also in terms of ongoing spousal maintenance.

Consider the graph, outlining pre- and post-divorce wages, above. We assumed in this case that the husband, as an engineer, earned an income that steadily increased over time. He experienced no interruption in his career. In contrast, we analyzed three common scenarios that would affect the wife's earning capacity. In the first case, we assumed that the wife maintained a teaching career throughout her marriage and beyond divorce to retirement. The wage disparity between an engineering career and a teaching career continues to widen over time. As a married couple, these two professionals enjoyed a comparable lifestyle. After divorce, assuming assets were divided equally, the husband would become nearly twice as affluent as his wife.

In the second scenario, we assumed the engineer's wife interrupted her career for 14 years. As is typical for many American couples, the wife worked during the first few years of marriage to increase total household income. Once the husband completed an advanced degree and his salary was established,

the couple agreed that the wife should stay at home to help the children through their educational years. After a divorce in 1994, the wife would be unable to reenter the teaching field without advanced education.

Industries change over time, and the field of education is no exception. Increased competition, demand for higher standards and specialization along with cost control have contributed to a shift in required teaching credentials and experience. No quantifiable number emerges that indicates just how many years a person must be out of the work force for skills to become obsolete. Even one year of absence from some jobs can result in loss of seniority, credibility and effectiveness. In settlement planning, any interruption must be analyzed for potential opportunity cost. The general rule follows that the longer the interruption, the greater the loss.

So the engineer's wife, working with a certified career counselor, developed a plan to go back to school to earn a master's degree in special education, where she could expect to earn about \$40,000 annually after a couple of years of part-time work as a substitute teacher while waiting for a permanent opening in special education. An important factor in this case pertains to the difference between what the wife would have earned had she maintained a steady career in teaching and what she would earn by interrupting her career. The difference between the two is lost opportunity or "opportunity cost." This discrepancy becomes even more dramatic than what is represented on our graph compared to retirement benefits accrued by the wife of scenario #1 who maintained a steady career. The wife who interrupted her career gave up her benefits.

Take the homemaker as a third example. In scenario #3, the engineer and his wife agreed that the best use of her time was at home with the kids. By providing emotional support and stability at home, the husband felt he could better concentrate his effort on his job and excel in his career. The results are seen on the graph.

In this scenario, the wife, who had no previous work experience, faced limited opportunities. With the help of a certified career counselor, she determined that a job as an accountant would provide the optimal match with her personality, style, work habits and expectations, while it offered the best employment and wage opportunities under the circumstances. Because her undergraduate degree was in English, the wife planned to return full time to college to complete a bach-

The question before the courts is twofold:

If the law mandates equity in divorce settlements, under what circumstances should spousal maintenance be awarded in a dissolution or legal separation case?

If an award is appropriate, for what length of time should it be maintained?

elor of science degree with an emphasis in accounting. Entering the job market at age 46, she would take a temporary position for one year until a full-time opportunity opened up. As an accountant, the engineer's ex-wife could expect to earn less than one-fifth her former husband's projected wages. Now, compare the opportunity cost between this and what she could have earned had she maintained a teaching position as in scenario #1.

The graph underscores wage disparity (past, present and future) between men and women, husbands and wives. Moreover, the graph emphasizes the opportunity cost of a couple's decision to interrupt or forego one of two careers.

What about the legal perspective? The question before the courts is twofold: If the law mandates equity in divorce settlements, under what circumstances should spousal maintenance be awarded in a dissolution or legal separation case? If an award is appropriate, for what length of time should it be maintained?

Statutory Authority

RCW 26.09.090 provides the statutory basis by which spousal maintenance may be awarded; it gives the court full discretion to award spousal maintenance in such amounts and for such duration as the *court deems just*, after considering all relevant factors, which include: the parties' financial resources; the needs of the spouse seeking maintenance and the ability to pay of the person being asked to provide the support; education or training to enable the spouse seeking maintenance to find suitable employment; the standard of living established during the marriage and the duration of the marriage; the age, physical and emotional condition, and financial obligations of the spouse seeking support.

Cases and Theories

1) Current Case Law Summary

In *In re Marriage of Washburn*, 101 Wn.2d 168, 677 P.2 152 (1984), the Supreme Court stated that under RCW 26.09.090, the only limitation placed on the trial court's ability to award maintenance is that the amount and duration, considering all relevant factors, be just. *Washburn*, at 178. The court stressed that a paramount concern in determining issues of property division and maintenance is the economic condition in which a dissolution decree leaves the parties. *Washburn*, at 181.

In *In re Marriage of Morrow*, 53 Wn.App. 579, 770 P.2 197 (1989), the appellate court emphasized that spousal maintenance is not to be looked upon strictly as the means of providing bare necessities, but as a ". . . flexible tool by which the parties' standard of living may be equalized for an appropriate period of time." *Morrow*, at 485.

In *In re Marriage of Bulicek*, 59 Wn.App. 630, 800 P.2 394 (1990), the appellate court stated that, following the divorce, Mrs. Bulicek would never be able to achieve an income similar to—or even close to—that of her husband. The court stated it was well within the discretion of the trial court to use spousal maintenance to address such economic realities.

The appellate court in *In re Marriage of Sheffer*, 61 Wn.App. 51, 802 P.2 817 (1990), stressed that ". . . the standard of living of the parties during the marriage and the parties' post-dissolution economic condition are paramount concerns..." when considering spousal maintenance. *Sheffer*, at 57-58.

In *Re Marriage of Tower*, 55 Wn.App. 697, 790 P.2 863 (1989) (review denied 114 Wn.2 1002, 788 P.2 1077), affirmed a lower court ruling providing the wife of a 19-year marriage, diagnosed with multiple sclerosis and unable to be self-supporting, the equivalent of lifetime, permanent spousal support. The court ruled that the net result of the entire decree, inclusive of the maintenance and child support provisions, should enable the parties to have approximately equal monthly disposable income until the youngest child was emancipated.

2) Theories, Old and New

A. Transitional/Rehabilitative

It is not unusual, even in a marriage of modest length, for a trial court to award spousal maintenance of short duration, so as to provide interim financial assistance to a spouse, to aid that spouse in the transition

from married to single life, or perhaps, to complete some schooling or training. Terms given to such a support award are "transitional" and "rehabilitative."

At the other end of the spectrum, most family law practitioners are familiar with justifications for an award of lengthy, perhaps even permanent, spousal maintenance in a scenario where a spouse, most typically the wife, is concluding a long-term marriage (e.g., 25 years or longer), with no marketable skills or professional training, as a result of that spouse having served the marriage primarily in the role of homemaker. Analysis of the case law cited above, however, shows that courts, in awarding spousal maintenance, give increasing recognition and emphasis to the loss of economic opportunity experienced by a spouse who sacrifices or interrupts a career to be a homemaker or takes a less demanding job to further the other spouse's career. The longer the marriage and the longer a spouse is out of the work force, the greater and more permanent is the loss of that spouse's earning capacity. Nonetheless, the length of the marriage ceases to become fully determinative in terms of justifying a spousal maintenance award.

B. Restitutive/Compensatory

It is not uncommon that a spouse has interrupted or forestalled a professional advancement by doing part-time clerical work or acting strictly as a homemaker, so as to enable the other spouse to complete advanced degrees and establish a career. The expectation is that the parties will eventually enjoy together economic benefits derived from this arrangement. The concept may work if the parties stay married. In the event of a dissolution, however, in the absence of spousal support, the spouse who has interrupted his/her career is at an economic disadvantage, regardless of the length of the marriage. That spouse often is awarded spousal maintenance on the "compensatory" or "restitutive" theory, to provide payment for the lost economic opportunities experienced during the time when the other spouse was advancing a career, and, correspondingly, their earnings potential and capacity.

Of the King County trial court decisions rendered between July 1, 1992, and June 30, 1993, where spousal maintenance was awarded, three cases come to light in which the awards were based on compensatory theory.

In two of those cases, the length of marriage was 10 years; there were minor children; the husband had adequate income; and

How do we plan a divorce settlement that offers compensatory awards for opportunity cost and wage disparity so that benefits and losses are equally shared?

How do we measure projected income in terms of future wages, from pensions, IRAs and other retirement investments set aside during a marriage?

the wife was deemed entitled to compensatory maintenance. In one of those two cases, the wife's trial testimony was that she had sacrificed her career advancement to take care of her husband and their children, and she was thus in an economically disadvantaged position compared with her husband.¹ In the third case, the marriage was 31 years in duration, the children were all adults, the husband had significant income, and the court found that the wife had no prospects for rehabilitation or gainful employment and was in need of compensatory maintenance for her years of service to the community and her assistance in making the husband employable.²

Approximately five percent of dissolution cases filed with the court actually go to trial. An analysis of trial court decisions where spousal maintenance is awarded is not necessarily reflective of the considerations used in the other 95 percent of dissolution cases, where spousal support is negotiated via settlement.

C. Partnership Model

Long-term marriages can be characterized as "partnerships" in which each spouse has an important role to play. If the wife operated primarily as the homemaker, for example, or worked in low-paying positions, while the husband earned an advanced degree and significant income, those contributions should be considered of similar or equal value. In all three of our scenarios, however, the husband's standard of living will increase after the divorce, while the wife's standard of living will deteriorate sharply unless an equitable distribution of property, and/or spousal maintenance is awarded. When this marital partnership is dissolving, efforts should be made to ensure that the economic hardship created by

the dissolution "... be shared equally, or at least fairly and equitably, rather than fall disproportionately on one spouse."³ As Professor Ellis further states:

"The partnership notion assumes that both spouses make substantially equal (although not necessarily identical) contributions to a marriage. If so, they should receive substantially equal benefits from the marriage and should not be left in widely disparate positions after marriage ends."⁴ [emphasis added]

In this, the "partnership theory," spousal maintenance should be utilized to level the playing field by providing to the spouse (most often the wife) whose economic position is significantly inferior to the other spouse ongoing support that, in combination with an equitable distribution of property, places her in a position comparable to that of her husband.

Summary of the Legal Perspective

In examining the appropriateness of spousal maintenance, attorneys should view the length of the marriage as a factor, but not a primary one. Increased attention should be focused on the economic facts and circumstances of the case and the economic positions of each party. In a short-term marriage, neither spouse should have the expectation of financial assistance, and the general focus should be on returning each party to the premarital status quo. At the same time, choices, decisions and agreements made within even a marriage of relatively short duration may impact what is a financially fair and equitable dissolution settlement. The longer the marriage, the greater the possible loss of economic opportunity and sacrifice of earning capacity by one or other of the spouses. At the conclusion of a long marriage, an advantaged spouse may be placed in a position to validate the contribution of the financially disadvantaged spouse by making some economic sacrifices in the form of ongoing spousal maintenance as a tool for the recipient's future comparable economic security.

How do we plan a divorce settlement that offers compensatory awards for opportunity cost and wage disparity so that benefits and losses are equally shared? In addition, how do we measure projected income in terms of future wages, from pensions, IRAs and other retirement investments set aside during a marriage?

A certified financial planner and certified

career counselor provide some of the answers which will vary case by case. These experts help attorneys plan settlements that maximize equity based on careful analysis of relevant variables over time. Computer models compare a variety of outcomes in different scenarios, so the optimum settlements can be selected.

Consider, for a moment, two diametrically opposed settlement approaches presented in the following illustration:

		Approaches	
		Static	Variable/Dynamic
Assumptions	#1	No disparity	Disparity
	#2	Finite state	Relative conditions
	#3	Short term (3-8 yrs)	Long term (10-15 yrs)

The "static" approach assumes that parity exists between men and women in the work place. This perspective may acknowledge that women traditionally have earned less than men, but that the gap can be closed with proper education, training, initiative and hard work. That perspective is rooted in the women's movement of the late 1960s and 1970s.

The "variable/dynamic" approach takes into account that while women entered the work force in record numbers during the last 30 years, their wages are still lower than men's. Overall, a woman earns about 70 cents to a man's dollar. According to the United States Census Bureau, women are not equally represented in all professions. Women continue to be overrepresented (77 percent) in clerical, administrative support and service occupations, including education. They are underrepresented in production, craft, repair and labor occupations (9.5 percent). Despite good news that college enrollment for women exceeds that of men, and the median earnings of women who worked full-time year-round rose by 1.3 percent between 1991 and 1992, median wages for women were only \$21,440 in 1992 compared with median wages for men at \$30,358 (unchanged from the previous year).

The median earnings of women aged 25 and older and who were year-round full-time workers was \$18,648 for high school graduates in 1992; \$24,849 for those with an associate degree; \$29,284 for those with a bachelor's degree; and \$35,018 for those with a master's degree. Comparable figures for men were \$26,766; \$32,349; \$40,381 and \$47,260, respectively.

The static approach to divorce settlement planning operates on the second assumption

that a divorce settlement is based on finite analysis, often creating linear projections founded on historical data. The variable/dynamic approach takes into account such variables as economic instability, industry life-cycle curves, sex and age discrimination in the work place, a shift from large conglomerates to small, entrepreneurial businesses and the effects of education and training on wages at the individual level. Those dynamic factors will influence a person's career decisions and earnings both pre- and post-divorce. Variability must be considered in the settlement plan and allowances made for renegotiating when circumstances change.

Thirdly, the static approach operates under the assumption that the short term is most relevant to settlement planning. The short view assumes that financial awards can offset opportunity costs within three to five years. For instance, if a nonworking wife completes an advanced degree and obtains a couple of years of work experience, it is assumed she will be prepared for financial independence and enjoy a comparable lifestyle to that of her former husband.

Conversely, the variable/dynamic approach recognizes that a longer-term period is more realistic. If equity is to be served, maintenance must be extended to at least 10 years, especially in the case of long-term marriages from which a woman must enter a biased work place, after the age of 40 and with limited work experience.

Unfortunately, awards often are based on outdated "static" models created in the 1970s. They just don't apply to the demands of the 1990s and the 21st century. In a society where divorce affects more than half of all marriages, a more dynamic approach toward equitable solutions is imperative.

Recommendations

The foundation of any divorce settlement plan should include the following:

- 1) A career plan that :
 - analyses an individual's strength and weaknesses,
 - evaluates an individual's suitability for various types of work,
 - identifies appropriate career opportunities,
 - prescribes necessary training and/or education and
 - estimates associated costs and projects expected wages over time.
- 2) A financial plan that includes:

- pre- and post-divorce budget planning,
- a comprehensive list of assets and asset valuations,
- an income tax and cash flow analysis,
- a long-term (10 years plus) cash flow analysis,
- coordinated retirement estimates and projections for pensions, IRAs and other investments and
- tax consequences of liquidating various assets.

Divorce settlements will become increasingly equitable when attorneys implement career and financial planning along with computer modeling to analyze the short- and long-term consequences of alternative awards and spousal maintenance. The simulation of outcomes based on various proposals will help close the gap between divorcing parties and make sure that the benefits and burdens of dissolution are fairly distributed.

¹ *The Court Report: The Year of King County Family Law Decisions*, Kathryn J. Kaloosny, J.D., (1994), pp. 126 and 189.

² *Ibid.* at p. 274.

³ *Judicial Training Materials on Spousal Support: Facilitators' Manual*, produced by the Women Judges for Justice, and revised by Professor Ellis, contained within the Family Law Spousal Maintenance Report from the Superior Court Judges' Spring Conference 1992, p. 27.

⁴ *Ibid.* at p. 27.

* * *

Jan Reha, owner of Career Discovery, is a career counselor who specializes in vocational expert services for dissolution. She co-developed the Displaced Homemaker Program at Bellevue Community College in 1977 and has had a private practice in Bellevue for the past 13 years.

Kathleen Miller is a partner of Miller, Bird Advisors Inc. in Bellevue. She has specialized in cash flow analysis, investment management and financial planning in pre- and post-divorce cases for the last ten years.

Don P. Desonier has been a practicing attorney since 1974 with emphasis on family law since 1984. He serves as a mediator and arbitrator in family law matters. His offices are in Bellevue.

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PUBLIC SCRUTINY—THE PRICE OF SELF-REGULATION?

by **James V. Handmacher**
*WSBA Governor
9th Congressional District*

Attorneys are a self-regulated profession. Because of that, there is an inherent suspicion among some segments of the public that the lawyer disciplinary system is designed simply to protect lawyers. Operating it in secret fuels those suspicions.

WSBA disciplinary staff receive frequent inquiries from the press and the public about grievances against lawyers. Except for certain high-profile cases, their standard response is to decline comment. This is required by the current RLD 11.1, which generally prohibits the WSBA staff from disclosing the nature of the grievance or the results of an investigation unless and until a formal complaint is filed against the lawyer. Since over 80 percent of all grievances are resolved without the filing of a complaint, most of the disciplinary process is conducted in secret.

In response to a request from Lee Ripley, chief disciplinary counsel for the WSBA, the Disciplinary Committee of the Board of Governors has investigated a change in the confidentiality rules. The Committee looked at the experience in other states which have relaxed the confidentiality of their disciplinary process.

In Florida, all discipline files are open at the conclusion of the investigation, regardless of whether a formal complaint is filed. Tony Boggs, the Florida Bar's Director of Lawyer Regulation, says that their rule has worked well. The media who have requested access to the public records have concluded that the Bar does a better job of lawyer discipline than they thought. There have been few complaints from lawyers or others involved in the discipline process. He feels the Florida rule does not go far enough, and that there should be free access to public records from the time the process is initiated.

In Oregon, all documents received in the disciplinary process are public record

upon receipt. Thus, there is full public access to the disciplinary process from the date the grievance is filed. Jeff Sapiro, Disciplinary Counsel for the Oregon Bar, thinks that their system works very well. He believes that the Bar can deflect a large amount of criticism by opening the process. He stated that most Oregon lawyers take their open system for granted, and only 10-15 lawyers have complained about it in the last 10 years. He says that publicity during the grievance process rarely occurs. He notes that keeping the process confidential does not prevent such publicity, since the press can always talk to the grievant.

After reviewing the various alternatives, the Disciplinary Committee of the Board of Governors has recommended a rule on confidentiality just short of the Oregon full-disclosure rule. Proposed RLD 11.1 would provide that records of disciplinary proceedings be public information after a lawyer responds or has a reasonable opportunity to respond to a grievance. The rule retains the process for obtaining a protective order when necessary to protect a compelling interest of a grievant, witness, third party, or respondent attorney. A complete copy of the rule is appended to this article.

The Board of Governors is considering whether to recommend to the Supreme Court the adoption of this rule. The Board has deferred action until its meeting on July 29, in order to give members of the Bar and public a fair opportunity to review and comment. The Board welcomes and encourages your comments on this proposal. Please direct them to either your individual governor or Lee Ripley, disciplinary counsel for the Bar.

*See the complete proposed rule
on pages 45 and 46*

PROPOSED TITLE 11 RELEASE OF DISCIPLINARY INFORMATION [DRAFT APRIL 22, 1994]

Rule 11.1 Disclosure

- (a) **Policy Statement.** 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.
- (b) **Pending Investigations.** Disciplinary grievances either under evaluation or under investigation shall be treated as confidential until after a lawyer responds or has a reasonable opportunity to respond to a grievance. If the grievance is conditionally dismissed without a request that the respondent lawyer submit a response, the respondent lawyer shall receive a copy of the grievance and the grievance shall not become public information until the lawyer either submits a written response or 10 days elapse after the lawyer's receipt of a copy of the grievance. For purposes of this rule, proceedings based upon a lawyer's conviction of a felony or serious crime, as defined in rule 3.1(i), shall be public information.
- (c) **Public Information.** Public information shall consist of the record before a review committee, the record before a hearing officer or panel, the record before the Disciplinary Board, and any reports, correspondence, papers, recordings and/or transcripts of hearings furnished to, served on, or received from the respondent lawyer or the grievant. Nothing in this rule shall require disclosure of confidential information under Title 10, confidential information under rule 2.9(a)(4), or

information subject to a protective order issued under rule 11.1(g), or as otherwise ordered by the Supreme Court.

- (d) **Scope of Confidentiality.** All disciplinary materials which are not public information are confidential, and are held by the Washington State Bar Association under the authority of the Supreme Court of Washington.
- (e) **Matters Which Are Not Public.** In no case shall the deliberations of a hearing panel, board, or court, or matters made confidential by a protective order, be public information.
- (f) **Limitations on Disclosure.** Any materials provided to the Washington State Bar Association that are confidential under applicable law (for example, medical records or police reports) shall remain confidential and shall not be disclosed except as authorized by applicable law.
- (g) **Protective Orders.** In order to protect a compelling interest of a grievant, witness, third party, or respondent, the following individuals may, upon motion and for good cause shown, issue a protective order prohibiting the disclosure of specific information or specific documents or pleadings, and direct that the proceedings be conducted so as to implement the order:
- (1) the Chair of the Disciplinary Board,
 - (2) the Chair of a review committee, when a matter is before a review committee,
 - (3) a hearing officer or panel chairperson to whom a matter is assigned, or

(4) the Chair of the Character and Fitness Committee, in the case of a petition for reinstatement after disbarment.

The filing of a motion for a protective order shall stay the provisions of this rule with regard to any matter sought to be kept confidential in that motion, and the motion itself shall be confidential until ruled upon. The Disciplinary Board shall review decisions granting or denying protective orders if either the respondent lawyer or disciplinary counsel requests review within 5 days of service of the decision. Upon review, the Disciplinary Board may affirm, reverse, or modify the protective order as it deems appropriate. The Board's decision shall be final. The chair of the Character & Fitness Committee's decisions granting or denying protective orders shall be reviewed by the Board of Governors. Upon review, the Board of Governors may affirm, reverse, or modify the chair's decision as the Board of Governors deems appropriate. The Board's decision shall be final. A request for review by the Disciplinary Board or the Board of Governors shall stay the provisions of this rule with regard to any matter sought to be kept confidential in that request, and the request itself shall be confidential until ruled upon.

- (h) **Disclosure of Information.** Except as provided in rule 11.1(g), nothing in these rules shall prohibit the grievant, respondent, or any witness from disclosing the existence of proceedings under these rules or from disclosing any documents or correspondence served on or provided to those persons.
- (i) **Association Response to Inquiry.**



The president, the Board of Governors, the executive director or chief disciplinary counsel of the WSBA, or their designees, may respond to specific inquiries concerning matters that are in the public domain, but otherwise confidential under the rules by disclosing the status of the disciplinary proceedings.

- (j) **Notice to Judges.** Any judge of a court of record may be advised of the status of a confidential disciplinary grievance and may be provided with requested confidential or public information. The judge shall maintain the confidentiality of the matter.
- (k) **Cooperation With Criminal Authorities.** Except as provided in (e) and (f), these rules shall not preclude the giving of any information or testimony to authorities authorized to investigate alleged criminal activity.
- (l) **Application to Stipulations.** A stipulation entered into pursuant to rule 4.14 shall be confidential until approved by the Board, except that a grievant may be advised concerning a stipulation and its proposed or actual content at any time. A stipulation approved by the Board shall be public information.
- (m) **Response to False or Misleading Statements.** If public statements that are false or misleading are made about any otherwise confidential disciplinary case, the president, the Board of Governors, the executive director or chief disciplinary counsel of the WSBA, or their designees, may disclose all information necessary to correct such false or misleading statements.
- (n) **Disclosure Based Upon Respondent's Waiver.** Upon written waiver executed by a respondent lawyer, the Washington State Bar Association may disclose the status of otherwise confidential disciplinary proceedings and provide copies of public information to:
- (1) the Washington State Bar Association Committee of Law Ex-

aminers or the Washington State Bar Association Character and Fitness Committee, the National Conference of Bar Examiners, or the comparable body in other jurisdictions for the purpose of evaluating the character and fitness of an applicant for admission to the practice of law in that jurisdiction; or

- (2) the Washington State Bar Association Judicial Recommendation Committee or the comparable body in other jurisdictions for the purpose of evaluating the character and fitness of a candidate for judicial office; or
- (3) the Governor of the State of Washington, or any other state for the purpose of evaluating the character and fitness of a potential nominee to judicial office.
- (4) any other agency that an Association member authorizes to investigate their disciplinary record.
- (o) **Wrongful Disclosure.** Disclosure, except as permitted by these rules, by any person involved with an investigation or proceeding either as an officer or agent of the Association (including, but not limited to, its staff, members of the Board of Governors, the Disciplinary Board, review committees, hearing panels, hearing officers, disciplinary counsel, special district counsel, a lawyer appointed pursuant to rule 8.6, or any other individual acting under authority of these rules) of any information concerning a pending or completed investigation or proceeding, except as permitted by these rules, may subject that person to an action for contempt of the Supreme Court. When the person is also a lawyer, such wrongful disclosure may also be grounds for discipline.
- (p) **Effective date.** This rule shall apply to all grievances filed with the Association after January 1, 1996. Grievances received before the effective date of this rule shall be governed by the previous version of RLD 11.1.

NATIONAL BAR ASSOCIATION SETS SEATTLE CONVENTION DATES

Under the banner, "United to Confront the Challenges of the 21st Century," the National Bar Association will hold its 69th Annual Convention in Seattle between August 7 and 13.

The convention comes to the city that staged its own prophecy of the next century in 1962, thanks to the efforts of the Loren Miller Bar Association and Seattle Bench and Bar Spouses. Nearly 100 separate events await participants, members of the nation's largest African-American bar association. Some 25 continuing legal education seminars alone dot the crowded agenda for the conference, to be held at the Westin Hotel. They cover a rich and varied range of topics, from "Current Policies and Practices in the U.S. Patent and Trademark Office," through "What to Do When the Big Case Walks In," "Summary of U.S. Supreme Court Criminal Law Decisions, 1993-94 Term," "Surviving and Thriving in Majority Firms," "What 'Reinventing Government' Means to the Government Lawyer," "Legal and Social Issues Affecting African-American Communities," "International Business Transactions: How and Where Minority Lawyers Can Obtain Business," to "Empowerment of Battered Women."

Alumni breakfasts for graduates of Georgetown, Harvard, Howard, North Carolina Central, Southern, and Syracuse universities, the universities of California, Florida and Michigan, and Thurgood Marshall School of Law are planned on August 10.

Among the events planned for the conference are election of new NBA officers and governors; admission to the NBA Hall of Fame; meetings by the Judicial Council of the National Bar Association; and the convention of the National Association of Bench and Bar Spouses. A variety of tours and events to allow delegates to experience the natural wonders of the area are also on tap. There's even a Phase II of the NBA Convention: a seven-night cruise of the Inside Passage to Alaska aboard the Holland America Line's vessel *Westerdam*. According to Loren Miller Bar Association president-elect Monica Benton, about 1,000 or more lawyers and spouses are expected to attend the event. For more information, Benton can be contacted at the Loren Miller Bar Association, P.O. Box 4033, Seattle, WA 98104; (206) 553-0532.



TWENTY-FIRST-CENTURY LAW

by Carol Richardson

An associate in a national law firm was recently approached by his supervisor because someone had complained that he was wearing sweats in the office. The associate gave his superior two briefs. "One was done in my sweats, the other in a white shirt and tie. You tell me which one is better." But accepted attire will be one of the lesser issues which is subsumed within the larger landscape of the twenty-first-century law firm.

A real estate partner of an Eastside firm described to me his view of law firm practice in the year 2010: a showpiece reception area, surrounded by conference rooms, ample for the meetings held on site, not too unlike firms of today. The similarities ended there. Beyond the common areas this partner saw a dramatic new form—it was devoid of offices.

Small cubicles replaced the rows and rows, or more accurately, layers and layers of individual offices. Each cubicle was complete with state-of-the-art electronic equipment. It was the desk of an attorney temporarily on-site. Where were the attorneys? At home, in their cars, at clients' offices, on boats, or working from European ski resorts. The cubicle was the new mobile office practice of the twenty-first century.

As technology plays an increasing role in how attorneys work, the change in the law office of tomorrow is only the tip of the iceberg. It is the change in the way people work which is of such magnitude that no business, especially law, will be immune to its effects. Lawyers will be more directly involved in their work. No longer will they routinely do a piece of the project. Rather, they will be responsible for the entire project from start to finish. For example, an estate planning attorney might set up form documents and conduct all meetings at a client's home. Using a notebook computer and portable printer, relevant information is entered during the meeting; documents are produced and signatures obtained; the attorney collects a fixed fee and is on her way.

A contract attorney with whom I work recently found himself back in a traditional law firm setting without comput-

Where were the attorneys? At home, in their cars, at clients' offices, on boats, or working from European ski resorts . . . in the new mobile office practice of the twenty-first century.

ers. He expressed great frustration over the inefficiency of the old process of having all of his work—even a three-line cover letter—typed by personal secretaries. It would have been faster and more cost-effective for him to produce the entire document himself.

One of my clients already requires any contract attorney he uses to be computer-literate. His office is already devoid of support staff. It is the attorney who, indeed, does all the work for the client.

As cellular technology advances, eliminating the need to be in a physical office, attorneys will have greater freedom to choose where they work. This is evidenced by one Princeton Law School graduate who continues to do work for a Seattle firm even though he moved to California. This attorney, as well as other technologically proficient attorneys, can quickly and efficiently find the right case and the right answer for their clients while sitting in the courtroom, at home, in the park or halfway around the world. Technology and economics are a potent blend.

The successful firm in the emerging economy will be a "radically flat organization," according to professor James Quinn at Dartmouth's School of Business, author of *Intelligent Enterprise*. He sees the office as a spiderweb organization, so-called for "the lightness yet completeness of its interconnection." The old division of labor based on hierarchy, so prevalent in law firms, will be replaced by a horizontal division of labor based on specialties.

There will be more focus on hiring the best person to perform the needed services and less focus on hiring a law firm which has the capacity to handle a client's problems, no matter how complex. Clients may no longer tolerate talking with one attorney whom they like and trust and having another attorney perform the work. Firms, regardless of size, will have to link up with specialists, everywhere, to fulfill the clients' requirements. Firms will no longer need to be large to compete and obtain top clients. They will be able to add and subtract staff in their firm, and all over the world, as needed. Not only will firms be smaller, but there will be less and less reason for attorneys to be in firms.

The firm of the future will be structured very differently than the firm of the past. The new firm will be composed of a core of attorneys who provide required types of core services. The other two components of full service will be supplied by specialist contractors or part-time law clerks and support staff. It will be more economical to employ specialists as well as nonspecialist contractors and to buy their services as needed. This is the change forecast by Charles Handy, author of *The Age of Reason*, touted by *Business Week* as one of the ten best business books of the year. "It is a sensible strategy when work ebbs and flows as it tends to do in the practice of law.

A medium-sized law firm with which I work hired a contract attorney when it needed a bond expert. The annual salary this attorney would command in a traditional hiring situation was \$225,000 plus benefits. The cost to the firm was a prorated salary for the six months it took to complete the work. Once the work was completed, the expense of the attorney was eliminated.

How will this change affect the hiring of lawyers in the future? How will a law firm find an attorney with advanced skills who is in a remote location? What will it mean to "make rain" in the law firm of tomorrow?

There will be fewer positions open, and it will not make good business sense to devote the hours and hours of attorney interviewing time required in the tradi-

tional hiring process. Recently, a managing partner of a prominent Seattle law firm told me his firm had a list of 20 attorneys the firm wanted to recruit. Their strategic plan was to have two partners in their firm take each attorney out to lunch. Two partners screening 20 attorneys for two hours at a minimum of \$150 per hour results in a \$12,000 lunch, and that doesn't include the tip. If this strikes you as cost-prohibitive in tomorrow's market, you're right.

As positions decrease, firms are finding it necessary to be more efficient in the hiring process. They are turning to recruitment specialists, skilled in finding the needed expertise. Retained searches are becoming more common. Not only is the process more efficient, but it ensures that the firms will be given the highest priority in the search firm's efforts.

There will be a significant growth in the use of contract attorneys. A firm's

perception of the contract attorney will change to that of a "second sister" to the permanent attorney; the caliber of this group might surprise many managing partners even today. The pool of contract attorneys no longer comprises those who are unable to meet the stringent requirements of top caliber firms. Many of today's contract attorneys are highly credentialed professionals who chose a lifestyle incompatible with the high billable-hour requirements of the top firms.

A bank of contract attorneys may have credentials like Order of the Coif, law review and partnership in a law firm. These attorneys have changed from traditional practice for a variety of reasons. In one instance, an associate in a major firm, with all the right credentials, and in line for partnership, opted to leave the big-firm environment, practice law as a solo practitioner and set up a marketing company with his wife. Another attorney with similar credentials is setting up an import-export business while financing it through contract work.

This new age of more-specialized, highly automated mobile offices and smaller law firms will create a new network system in the recruitment business. There will be a tremendous market for those providing a gateway to the attorneys with the required global expertise, whether they are in Washington, D.C., Seattle, or on another continent. Through their own automation process and their expertise, futuristic attorney search and placement professionals will create a new web to serve the attorneys, firms, and clients in accessing this new order and new work force.

The effective law firm of the future will be flexible, more entrepreneurial, highly automated and especially adapted to meet the expanding and contracting needs of their clients. No longer will they bear the overhead of the traditional partnership regime. A firm's capacity to deliver services, both routine and special, will be tied to their ability to access, manipulate and coordinate information to meet their clients' needs. Except in certain special social and business contexts, accepted attire won't be relevant to those engaged in twenty-first-century law.

* * *

Carol Richardson is a search and placement specialist and a principal in Omega Attorney Placement in Seattle.



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DOCUMENT ASSEMBLY SOFTWARE FOR LAW OFFICES

by David M. Sandhaus

Why Document Assembly?

A manufacturing company has a product. It may be an airplane, automobile, train or widget. A law firm has a product, too. It is a legal opinion. That legal opinion may take the form of a lease, trust, will, criminal information, spousal support agreement, or any pleading.

Manufacturing companies have found that it is cost-effective to automate the production process. This eliminates inefficiencies due to repetitive, labor-intensive and error-prone work. Law firms, though, characteristically don't automate their work, so they diminish their profitability and quality by failing to automate billable work product. For example, it's common for a law firm to create a legal document, such as a lease, which is carefully drafted clause by clause after being researched diligently in all the important hornbooks and cases.

Then, two years later when another lease is required, the whole research and drafting process is repeated again by another attorney in the firm. This creates several problems.

First, the second attorney doesn't benefit from the first attorney's research. For instance, the second drafter may miss important legal points covered in the first lease. Second, the process of "reinventing the lease" is time-consuming; it unnecessarily raises the cost to clients and the firm. In fact, many law firms don't realize that much of their work is amenable to "automation." Lawyers don't pursue increased profitability and quality through automation because it hasn't entered upon their consciousness that such a feat is possible.

An argument against document assembly is that speeding up the document production process decreases a firm's billable hours and its profitability. That argument more accurately reflects many attorneys' failure to grasp the competitive advantages of alternative billing strategies and of lowering the costs of production to clients. No capitalistic manufacturer would consider slowing down pro-

duction or adding more workers to increase profitability. Although attorneys would be remiss in slavishly following manufacturing companies in setting up their own production systems (such as "TQM" programs), they should pay careful attention to producing quality work product in the most cost effective manner.

How Document Assembly Software Works

Document assembly software and similar products address the problems created by lack of automation, namely lack of quality control and over-reliance on labor-intensive processes in creating work product. Document assembly software automates the process of creating complex legal documents. Typically, it works by posing the drafter with a series of questions, often through an input form on the computer. Legal documents are then assembled using prefabricated "boilerplate" based on answers to these questions. The answers (sometimes referred to collectively as "knowledge bases") to these questions are either provided by the document assembly software company such as West Publishing, Matthew Bender, or McGraw-Hill based on their legal research, or they are developed by the law firm itself, based on its own research and prior work product. In the latter case, document assembly software allows a law firm to save its prior work product in a structured format that is recalled via a series of questions to the customized program. This also allows a law firm to change the boilerplate text as the law changes.

Creating a document assembly system in-house does require a great deal of up front work by an attorney proficient in computer use or by hiring a consultant. You can also purchase a turnkey document assembly program and avoid the necessity of programming in a query-and-knowledge base system. However, oftentimes purchasing a turnkey system means that you must rely on the vendor (some vendors give you the option of customizing their program to meet your

firm's specific needs) to decide what legal issues are most important and wait for the vendor to adjust the system to changes in the law.

Document assembly software at its highest level provides an "expert system" that advises an attorney on how to complete a legal document. For example, an attorney who has a client with a net worth of more than \$600,000 would be advised by the expert system to use one type of a trust over another, or to fill out multiple tax forms instead of a single form. Document assembly at its lowest level provides only boilerplate answers without checking for legal applicability or proper usage.

Document assembly systems can also be created using advanced word processing programs, such as Microsoft Word For Windows, or integrated word processing/database programs, such as Symantec Q&A. Word For Windows allows you to create expert-based systems based on user programmed rule sets and variables. Q&A allows you to set up document templates that import information from set databases.

For More Information

There have been several articles written over the past few years on document assembly. The best article I have seen on this topic appeared in the July 1993 issue of *Computer Counsel*, Volume 5, Issue No. 7. *Computer Counsel* rated the best document assembly software programs on a number of factors, including: ability to customize, user satisfaction, ease of use, etc. The article also gave an in-depth review of the strengths and weaknesses of each program. Back issues can be ordered from Richard Robbins of *Computer Counsel*, 641 W. Lake St., Suite 403, Chicago, IL 60661. Telephone (312) 207-6900.

See selected list of document assembly programs on page 50



A Selection of Document Assembly Programs

Capsoft Development Corporation
200 Sage Center
226 West 2230 North
Provo, Utah 84604
(801) 375-6562
Price: \$2,000 per author, \$300 per user
CAPS/Personal \$495

Clause-It
Masterite Software
37- W. 222, Route 64,
Suite 253
St. Charles, IL 60175
(708) 513-4200
Price: \$495

DocuDraft
Canterbury Systems Corporation
85 Scarsdale Road
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1870 Winton Road South
P.O. Box 18099
Rochester, New York 14618
(800) 422-3880
Base Price: \$395

General Counsel
The Technology Group
36 South Charles St.
Suite 444
Baltimore, MD 21201
(410) 576-2040
Price: \$795 stand alone

West's Desktop Practice Systems
West Publishing
610 Opperman Drive
Eagan, MN 55123
(800) 848-3475
Price: \$295

Q&A
Symantec Corporation
10201 Torre Ave.
Cupertino, CA 95014
(408) 253-9600
Price: \$395

* * *

David Sandhaus is a practicing attorney and can be reached at (509) 448-8757.

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NEWS FROM HOME

Thurston County Prosecutor **Pat Sutherland** has announced that his retirement will take place at the end of 1994. He served in the State Legislature from 1949 to 1959 before being appointed prosecuting attorney in 1974. During his tenure, the Thurston county prosecuting attorney's office grew from six deputies to 27 with a yearly budget of 2.5 million dollars. Sutherland was also a candidate for attorney general of Washington in 1956.

John W. Dayhoff has joined the Tacoma office of Williams, Kastner & Gibbs. He has practiced law since 1972 and was previously associated with Dolack Hansler.

Lewis County Prosecuting Attorney **Nelson Hunt** has announced he will be a candidate for a second term in the fall elections.

Colleen A. Harrington has been named a partner in the Pullman law firm of Erwin, Myklebust, Savage & Brown. **Peter A. Volk** has joined the firm as an associate.

Olympia attorney **Shirley Ort** was one of nearly 900 international observers monitoring national elections in El Salvador in March. Ort, the state Higher Education Coordinating Board's deputy director for student financial aid, became interested in participating through her involvement with the WSBA World Peace Through Law Section.

Kimberly A. Quach, chair of the Family Law Practice Group at Betts, Patterson & Mines, of Seattle, addressed the American Bar Association Family Law Section conference in Charleston, South Carolina, April 14. Her topic was "Pretrial Motions in Family Law." She is co-vice chair of trial techniques in the ABA's Family Law Section.

Spokane lawyer **John T. Powers, Jr.**, a partner with the law firm of Paine, Hamblen, Coffin, Brooke & Miller, has been certified in business bankruptcy law by the American Bankruptcy Board of Certification. He is immediate past president of the Spokane County Bar Association.

Joel J. Delman and **Lance Palmer** have been named partners in the Seattle law firm of Levinson, Friedman, Vhugen, Duggan & Bland. **Dennis Lam** has been

named an associate in the firm.

Margaret J. Partlow has been named head of the Interpretation and Appeals Division of the Washington State Department of Revenue. She manages a staff of 15 administrative law judges, who handle approximately 800 appeals of Department of Revenue decisions each year. Partlow was previously in private practice in Olympia and has experience as an attorney-manager of international sales consultant contracts for Boeing Commercial Airplane Company, as a staff trial attorney for the Federal Aviation Administration, and as an attorney with the law firm of Heckendorn & Judd in Seattle.

Christopher M. Davis, a 1993 graduate of the University of Oregon School of Law and former special deputy prosecutor for King County, has opened his new law practice in downtown Seattle.

Hessinger & Associates in Kent has announced that **David S. Engle** has become an associate of the firm. He will practice in the areas of domestic relations and consumer bankruptcy.

Bruce W. Williams has been named to the Board of Directors of Continental Inc., parent company of Continental Savings Bank and Continental Mortgage Company. He continues to serve as vice president, general counsel, and corporate secretary of Continental Inc. Before joining Continental in 1990, he served as a

commercial litigation attorney with Perkins Coie in Seattle.

Professor **William B. Stoebeck**, of counsel to Karr Tuttle Campbell, presented the Rembe Lecture at the University of Washington School of Law April 12. The Rembe Lecture is an annual faculty lecture in honor of Toni Rembe, a 1960 UW law graduate.

Professor Stoebeck's paper, "Back to the Crib?" is a commentary on English and American legal education past (from 1292 A.D.), present and future. He contends that law schools are professional schools that should prepare students for the legal profession, not graduate schools of political science, economics, or some other discipline. Stoebeck, long-time editor of a *Bar News* column on Washington case law, is currently writing a two-volume treatise on Washington real property law.

Vincent L. Penta, a sole practitioner in the planned city of Longview, has been reelected by his fellow planning commissioners as chairman of the Cowlitz County Planning Commission.

Bradley C. Diggs has been appointed managing partner and chief executive officer of Davis Wright Tremaine in Seattle. Diggs replaces **Mark Hutcheson**, who served as managing partner from 1989 to 1994 and will become chairman of the firm.

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well, Malanca, Petterson & Daheim has added four associates to its Tacoma office: **Melissa K. Bryan**, **Darrell L. Cockran**, **James B. Mead** and **David B. Moody**. The firm has also announced the promotion of **Lawrence F. Brown, Jr.** to partner. The firm has also added a father-and-daughter team. **J. James Gallagher** heads the firm's financial institutions group. His daughter, **Sandra**, is an associate concentrating on financial institution matters. Both are graduates of Catholic University of America's Columbus School of Law.

Tousley Brain in Seattle has announced the selection of four new partners in the firm. **Stephan O. Fjelstad** practices in business torts, contracts and securities litigation. **Deborah A. Knapp** is a securities, real property, business class action and complex-litigation attorney. **Susan A. Shyne** concentrates her practice in business and real property litigation with an emphasis on landlord/tenant issues and business disputes involving complex accounting issues. **Brian P. Ward** focuses his practice in real property transactional work.

Seattle attorney **Bob Randolph** has

been named Special Trade Representative for the State of Washington by Governor **Mike Lowry**. He was previously an attorney with the Seattle law firm of Hendrick and Lewis. A Rhodes Scholar, Randolph was a classmate of President Clinton's at Oxford University. As a genuine "FOB," Randolph proposed the toast to the President of the United States at an April dinner of the Oxford Society of Washington honoring the vice chancellor of Oxford University, Sir Peter North, QC.

John Williams, a business and real estate attorney who worked with the Seattle Goodwill Games, has been named regional advocate for the federal Small Business Administration.

Stanley D. Tate has joined Darigold Inc. as corporate counsel. He was previously associated with Ferguson & Burdell in Seattle.

José Gaitán, managing partner of the Seattle law firm of Gaitán & Cusack, has been named to the board of directors for the National Hispanic Scholarship Fund.

Shirley Wilson has been named magistrate for the Municipal Court of Seattle.

Seattle's Davis Wright Tremaine and the Loren Miller Bar Association held an April 15 "Welcoming Reception" for African-American attorneys and law clerks new to the Seattle area. King County Superior Court Judge **Norma Huggins** gave the welcoming address.

Henry E. Farber, an attorney with Davis Wright Tremaine's Seattle office, has been named editor in chief of *The Washington Labor Letter*, which provides a monthly analysis of recent state and federal administrative, judicial and legislative developments affecting Washington employers; it went into publication in April.

Ephrata attorney **Paul White** was honored this spring for more than 32 years of volunteer service as chairman of the Grant County Board of Adjustment.

Perkins Coie has announced that **Cathryn B. Roach**, a municipal-bond lawyer, has joined the firm's Public Finance Group as a partner. She came from Preston Gates and Ellis, where she was a partner.

Appel & Glueck of Seattle have announced that **Matthew W. Granger** has been named a shareholder and principal PAL in the firm, and **Debra A. Sitzberger** has joined the firm as an associate.

Edmund O. Belsheim, Jr. has been named chair of the business law department at Bogle & Gates.

Dana I. Dorland has opened her practice in Chehalis.

Dick Cease retired April 29 after 24 years as Spokane County Public Defender. He held the position longer than any other public defender in the state of Washington. When Cease took over in 1970, there were two attorneys, two secretaries, an investigator and a \$75,000 budget. Today, the office has 36 lawyers, three investigators, six paralegals and nine secretaries. The office handles more than 12,000 cases a year and has an annual budget of \$3.9 million. Upon retirement, Cease received a lifetime achievement award from the Washington Defenders Association in Seattle.

Retiring Vancouver, Washington, city attorney **Jerry King** was awarded the Val Joshua Racial Justice Award from the YMCA of Clark County in April. An article in the *Columbian* noted, "Jerry King began earning the Val Joshua Racial Justice award in 1972 when he wrote the city of Vancouver's first affirmative-action ordinance." That ordinance gave minority employees protection from discrimination. In the 22 years since, King has worked to draw minority employees to the city staff and open opportunities for women on policy-making boards and commissions. King retired in May after 29 years as Vancouver city attorney.

Lance W. Bass, **William B. Connors** and **David J.W. Hackett** have become associates of Miller, Nash, Wiener, Hager & Carlsen in the firm's Seattle office.

Paul L. Gardner has joined Christensen O'Connor Johnson & Kindness, the Seattle intellectual property law firm, in an of counsel capacity. Previously Gardner was a partner at Spensley Horn Jubas & Lubitz.

Larry B. Feinstein of Seattle has received a dual certification as a business bankruptcy specialist by the Commercial Law League of Americas' Academy of Commercial and Bankruptcy Law Specialists, and as a business bankruptcy specialist by the American Bankruptcy Institute's American Bankruptcy Board of Certification.

Robert B. Karr, a shareholder at Karr Tuttle Campbell in Seattle, has been elected to a fourth one-year term as president of the Foundation of International

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Association of Defense Counsel. At their recent annual meeting, Karr Tuttle Campbell shareholders elected the chair of the firms' litigation department, **Bruce E. Larson**, president of the firm.

Helsell, Fetterman, Martin, Todd & Hokanson named two new partners and

three new associates recently: **George A. Nicoud, III** and **Linda D. Walton** have been made partners. **Jennifer Divine**, **Erik D. Price**, and **Bradley S. Shannon** have joined the firm as associates.

Seattle attorney **Stanberry Foster, Jr.**, of counsel at Odgen Murphy Wallace,

has been appointed chair of the Technology and The Practice Committee of the American College of Trust and Estate Counsel. **Kent C. Meyer** and **Gil Sparks** have become Odgen Murphy partners, and **Nancy A. Harmon** has joined the firm as an associate.

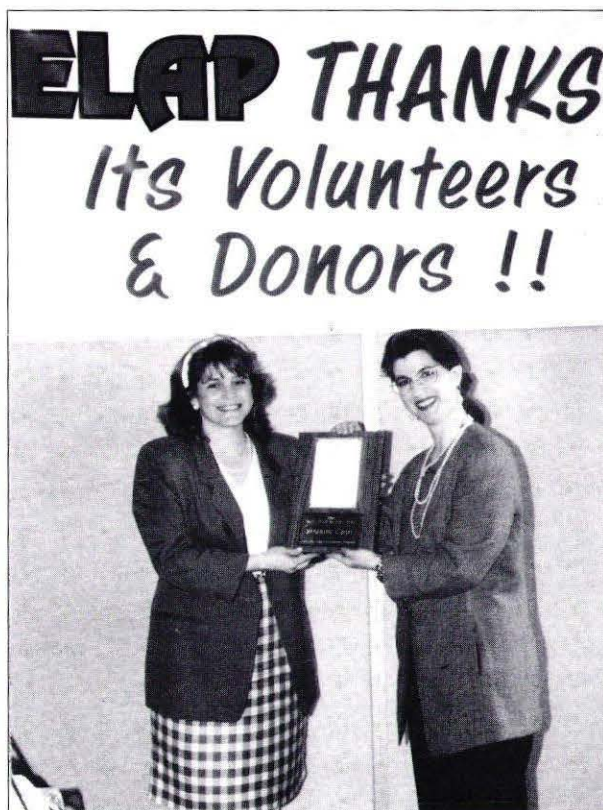
EAST KING COUNTY REPORT

by **MARIJEAN MOSCHETTO**

Even though it should be that in the summer activities slow down, actually there is a lot happening this summer on the Eastside.

The annual EKCBA Cruise was held in June with South King County Bar Association. More about that in a later column. SoKCBBA has its annual Golf Tournament in late July (tentative date July 29th), which is also the first leg of the second annual Suburban King County Bar Association Golf Challenge. Like last year, in order to compete in the Challenge you must be a member of one of the bar associations and compete in both tournaments. The second leg will be at the Golf Tournament for East King County Bar Association to be held, tentatively, on August 18th. If fame and glory and winning a silver cup for your bar association isn't enough to attract you to play, consider this — last year South King's team not only won the cup but also the door prizes. A promise was extracted from South King's team captain to reciprocate the hospitality this year, but to win the cup back we need players. To join South King's team, call **Andy Weiner**, (206) 242-9400, and East's team will be headed up by **Alex Wirt**, (206) 455-1909.

In May, the annual luncheon for the Eastside Legal Assistance Program was held. We were joined by a crowd of well-wishers, attorney volunteers, representatives of senior volunteers and funding agencies and by judicial hopefuls **Joseph Coleman**, **Faith Enyeart Ireland**, **Larry Jordan** and **Ron Cox**. This being the fifth anniversary of ELAP, it was noted that this program each year has doubled the number of Eastside citizens who have been provided legal services. Eastside firms responding to the financial need included Oseran, Hahn, VanValin &



Jacqueline L. Jeske receives "Volunteer of the Year" recognition from ELAP president **Marijean Moschetto**.
photo by Cheri Brennan

Watts; Hawkins Jeppesen Hoff; Inslee, Best, Doezie & Ryder; Trujillo, Peick, Lingenbrink & Magladry; Thomas, Gorud & Graves; Roy Mattern; Moschetto & Koplín, Inc., P.S.; and the East King County Bar Association. WSBA President **Paul Stritmatter**, who attended the luncheon, spoke to the attendees about the need to provide access to justice by volunteering our professional time. In an unexpected gesture that characterizes the generosity and commitment of our President, Paul also made a personal financial donation on the spot.

ELAP's Direct Representation Program (pro bono, to those of you who prefer the olde Latin) was show-cased with a presentation of how to juggle a busy practice, with thanks to **Chris Baer** for volunteering his juggling skills to make this point. Providing a shining example was Volunteer of the Year **Jackie Jeske** (see photo), who has volunteered more than 200 hours in the past year to helping those in

need of legal services. Contrary to the belief of many, there are thousands in our community who cannot afford a lawyer but need professional services. You are encouraged to call **Stewart Martin**, ELAP's Direct Representation Committee Chair, at (206) 637-3095, or the offices of Eastside Legal Assistance Program, at (206) 861-7033, to sign up.

Finally, at the luncheon we bade farewell to **Ron Dickinson**. Ron is moving to take a position with the federal government as an administrative law judge. Ron is a former EKCBA president and Mercer Island city attorney and we will miss him.

EKCBA luncheon meetings will resume in September on the third Thursday of each month. Look for announcements in your newsletter or contact the EKCBA office for details.

TREKKIN' TO CHELAN

Bar Leaders and Volunteer Attorney Coordinators Boldly Share Information, Responsibility

by **Doree Armstrong**
Bar News Editorial Assistant

If you haven't seen WSBA President Paul Stritmatter pour a pitcher of ice water over his head, or Executive Director Dennis P. Harwick modeling a one-size-fits-all Star Trek uniform with Klingon forehead, then you weren't at the May 22-23 Washington State Pro Bono/Bar Leaders Conference in Lake Chelan.

While Stritmatter's little wet T-shirt routine helped cool him down on a hot afternoon, it didn't dampen participants' enthusiasm for the conference, as they shared ideas and solutions with one another, and started forming an action plan to implement the Supreme Court's new Access to Justice order.

This was the second year of a WSBA-sponsored combined Volunteer Attorney Legal Services (VALS) and bar leaders conference, but with a twist. Instead of the WSBA designing - or paying for - the conference, it was handed over to an advisory committee of bar leaders, with the Bar saying, "Why don't you plan this thing to fit your needs?" explained Jo Rosner, WSBA's Coordinator of Volunteer Legal Services.

Bar leaders conference co-chairs Mike McKasy and Bill Crawford called other bar leaders to encourage them to attend and delegated responsibility for planning and finding facilitators for workshops. "By doing a grass roots approach rather than a top level approach, we got a better response," McKasy explained. "Lots of people commented that the personal calls really got them to the conference." About 40 leaders attended this year, compared to six last year. The VALS workshops



WSBA President **Paul Stritmatter** (right, standing with hat on) addresses a crowd of 80 bar leaders and volunteer attorney service providers at a joint conference May 22-23 at Campbell's Resort in Lake Chelan. Bar leaders held workshops to discuss everything from media relations to CLEs, while Volunteer Attorney Legal Services (VALS) representatives had their own workshops to share ideas on finding volunteers and funding programs.

attracted roughly the same number both years, about 40 also.

Mary Wechsler, incoming president of the King County Bar, was pleased to have the opportunity to find out what other bar leaders are up to. "Even with enormous disparity in size, we have a lot of issues in common: what makes the bar important to members, how to make committees work, what makes CLEs work, how to deal with the State Bar," she explained.

Since the WSBA could no longer afford to fund the conference, bar leaders had to foot the bill for their travel, accommodations and meals. VALS and special-bar representatives received their lodging, meals and materials through a \$7,000 grant from the Legal Foundation of Wash-

ington. WSBA did provide materials and staff time in preparing and overseeing the conference, and WSBA-CLE provided VALS with a set of four video tapes and a coursebook on domestic violence. (Volunteer attorneys may borrow the tapes for free and receive 6.5 CLE credits.)

McKasy, past president of the Tacoma-Pierce County Bar, said, "What I learned was that we have some tremendous leadership within the Bar, throughout the state, all of whom had something to contribute. We have just a wealth of information here, and common interests. I think the State Bar can reap a lot of information annually from that conference."

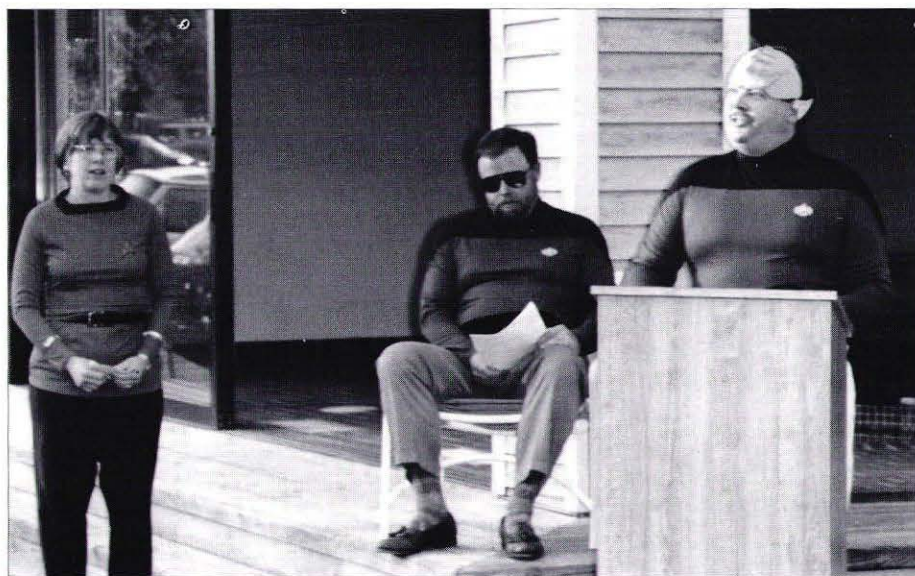
"I found it was very useful for networking, sharing information," co-chair

Crawford, president of the Kitsap County Bar, added. "I'm sure everybody got a few ideas to take home and work with. I got some ideas on media relations and publicity of our CLEs. We have a very nice (newsletter) for an unstaffed bar, but we're getting to the place where we're large enough to try some new things. It was just good to have a common goal, struggling with tremendous unmet needs. With pro bono and bar leaders in each region, now you know who they are; you know the kinds of things they're working on, and I feel I could call anyone."

VALS folks discussed the new two-year mandate from the Supreme Court that the Bar administer an Access to Justice (ATJ) program. A Bar task force had recommended an ATJ board be created, and the Board of Governors petitioned the Court, which in May issued an order to create the nine-member ATJ Board. (See Appointments, page 39.)

"The Access to Justice Board is important because it offers a single focal point for myriad groups, task forces, organizations and interest groups to communicate...to improve the justice system," Barbara Clark, Director of Legal Foundation of Washington, said. "The Supreme Court and the Bar give credibility to this arena and encourages these organizations to get together."

Kimberly Brown, executive director of both the Clark County Bar and the Clark County Volunteer Lawyers Program, led the first VALS workshop on finding volunteer attorneys. Brown encouraged the group to work closely with their local



Officers of the Starship "WSBA" attempt a little humor at Saturday night's barbecue for conference attendees' and their families. The "Captain," a.k.a. President **Paul Stritmatter**, hands over the helm to his Klingon First Officer, usually known as Executive Director **Dennis P. Harwick**, and "Lieutenant" **Barbara Clark**, whose day job is directing the Legal Foundation of Washington.

bars "so it becomes part of the conscience of the members." For example, each month Clark County publishes the names of all its members who volunteered the previous month.

One of her most important goals for the workshop was for attorneys to realize they are dealing with a whole new set of issues when they take a volunteer case. "One of the biggest complaints that you'll hear is that (clients) made an appointment and then they canceled, or they brought their children in and they were screaming," she said. "But then you have to ask, why didn't they show up? Did they not have money for bus fare? Did they not have anyone to watch their kids and they *knew* they would be screaming?"

"It is a totally different environment," Brown explained. "Keep these things in mind. These people aren't living paycheck to paycheck, they're living day to

day, and it affects how they deal with their legal problem. When you have no money, your legal issue is always on the bottom of your list to do, no matter how critical it is."

At the conclusion of the conference, WSBA awarded both the Kitsap and Benton/Franklin county bars the 1994 Law Day USA Merit Awards for new programs they had instituted, as well as the State Award of Merit to the Spokane County Bar for its local television broadcast during Law Week.

Of course, the conference wasn't all serious work, as Capt. Stritmatter & the Starship "WSBA" demonstrated. About that water-over-the-head thing: At last year's conference, then-President Steve DeForest placed a napkin on his head so he wouldn't get sunburned while speaking under a sultry sun. This year, Stritmatter, never one to let an obvious opportunity for one-up-man-ship go by, "gets up and dumps a pitcher of water on his head, and said he didn't want to be outdone by Steve DeForest," McKasy said, chuckling.

And the Star Trek skit by Stritmatter, Harwick and Clark was, as you can see from the photo above, an act of uncommon bravery for going where (thankfully) no bar leaders have gone before.

Mike McKasy (left), past president of the Tacoma-Pierce County Bar, and fellow conference co-chair **Bill Crawford** personally called all bar leaders to encourage them to attend. "By doing a grass roots approach rather than a top level approach, we got a better response."

GOVERNMENT LAWYERS BAR ASSOCIATION

by EVELYN A. FIELDING

Congratulations to the newly elected 1994-95 GLBA executive board: **Kristal Wiitala Knutson** (DSHS Review Judge), president; **Jan Frickelton** (AAG Education), president-elect; **Anne Spangler** (AAG Transportation and Public Construction), vice president; **Bryce Brown** (AAG Transportation and Public Construction), treasurer; **Judy Giniger** (Lottery Commission Legal Director), secretary; **Linda Sullivan** (AAG Social and Health Services), membership; **Mary Jo Diaz** (AAG Public Counsel) and **Evelyn Fielding** (AAG Social and Health Services), bar liaisons; **Kate Walsh** (AAG Social and Health Services) and **John Kuntz** (DSHS Office of Financial Recovery), program chairs; and **Tom Bjorgen** (Thurston County Prosecutor's Office) and **Bob Wallis** (UTC Review Officer), CLE chairs.

GLBA is sponsoring several exciting events during the summer and fall. June 10's CLE, entitled "The First Amendment: Its Future in Washington State," featured Judge **Gerry Alexander** of Division II, **Paul Lawrence**, president of the ACLU of Washington; **Barbara Dority**, executive director of the Washington Coalition Against Censorship; **Stephen Mosier**, political director of the Citizens Alliance of Washington; **Cher Ravagni**, intellectual-freedom chair of the Washington Library Association; **Mark Allen**, legal counsel to the Washington State Association of Broadcasters; and **Charles Robinson**, president of the American Booksellers Association.

Special thanks to **Stephanie Croom Williams** and **Gretchen Leanderson**, out-going CLE chairs, for their Herculean efforts at organizing GLBA's enormously successful May CLE, "Practical Pointers for Practicing Before Administrative Tribunals." With registration closed at 110 participants, this CLE holds the record for GLBA CLE attendance!

Advance Notice: This September, GLBA is planning to co-sponsor a Supreme Court Judicial Candidates Forum along with the other Thurston County bar associations. Date, time and location will be announced this summer.

If you are interested in joining GLBA (for a mere \$10 per year), or if you have questions about the association, please

contact **Linda Sullivan** at (206) 459-6223.

GREATER SEATTLE LEGAL SECRETARIES' ASSOCIATION REPORT

by LEANNA ANDERSON and LINDA KNISS

On April 5, the Greater Seattle Legal Secretaries Association installed its 1994-1995 officers as follows: president: **Lisa Rudgers**, PLS (Stanislaw, Ashbaugh, et al.); vice president: **Lisa Miner**, PLS (Warren, Kellogg et al.); secretary: **Autumn Webb** (The Boeing Company); treasurer: **Peigi Flynn**, PLS (LeSourd & Patten); governor: **Dianne Dimico** (Forsberg & Umlauf); and NALS representative: **Lisa Rudgers**, PLS (Stanislaw, Ashbaugh, et al.).

Congratulations to the following members of the Greater Seattle Legal Secretaries Association who recently passed the Certified Professional Legal Secretaries ("PLS") examination. Out of 39 individuals in Washington who took the PLS challenge, only 17 passed! Six of these individuals are members of GLSA. They are: **Marcia Heying**, **Castle Kelsey**, **Donna Maxwell**, **Lisa Miner**, **Shari Morisset**, and **Lisa Rudgers**.

Congratulations to the Greater Seattle Legal Secretaries Association's first Certified Accredited Legal Secretaries ("ALS"). They are: **Carolyn Bryce**, **Gerard Gravallese**, **Marcia Heying**, and **Ginger Stratton**. We are proud to say that not only are these the first "ALSs" in GLSA, but in the state of Washington as well!

KING COUNTY BAR ASSOCIATION

The King County Bar Association has elected new officers and members of its board of trustees, effective July 1. **Mary H. Wechsler** was elected president; **J. Richard Manning**, first vice president; **Scott A. Smith**, second vice president; and **John R. Ruhl**, secretary. **Daniel Gottlieb** continues as treasurer, with a two-year term.

New Central District trustees, elected to three-year terms are: **Diane K. Carey**, **Philip G. Hubbard** and **Frederick L. Noland**.

KITSAP COUNTY REPORT

by KATHLEEN M.S. WRIGHT

Law Day Laurels. As usual, Law Day was a memorable event in Kitsap County. Supreme Court Justice **Charles Z. Smith** gave the keynote speech, and outgoing County Commissioner **Billie Eder** was presented with the Liberty Bell award. A special presentation was made to **Holly Banks**, **Cynthia Rosa** and **Kathleen Shedd** for their very generous contributions to the Kitsap County Volunteer Attorney Service Clinic during the past year. And in his inimitable way, **Ron Anderson** again was the mover and shaker behind the Law Day festivities.

Attorney Referrals Ride Again. Ever since the demise of the WSBA referral service, the under- and unrepresented in Kitsap County have wondered, "How do I find a lawyer who will represent me in a diligent, forthcoming and inexpensive manner?" Well, wonder no longer. Through the intense efforts of all-around volunteer and good guy **Russ Hartman**, the Kitsap Community Action Program will establish an attorney referral service for fee-paying clients beginning July 1. This coincides with the issuance of a new telephone directory and Yellow Pages listing, but we do not think it has anything to do with the Beagle Awards.

Visitors. WSBA President **Paul Strittmatter** came to speak at a recent Kitsap Bar luncheon. All were impressed that he even found Port Orchard, although he did arrive after the jello mold course. In keeping with a theme sounded throughout his presidency, he spoke of professionalism, or the perceived lack thereof, and the need for courtesy and disclosure in the practice of law. Will the requirement of six CLE credits in ethics make a difference? Can one legislate good manners, let alone morality?

New Faces. **Gerald Kearney** now practices in Kingston. **Batur Oktay** arrives via New Jersey to the Crawford McGilliard firm in Port Orchard. **Cheryl Dickerhoff** is now in Silverdale. Immigration attorney **Jacqueline Wood** moves her practice from Seattle to Bainbridge Island, and real estate attorney **Bruce Weiland** does the same.

Different Places. **Lillian Schauer** is now at the Sidney Professional Building in Port Orchard. **Kathleen Shedd** departs McCluskey Sells to open a solo practice in Port Orchard as well.

Milestones. **Tim** (aka **Bruce**) **Botkin** was appointed county hearing examiner, and **Susan Daniel** recovered her treasured pink plastic lawn flamingo.

Reassignments. **John F. Nichols** has been repatriated to Clark County, and **Jerry Rigg** has been demoted from the Column Preparation Committee.

LAW FUND REPORT

by **LOREN MOORE**

Thanks go to the many firms and individuals that have already made contributions to our 1994 Annual Campaign. Special thanks to Reed McClure for pledging a gift, at the suggested level, of \$200 per attorney for a second year. LAW Fund salutes Bogle & Gates for making a generous firm gift and encouraging individuals within the firm to participate as well. Contributions to LAW Fund support our mission to help ensure equal access to justice by preserving and expanding civil legal services for low-income people throughout Washington state.

LAW Fund is pleased to welcome new Board member, **Vernon E. Fowler, Jr.**, of Peters & Fowler in Selah, and also our first nonlawyer board member, **Arnie Prentice** of Kibble & Prentice in Seattle.

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

SOUTH KING COUNTY REPORT

by **THOMAS A. CAMPBELL**

Since this column has been absent for several months, there are a lot of happenings to report. First, apologies must be offered to **Sue Sampson**, who was identified as Sue Simpson in the last rendition of this column. She contacted me to remind me that she should not be confused with Marge Simpson of the blue hair and whiny voice. A point well taken.

Not as easily rectified is the mistake made in the preparation of the list of past presidents. It seems that Hon. **Judith Eiler**'s name was listed twice and replaced **Gary Faull** in the 1984 term. We hope that Faull will not feel compelled to file affidavits of prejudice as a result of this unfortunate mishap. Since **Mike Salazar** is no longer practicing in this county, he will take full responsibility for all mistakes. He left the office of **Donald**

Ryan in December. Mike hung out his shingle in Fife to go it alone.

In February, the membership was regaled by stories of past presidents and charter members. **Andy Weiner** was tactful in recounting the night with **J. Micheal Kenyon**. **Duncan Bonjorni** gave a historical and inspirational talk. A plaque listing the past presidents has been prepared for installation at the South King County Regional Justice Center.

Bob Kuvara is spearheading a group of local criminal law practitioners to discuss local DWI practices. **Alva Long** suggested that the South King County Bar develop sections devoted to addressing issues pertinent to criminal and trial practice. Anybody with thoughts on these matters should contact a member of the South King County Bar board.

Attorneys on the move in South King County include **Bonnie Lindstrom**, who left the Federal Way city attorney's office to take a position in Olympia. Rumors abound that the membership will mutiny and cast overboard all board members who move from the area.

Dorlene Crawford is a new attorney practicing in Kent, and **Alec Schwimmer** has begun practice in Federal Way. **Sandra Wilton Young** opened her office in Federal Way, and **Joy Lee Barnhart** will be practicing bankruptcy and domestic-relations law in Renton.

Wedding bells were ringing in South King County. **Kenlynn Richards** was wed on May 21, with the Honorable **Marjorie Tedrick** presiding. In attendance were a colorful cast, including **Alva Long**, **Lorena Fiori** and **Amy Hanson**. Showing that she is able to cross the battle lines, Richards invited Auburn City Attorney **Mike Reynolds**.

Congratulations go to Sampson & Wilson for winning the city attorney contract for Black Diamond. **Duncan Wilson** is satisfying his Napoleonic urges by building his empire in the shadow of the mountain. Wilson has set his sights on Greenwater next.

Ken Fornabai has been attempting to train the Washington State Patrol on the proper methods of documenting maintenance on breath-testing devices in the state. Given the number of Fornabai's horse-related accidents, **Rick Bathum** put together a chart that aptly displays the maintenance and certification of Fornabai before allowing him back into service. The chart exhibits each damaged item and the name of the operator causing the

damage. In all fairness to Bathum, the true source of this chart must remain anonymous.

Speaking of DWI offenses, our bar was brought up to speed on the recent legislative changes by Representative **Tracy Eide**. It is our new understanding that the popular name table in the RCWA will list these new sections as "The Criminal Defense Attorneys Legislative Relief Act," thanks to Tracy's husband, **Mark Eide**.

The South King and East King bars have planned some of our summertime events as joint meetings. Our installation banquet will float away from the docks with the intent of swearing in the new officers of both associations. **Mike Salazar** volunteered, in our last meeting, to be thrown overboard in celebration of his successful year as president. The East-side attorneys have issued the golf challenge to the Southend attorneys again this year. The South County Tournament, spearheaded by **Tim Jenkins** and **Phil Beige**, will be held at the rolling meadows of the Enumclaw Golf Club.

Finally, **Theresa Ahern** will be taking over authorship of this column as she has been elected the new secretary of the South King County Bar Association. She is happy to know that her name, by necessity, will appear here on a monthly basis.

WASHINGTON STATE ASSOCIATION OF MUNICIPAL ATTORNEYS

The following persons were elected or succeeded to their respective offices indicated and to the WSAMA Board of Directors for 1994-1995, at the 38th annual meeting of the Washington State Association of Municipal Attorneys held June 27-29 at Port Ludlow: **Mary Erickson**, city attorney of Olympia, president; **Sandra M. Watson**, assistant city attorney of Seattle, first vice president; **Wayne D. Tanaka**, city attorney of Issaquah, second vice president; **Robert F. Hauth**, secretary-treasurer; **Glenna Bradley-House**, assistant city attorney of Tacoma; **Dorothy Brodrick**, City Attorney of Union Gap; **Daniel B. Heid**, city attorney of SeaTac; **Richard N. Little, Jr.**, assistant city attorney of Bellingham; **Greg A. Rubstello**, city attorney of Pasco; **John E. Vanek**, city attorney of Yakima; and **Richard L. Andrews**, city attorney of Bellevue, immediate past president.

WASHINGTON ASSOCIATION OF LEGAL SECRETARIES REPORT

by CINDY MANSON

Members of WALS have recently been designated Certified Professional Legal Secretaries (PLS) by the National Association of Legal Secretaries. They are: **M. Louise Akramoff** of the Attorney General Division of DSHS in Olympia; **Christine L. Bain** of McGavick Graves in Tacoma; **Susan D. Boat** of Campbell, Dille & Barnett in Puyallup; **Theresa L. DeGrandpre** of Ater, Wynne, Hewitt, Dodson & Skerritt in Portland; **Marcia E. Heying**, ALS, of Law Offices of Gary East in Bellevue; **Charlotte S. Jensen** of Soriano & Soriano in Bremerton; **Castle G. Kelsey** of the Society of Counsel in Seattle; **Kathy A. Lovelady**, freelance, of Vancouver, Washington; **Shirley Matz** of Gordon, Thomas, Honeywell, Malanca, Peterson & Daheim in Tacoma; **Donna M. Maxwell** of Hendricks & Lewis in Seattle; **Lisa D. Miner** of Warren, Kellogg, Barber, Dean & Fontes, P.S. in Seattle; **Shari A. Morriset** of Gordon, Thomas, Honeywell, Malanca, Peterson & Daheim in Tacoma; **Lisa A. Rudgers** of Stanislaw, Ashbaugh, Riper, Peters & Beal in Seattle; **Stephanie R. Vossen** of Law Office of G. Alex Styve-Knapp in Kelso; **Jeri A. Voyles** of McGavick Graves in Tacoma; and **Teri L. Wert** of the Clark County Superior Court Clerk's Office in Vancouver, Washington.

Tina Morton, a resident of Vancouver, Washington, and member of the Oregon Association of Legal Secretaries, also received her certification. She is employed by Preston Thorgrimson Shidler Gates & Ellis in Portland.

Teresa J. Stone, with Lacy & Kane in Wenatchee, has been certified as an Accredited Legal Secretary by the National Association of Legal Secretaries.

For more information about the Accredited and Professional Legal Secretaries certifications, contact **Peigi Flynn** at (206) 624-1040.

WASHINGTON WOMEN LAWYERS REPORT

by ANNE M. BREMNER

WWL's Annual Dinner will take place on Thursday, October 20, 1994, at the Seattle Sheraton. The guest speaker is

Sheila Kuehl, and our theme this year is "Hold High The Torch."

WWL's Annual CLE and Lunch will be held at the Seattle Sheraton on Friday, October 21. The CLE theme is "Women in Business," and topics will focus on getting to the top at a law firm, alternative career paths and work options, counseling the business client, and prospects and opportunities in the year 2000.

WWL president **Kathy Cooper Franklin** attended the WSBA Board of Governor's March Meeting and reported that although they discussed the contested language in the Judicial Conduct Rules, nothing was decided on the issue.

The *Capitol Chapter* was pleased to report that it now has 75 members and welcomes more! The Chapter recently sponsored a "Professional Appearance" seminar and a CLE on domestic violence will be held on June 24. In addition, the chapter is working with several other organizations to open a new legal clinic.

The *King County Chapter* held its judicial appreciation lunch on May 4. Several recent brown-bag lunches have been very informative and interesting. Future topics will include financial skills for women.

The *Pierce County Chapter* is working to start a mentor program. It already has 22 lawyers who have volunteered to participate as mentors.

The *U.W. Chapter* is proud to introduce member **Trish Murphy** as its new chapter representative. It recently had success getting Justice **Antonin Scalia** as a guest speaker at the U.W. School of Law.

WSBA/YLD liaison **Gail Stone** reported the WSBA's Committee on Governance is currently considering forcing new lawyers into a mandatory one-year servitude after law school, to presumably ensure better quality practice. The YLD considers this idea to be amazingly shortsighted. In addition, Gail reported that a recent study on the method of judicial acquisitions (election v. appointment) recommends the merit/appointment approach.

Finally, the WWL speakers list is now available. For information on this, or any topic in this column, please contact **Tiffanie Kilmer** at (206) 622-5585.

YAKIMA COUNTY REPORT

by GARY G. MCGLOUGHLEN

This summer has more dry winds than

any in the history of the Yakima Valley. We really have the summertime doldrums, with even **Phil Lamb**, usually the source of all good rumors, dry.

Doug Peters, getting a run for his money in this column, has been appointed as the attorney representative for the Ninth Circuit. Quoted as saying although he does not have much to do as the representative, he does get to go to a conference in San Diego in August, where all federal judges from the Ninth Circuit meet. Doug invites all attorneys in the south half of eastern Washington to call or write him with any comments, good or bad, they have about the federal court or the federal judges. The conference is the opportunity to review and confer about how the court operates. Call Doug at (509) 697-7201 or (800) 777-7201.

Mike Finney could say only that he hoped his name would not be in this column.

Bob Bounds, recently retired city prosecutor for the city of Yakima, is still out training police officers on how to do their job correctly. Most recent was his appearance at the WSAMA conference, where he delivered his paper on "How to Conduct In-service Training Sessions for Police Officers." Bob is available to travel throughout the state with his educational course.

IN MEMORIAM

S. Dean Arnold

The following remembrance of Dean Arnold was contributed by his law partner, Scott C. Broyles of Clarkston. "Dean had practiced law in excess of 50 years in southeast Washington," Broyles noted. "He was a prominent, respected member of the Bar. His son, J. Kelley Arnold, is currently a superior court judge in Pierce County."

S. Dean Arnold was born on a farm near Waitsburg, Walla Walla County, Washington, November 29, 1907, as the fourth of six children of John Schuyler Arnold and Minnie Blackard Arnold. He attended the rural school and later attended school in Waitsburg and Prescott, graduating from the latter school in 1924. He enrolled at the University of Idaho that fall; he received a bachelor of arts degree in 1929 and a law degree in 1932. He practiced law in Clarkston from January, 1933 until 1989. He formed a partnership with Scott C. Broyles in 1974.

Arnold served one term as Asotin County Prosecuting Attorney (1935-38) and, off and on, served 37 years as Clarkston City Attorney. He was admitted to practice in the federal courts of Idaho and eastern Washington and the Ninth Judicial Circuit Court of Appeals. In 1974, the City of Clarkston honored him with the dedication of Arnold Park on Maple Street.

Arnold volunteered for military service in World War II, and after three years' service was separated with the rank of major. He was a member of the Episcopal Church of the Nativity in Lewiston, Idaho. Arnold was active in civic affairs in Asotin County as a member and past chair of the County Republican Central Committee, member and past president of the Chamber of Commerce, and a member of Clarkston Lodge No. 143, F&AM. He was also a member of the Reserve Officers' Association, Veterans of Foreign Wars, Rotary International and the Elks. For many years he was a member of the local WSBA administrative committee.

Arnold married Helen Hanson of Boise on February 25, 1935, and she survives at the family home. Also surviving are their two children, J. Kelley Arnold, and Susan C. Arnold, a teacher in King County's Lake Washington School District. He is also survived by three grandchildren, John C. Arnold of Ketchum, Idaho; Dean B. Arnold of Hailey, Idaho, and Daniel K. Arnold of Tacoma, and many nieces and nephews. Four brothers and one sister preceded him in death.

Thomas J. Gagliardi

Thomas J. Gagliardi, 73, died March 16, 1994, in Tacoma. A Tacoma native, Gagliardi graduated from Bellarmine High School and attended the University of Santa Clara before transferring to the University of Washington, where he obtained his law degree.

Admitted to practice in 1952, Gagliardi set up practice with his father, the late S. A. Gagliardi, and his brother, George T. Gagliardi. He was a member of the Tacoma-Pierce County Bar Association for 42 years, served as chair of the Pierce County Red Cross, and was a member of the Tacoma Golf & Country Club. Survivors include his brother, three sisters, wife, and three sons.

Robert D. Greene

The following notice was sent to the Bar News by Miami attorney Harold A. Greene:

I regret to advise that my son, Robert

Daniel Greene, a practicing attorney in Florida, a graduate of the University of Washington School of Law, and a member of the bar of the states of Washington and Florida, died on March 4, 1994. At his death Robert was an associate with the firm of Broad & Cassell, Miami, Florida. He was previously an associate with the firm of Cullen & Cullen, Olympia, Washington.

Robert suffered from a brain tumor which was diagnosed in February, 1992, and died after a long battle with the disease. He is survived by his wife, Becky Hellstrom Greene, formerly of Olympia; his parents, Lois H. and Harold A. Greene; and his brothers, Jonathan D. Greene, Richard S. Greene and Stephen S. Greene.

Contributions in his name should be sent to the Robert D. Greene Scholarship Fund, College of Arts & Sciences, Campus Box 1210, Washington University, 1 Brookings Drive, St. Louis, Missouri 63130.

Orris L. Hamilton

Orris L. Hamilton, former Chief Justice of Washington, died March 20, 1994, in Olympia. He was 79 years old. Hamilton was born and raised in Prosser, and he was the son of Garrison W. Hamilton, Attorney General of Washington from 1933 to 1940. Clerking for his father excited an interest in law and government. Hamilton obtained a job in Washington, D.C., with the Department of Fisheries and later worked for the Bureau of the Census and the Securities and Exchange Commission while attending American University's Washington College of Law at night. He was admitted to practice in both Washingtons—D.C. and the State of—in 1940.

Hamilton returned home and served two years as an assistant attorney general under his father's successor, Smith Troy. In 1942, he joined the Seattle law firm of Falknor, Emory & Howe, but he worked there only a few months before joining the army. He served Europe in World War II and was awarded the Bronze Star.

After the war, Hamilton opened his law practice in Prosser and later was elected Benton County Prosecuting Attorney in 1946. In 1948 he was appointed Benton County Superior Court Judge; at 34 he was the youngest superior court judge serving in the state.

In his book, *The Washington High Bench* (Washington State University Press, 1992), Professor Charles H. Sheldon described Hamilton as a "stickler" for ensuring "the rights of the ac-

cused even before the U.S. Supreme Court forced such protections upon states. He was especially concerned with guilty pleas. If 'he had doubts about' a plea, 'he would not accept it.' The judge was always ready for trial."

In 1962 Hamilton was appointed to the Washington Supreme Court and served for 17 years. Sheldon characterizes him as "a moderate judge, restraintist in the exercise of judicial power," who became somewhat more conservative as his tenure lengthened. To the end, he demanded proper procedures in protecting the rights of criminal defendants. He was Chief Justice in 1971-72. In 1978, Hamilton retired, noting he had served on the trial and appellate bench for thirty years, "a milestone which I do not deem desirable to bypass . . . I have decided to step down at the conclusion of my current term, to make room for new blood."

Active in numerous civic and legal groups, Hamilton was a past president of the Washington Superior Court Judges' Association, a member of the American Judicature Society, the Institute of Judicial Administration, and the National Institute of Crime and Delinquency, as well as the Elks, VFW, and the American Legion.

Hamilton's survivors include his wife, three children, seven grandchildren and three great-grandchildren.

Lyle Higgins

Lyle B. Higgins, 79, popularly known as "Butch," died March 28, 1994, in Chelan. A Chelan native, he graduated from Chelan High School and the University of Washington before returning to Chelan to go into business. In 1938, he returned to the UW and graduated with a law degree in 1940, second in his class.

Higgins came home and opened a law practice, which was interrupted by World War II. He served in the Navy, reaching the rank of lieutenant while serving as commander of a landing craft. He resumed his practice in Chelan after the war. In the late 1950s, he was an unsuccessful candidate for the election to the Supreme Court of Washington.

In 1974 David R. Hellyer joined Higgins' practice, and he continued it after poor health forced Higgins' retirement in 1977. "He was active in his community, and served in many local government capacities. He was well respected by his peers for his fairness, pragmatism, clarity and humor," Hellyer recalled. Higgins' survivors include his wife, four children and 13 grandchildren.



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and

Cynthia R. Fischer

formerly of Pettit & Martin in San Francisco

have joined the firm as associates

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2) State and federal law allow minimum, but prohibit maximum—e.g., no ranges—qualifying experience.

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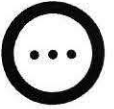
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MORE FROM READERS' RECOLLECTIONS

Robert C. St. Louis of Seattle sent in "a note concerning an experience of mine which some may find amusing" and which he titles:

BEWARE THE MAN FROM OUT OF TOWN

It was only the plaintiff's opening statement during a bench civil trial when Judge Cramer glowered down at me and my client and demanded to know if the prosecuting attorney had been informed of this. The plaintiff was claiming that my client had forged his signature on a promissory note and mortgage. Henry Cramer was known for being able to make quick decisions but this was quite a shock to me, coming at this stage of the trial. I knew my client and there was no doubt in my mind that the plaintiff was mistaken. Either he was lying or, as so often is the case, he had somehow deluded himself into believing that he was telling the truth.

The plaintiff's testimony was what I expected and cross-examination did not destroy him. The real blow to our case came when the plaintiff's handwriting expert took the stand. He came on strong and told a story that must have been very convincing to the judge. He was so good that I felt that he could take my signature, look at it for a minute, and then convince me it was a forgery. We felt even worse now than we had at the inception of the trial. However, the expert had made a couple of comments which made me wonder about his real abilities—e.g., that all people are proud of their signatures and are careful to always sign in the same manner.

In light of this state of affairs it came as a surprise to me that Judge Cramer granted my request for a recess to respond with my own expert. The one week recess grew to a couple of weeks because of the judge's schedule and I had time to learn a bit about

experts and handwriting. The trial resumed with my cross examination of the plaintiff's expert. All modesty aside, I made him look foolish. What had looked like devastation now took on a totally different appearance. Then our expert took the stand and what had been described as instances of dissimilarities, proving that the suspect signatures were forgeries, became proof that the signatures were genuine. Justice prevailed.

This kind of thing would not occur under our present discovery rules, but in the 1950s it was not uncommon to come up against surprise experts. At that time we referred to an expert as a man from out of town with a briefcase. Sometimes that may be about all they have in the way of qualifications, other than the ability to tell a convincing story. The experience convinced me that I had to be careful to not only question the story told to me by my clients, but those of all the other witnesses as well.



"After 54 years of practice I, too, have been caught up with the nostalgia evidenced in recent issues of the *Bar News*, and decided to share a pleasant experience of half a century ago," writes Wayne C. Booth, Sr. of Seattle. "I hope there are no typographical errors," he adds. "I can no longer blame my secretary as I now do all this on my pet computer."

THE GOOD OLD DAYS

Sitting at my window on the 18th floor and looking down at the earth moving machine at work at Seattle University brought a flow of memory of the good old days when, as a young attorney from Seattle, I dropped in on the office of Wells & Wells in Anacortes. I stopped to visit with my classmate Bill Wells, who had

recently started practice with his father, a local lawyer well-established in time and respect.

It was about 10:30 a.m. Their secretary announced that both Messrs. Wells were not in, but when I told her I just wanted to visit an old friend she told me they were both at Mr. Wells Sr.'s home on Cap Sante and I would be welcome.

I found the home, an elegant old structure in the style of the early 1900s. I was welcomed at the door and ushered into the gracious living room. A genuine log fire in the fireplace gave warmth against the rainy day viewed through the windows. Bill, his father, mother, and brother, with their piano and xylophone, parlor game and a bowl of popcorn, reflected an aura of joy and peace. The elder Mr. Wells explained, "Well, it was rainy today, and the bulldozer out there was working on our road, so we decided to stay home and watch it." And they were having fun doing it!

Wow! They never taught us at Weter, Roberts & Shefelman that the law practice could be like this.

But all this did not come overnight. They had earned it by years of hard work through good and depression times.

After over half a century practicing law, I now appreciate the elder Mr. Wells' sense of values. It is nice to just sit and watch the machine do the work next door.



Gloria Hanson, RPR, CSR, Official Court Reporter in the Whatcom County Superior Court, keeps an ear out for those off-the-wall-moments that only a courtroom can bring out:

THE COURT: I sentence you to 25 years in the Department of Corrections.

THE DEFENDANT: But, Your Honor, I can't do 25 years.

THE COURT: Do as many as you can.

"The Good Old Days," © 1993 by Wayne C. Booth, Sr.

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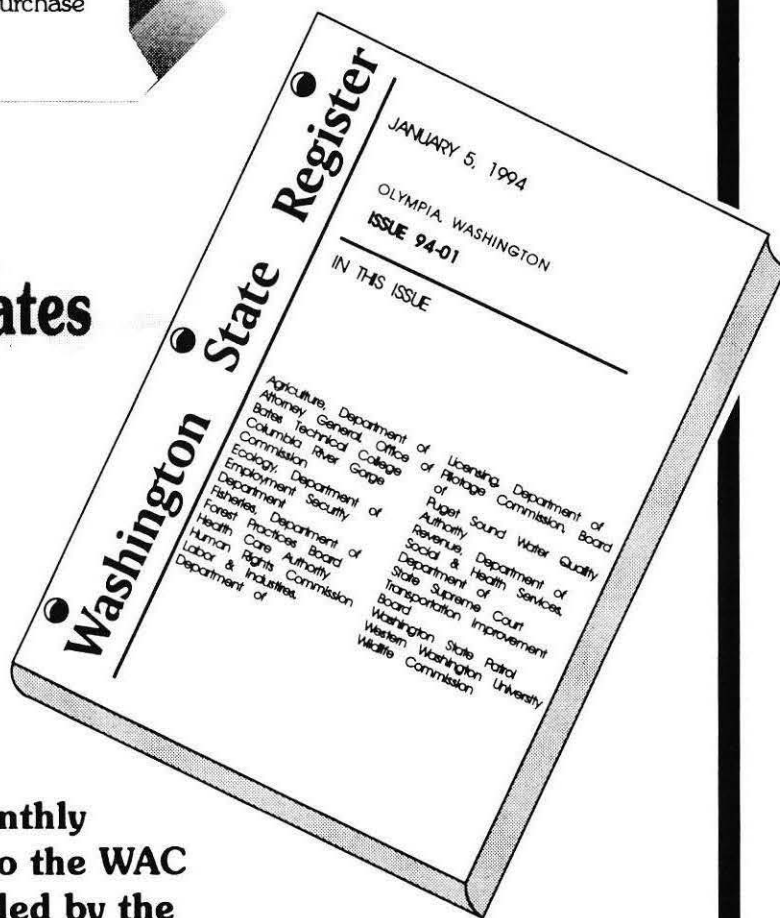
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