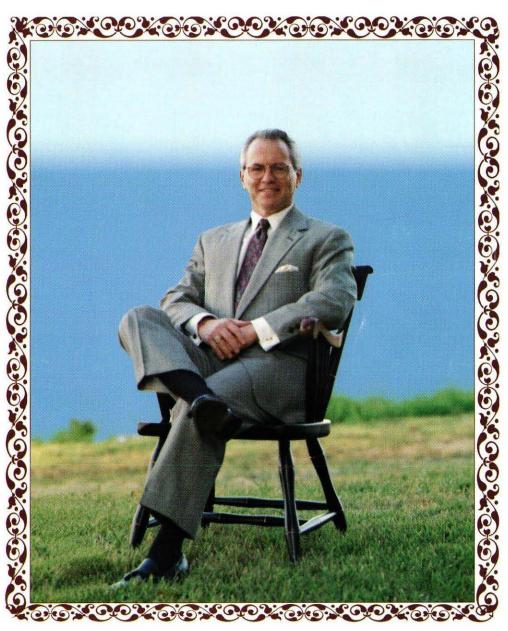
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The official publication of the Washington State Bar



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The Bar News encourages correspondence and article submissions. The submission deadline is the 15th day of the month for the second issue following; e.g., January 15 for the March 1 issue. We request a 3 1/2" disk and hard copy at the time of submission. Please include a SASE if you would like your material returned. Article submissions should run approximately 1600 to 2400 words. Graphics and illustrations are welcomed. Address all correspondence and submissions to: Hal White, Bar News Editor, 500 Westin Bldg., 2001 Sixth Ave., Seattle, WA 98121-2599.

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The official publication of the Washington State Bar

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#### Coming to a Computer Near You

Editor:

Over the past 10 years, many people have commented that computerized legal research seems greatly overpriced in view of a continuing decline in computer hardware costs. Unfortunately, efforts by WSBA volunteers to gain release of required law databases from state computers did not meet with initial success.

However, in 1989, WSBA President Elizabeth Bracelin, declaring the efforts of these volunteers to be the "world's greatest pro bono project," lent her official support. Thanks to her foresight, the WSBA on-line system, the L.A.W. BBS, came into existence.

Despite this advance, various state officials refused to authorize placement of the Washington Reports database into the most useful computerized form, i.e., a keyword-searchable CD-ROM. As a result, the only CD-ROMs available have been from expensive, commercial providers.

But this situation has now changed. In August, Chief Justice Barbara Durham and other members of the commission on law reports voted to license the *Washington Reports* database to all comers for placement on CD-ROM. The commission recommended a licensing fee low enough to allow a CD containing Washington Second, Appellate, RCW and WAC to be sold for under \$50.

Although the full Supreme Court has yet to approve the commission's action, that appears likely to occur during September. Since production times are short, this would permit under-\$50 CD-ROMs to be on the street, from various sources, as early as November or December of this year.

For this development, WSBA members owe thanks not only to Chief Justice Durham, but also to Reporter of Decisions Deborah Norwood, who helped to develop the new licensing arrangement, and also to WSBA Governor Linda Dunn, who acted as the WSBA's liaison to the commission.

EDWARD V. HISKES Richland

#### Arvey, Take Two

Editor:

The September *Bar News* contained an article by Representative Marlin Appelwick suggesting an alternative

method for calculating child support in split-custody cases, based on a method developed by the Court of Appeals, Division I in *Marriage of Arvey*. The alternative method is analogized to setting up two sets of worksheets, one for each household; it expands the Arvey method so that it works in split-custody cases where the children are in either the same or different age brackets on the economic table.

Representative Appelwick's article pinpointed a key weakness of the Arvey 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.

method: its inability to deal with children in different age brackets. However, while the article based this alternative method

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on a two-worksheet concept, I believe it is better to think of it as being based on two orders of child support that have the effect of creating a net transfer payment obligation.

In theory, parents splitting custody of their children could petition the court for two orders of child support. One order would list the father as obligor and set his support obligation for the child(ren) living in the mother's home. The second order would then set the mother's obligation for the child(ren) living in the father's home. While these two orders would require two checks to be written and sent each month, the actual effect would be a net transfer payment made by the parent with the higher obligation. Based on the net effect of these two orders, a single order can instead be created, which would make each parent an obligor and obligee, but would make only one parent the payer. Further, naming the paying parent "payer" properly follows the holding of Arvey, which requires that neither parent be labeled as "obligor" in split-custody orders.

The net-orders method is not limited to the four examples presented in the prior article. It will work in split custody cases where the children are in the same or different age brackets, in split-custody cases where one or both parents have children from other relationships, and finally in shared-custody cases where one or more children spend a significant amount of time with the noncustodial parent. It is also capable of working in any combination of these different types of cases.

The flawed step in the *Arvey* method is the total child support obligation calculation. By adding the basic-support obligations of each child together before taking each parent's Proportional Share, any advantage or disadvantage given to a parent is spread between both parents. This means that a parent with custody of an older child pays more because the formula does not deal with the increased costs in that parent's home. Similarly, a parent with children from other relationship(s) would not get the full advantage of his or her deviation for those children because the deviation would be spread to both parents.

A worksheet for the net-orders method would look like the one below.

In the example there are three children in a split-custody scenario and one of them is in an older age bracket. The key equation in this method takes place when each parent's net-support obligation for their noncustodial child(ren) is calculated. It is at that point that the children's ages take effect and obligate the older child's noncustodial parent to pay more than he or she would using the *Arvey* method.

In a situation where a parent is receiving a deviation for his or her children from other relationships, the net obligation is calculated from a *deviated basic-support obligation per child*. In the prior example

if mother had a fourth child she was obligated to support, then the \$559 basic-support obligation would first be reduced to \$473, and then her net-support obligation for her noncustodial child would be calculated based on her proportional share of that deviated amount.

Finally, a variation of the net-orders formula will even work for a residential schedule deviation, which the court may grant if the parents have shared custody of a child or children. The most common situation is the shared custody of a single child. In this situation a parent's net support obligation for their noncustodial child(ren) equals that parent's proportional share multiplied by the basic-support obligation for that child multiplied by the percentage of time the child is with the other parent ((% income X BSO) X % with other parent). The result is a net-support obligation for the period of time the child is in the other parent's home. The difference between the two net-support obligations would then equal the payer's transfer payment obligation.

The flexibility and simplicity of the netorders method makes it the best procedure to use in both split- and shared-custody cases. A single method for all split- and shared-custody cases is preferable because it makes the legal system more predictable and dependable.

Side note: because a variation of the net-orders method does work in sharedcustody cases, the future might hold an

Monthly net income	= 5	\$3,995.47	(Father)	\$2,015.15	(Mother)
Combined monthly net income	= 5	\$6,010.62			(MACCO S. CO.CO S. D. D. D. A. C. SAFE)
Basic-support obligation per					
child (economic table)	=	\$559.00	(Child #1)	\$559.00	(Child #2)
				\$691.00	(Child #3)
Proportional share of income	=	.665	(Father)	.335	(Mother)
Each parent's net-support obligation					
for their noncustodial child(ren)	=	\$831.25	(Father)	\$187.27	(Mother)
(66.5% X (\$559.00 + \$	691.00	) (CH#2 -	+ CH#3))	(33.5% X \$559.0	0 (CH#1))
Split-custody adjustment		\$831.25	(Father's oblig	ation)	
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Transfer payment obligation	=	\$643.98	(Father owes N	Mother)	

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#### **Gun Rights & Media Bias**

Editor:

Thanks and a tip of the hat to William G. Dennis for his marvelous articles on gun control. They should prove infuriating to those many people, all too many of them lawyers sad to say, who are so quick to argue that our Constitution says not what it clearly says, but what they wish it said.

His point that the mainstream news media in this country are on an ideological campaign to sell gun control is also right on target. Their one sided reporting on the subject should be obvious to anyone willing to see it.

As a former Seattle policeman for twenty-five years I also agree with Mr. Dennis in his contention that cops generally do not favor gun control. They know perfectly well that they can't respond in time to protect people the vast majority of the time, and they don't believe for a minute that gun control laws deter criminals.

We have a crime problem in America, and we have a violence problem. We have not addressed them very effectively, despite the fact that we have known for decades that the vast majority of our crime and violence is the work of a small minority of easily identified individuals. It is about time we addressed crime and violence directly, instead of kidding ourselves that taking guns away from honest people will make it go away. Gun control is not crime control. Claims to the contrary are no more than cheap political demagoguery. Gun control is a bandaid solution to a hemorrhage problem, and it can accomplish nothing but to rob Americans of their right under the Second Amendment to protect themselves. We can do better.

One final thought. I hope you have lots of space in your mail room. If you thought to ever see the end of the debate on gun control, you probably should not have published these very provocative articles by Mr. Dennis.

WILLIAM M. TAYLOR Seattle

#### Charge With Impunity? Lawyers?

Editor:

In twelve years as an attorney I have begun to develop a somewhat thick skin with regard to comments about attorney ethics and financial matters. However, I have also come to expect a certain amount of support from organizations of attorneys who should understand that most attorneys work very hard in a genuine effort to benefit their clients and/or the system as well as earn a living.

I cannot tell you how disturbed I was with the editor's note (August 1995, page 9) and its implication that lawyers charge clients with relative impunity for services rendered. I certainly do not expect to be demeaned by an organization to which I must pay dues in order to practice law in the state of Washington. Any stone tablets, writing instruments, phone lines, fax machines, or e-mail that I may utilize as a lawyer are "acquired independently at my own expense." In addition, I must pay dues to the Bar Association or be denied the right to practice in this state. I just can't see any benefit to Washington Bar Association staff from such a ridiculous statement as was made regarding billing practices.

I have voted in favor of continued services by the Washington State Bar Association at each opportunity. I have paid dues each year and have never complained

of any dues increase. However, that vote will change based on the comment referred to in this letter.

TIMOTHY B. FENNESSY Spokane

#### Partisanship & the WSBA

Editor:

I write in response to Tom G. Cordell's letter in the last issue. During my sojourn in this the "other Washington" I maintain my Washington State Bar membership. In the pages of the Bar News, I watched with interest the debate about the recently failed referendum to limit the use which can be made of our Bar dues. Mr. Cordell suggested that the Bar Association should "[t]ake a position against the Republican National Party's Draconian" tort reform proposals. It is sentiments like these that are responsible for the campaign to restrict the permissible use of our dues. The referendum failed, but to avoid further efforts (and possible First Amendment challenges), the Bar Association and Mr. Cordell ought to be very careful about advocating the use of our Bar dues for a naked political agenda. The American Bar Association has lost thousands of members because of its political stands. Imagine the uproar if the WSBA decided to support efforts to pass a pro-life constitutional amendment or decided to confer honors upon Justice Thomas.

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have differing views on social, political, and moral questions. Neither the Bar Association nor any of its members should ever consider seriously suggestions like that of Mr. Cordell.

HARRY J.F. KORRELL Washington, D.C.

## Clarifying Affirmative Action

Two significant false assumptions underlie much of our national discussion of affirmative action. One false assumption is that all ethnic and racial minorities now receive protection under affirmative action. In fact, many minorities subject to discrimination are not protected under affirmative action. Among these minorities are: Arabs; Jews; in general, all whites from the Middle East and North Africa; all non-English-speaking, non-Hispanic white immigrants. In our national discussion, we would be more accurate in saying that "selected minorities" are protected under affirmative action, rather than referring to "minorities" generically and, thereby, implying that all minorities are afforded protection when they are not.

A second false assumption is that affirmative action exists to help groups identified as low-income, that we go through all the social difficulty of affirmative action in order to raise economically disadvantaged groups toward the economic mean. According to the U.S. Census, the Americans at the top of the economic heap in this country, with the highest income of all groups, are Asians-yet, even though their income is higher than that of whites, Asians enjoy the protection of affirmative action. Some might argue that certain subsets of Asians are poor; but this is also true of certain subsets of whites, and fairness would require that, if all Asians gain protected status under this argument, then so should all whites.

Our national discussion of affirmative action will be more productive if we set aside these false assumptions and realize that, at present, protected status under affirmative action is not granted to all minorities in need of protection from discrimination, nor is affirmative-action protection granted to groups on the basis of economic need. As a society, we should crystallize our reasons for continuing affirmative action; if it is for ethnic and racial minorities subject to discrimination, then it must be for all such minori-

ties; if it is for low-income groups, its protection would cease when those groups rise to, or above, the economic mean. Or, if affirmative action exists for some other reason (proportional racial and ethnic distribution in the businesses and institutions of society, just on principle?), then we need to face that reason squarely, so we can decide whether such an outcome is even tenable, whether the goal is so worthy that we will pursue it at the cost of great social discord.

ALICIA HAYES Issaquah

#### Responses to Gay Affirmative Action

Editor:

This letter responds to the issues raised by Mr. Victor Flatt's article in the August Bar News entitled "Diversity, Discrimination, Affirmative Action and the Gay/ Lesbian Experience." First, are homosexuals a "minority" in the legal sense, i.e., constitutionally entitled to anti-discrimination protection? Mr. Flatt suggests that the answer to that question revolves around whether homosexuality is a choice or an "immutable characteristic." He states, "In terms of constitutional 'equal protection' doctrine, one of the justifications for awarding a group a higher level of scrutiny has been that members are being discriminated against based on a characteristic that 'they cannot change.'" What's the real argument here?—that homosexuality is genetically based? Are people just "born that way?"

Genetics has been offered as an explanatory hypothesis for many behaviors: criminality, alcoholism, obesity, even adultery, of late. Moreover, religion could even be considered "genetic" as an "inherent yearning" toward a supreme being or higher source. That being the case, is heterosexuality also genetic? Why not "homophobia?" Maybe vocal advocates of heterosexuality are genetically driven to preserve, even promote, their own "immutable characteristic." Obviously, if we are all pre-cast in some "orientation" that we cannot change, we are simply creatures driven by instinct and not accountable for our choices. How convenient.

But just in case homosexuality does involve an element of choice, Mr. Flatt devotes some attention to the claim by some that "homosexual behavior is morally wrong." Yet he summarily dismisses

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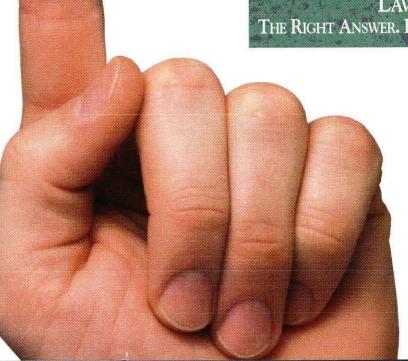
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morality, and its religious roots, with "Adults are free to make choices of conscience about religion that do not hurt others. The same argument applies to gays and lesbians." Now, either it is an "immutable characteristic," or it is a "choice of conscience." Which is it? And who says our moral choices do not affect, even hurt, others? Other forms of so-called "victimless" conduct arguably do not hurt others, but we, through government sanctions, not only discourage such conduct, we penalize it. Examples of such "consenting adult" conduct are drug addiction, prostitution, and to a lesser extent, alcoholism and lewdness.

We do have a stake as a community in the moral choices we make as individuals. Former British Prime Minister Margaret Thatcher recently spoke to this issue quoting a third-century Roman jurist: "What is right is not derived from the rule, but the rule arises from our knowledge of what is right. In other words, the law is founded on what we believe to be true and just. It has moral foundations." 1 Thus, homosexuality will never be right because it has the protection of a "rule," but whatever rules we make concerning the issue must be based on what is right—morally right. Because we recognize that "choices of conscience" affect all of us, not just the individuals themselves, we must accept responsibility for our choices, rather than look to government to protect us from the effects of our choices.

Indeed, the issue of personal accountability was recently addressed by the Supreme Court of this state in the case of Kelly v. Falin, 127 Wn 2d 31 (June 1995). In that case, the survivors of a drunk driver, who killed himself when he slammed his car into a tree, sued the tavern for "over serving" him. The court's decision emphasizes that personal accountability still forms the essence and foundation of freedom, and government cannot and will not always step in and protect us from the consequences of our own choices. The language of the court is almost poetic: "Given a choice between a rule that fosters individual responsibility and one that forsakes personal accountability, we opt for personal agency over dependency and embrace individual autonomy over paternalism."

Not unlike the drunk driver in that case, in another celebrated case, a state representative recently self-destructed from

AIDS. Interestingly, Mr. Flatt did not mention the issue of AIDS anywhere in his article; yet the fact that AIDS is reaching epidemic proportions, primarily among homosexuals, gives cause for serious alarm. This is a disease that produces death. No cure. It's terminal. Carriers infect others, and they die, too. Yet Mr. Flatt would have us believe that such practices "do not hurt others." In my mind, given

the alarming rate at which this dreaded disease seems to be spreading, rather than affirmative action to make sure that homosexuals have access to anywhere they want, maybe we should consider some form of quarantine. Indeed, the state police power is specifically designed to "protect the welfare, health, peace, morals, and safety of the people of the state." <sup>2</sup>

However, the police power has not been

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used to "quarantine" homosexuals, nor, on the other hand, should affirmative action be implemented to grant them preferential access or privileges. Indeed, local ordinances and state initiatives have focused on simply denying homosexuals protected minority status and preferential treatment.

In sum, maybe the best role of government in this situation is no role at all. Homosexuals, at least according to Mr. Flatt, however, want paternalistic protection from the effects of their "choices of conscience," but such is not the role of government. With freedom of choice comes personal accountability; in the case of homosexuality, the only "sanctions" imposed are the equally valid "choices of conscience" that non-homosexuals have a right to make. Affirmative action, in any form, would thus deny the "straight community" the right to live, work, and associate with those whom they may prefer.

The bottom line seems to be that not all personal choices rise to the level of individual rights, enforceable by rule of law. Just as government has seen fit not to exercise the police power to protect the community at large from homosexuality, government should not be used as a mechanism for protecting homosexuality through anti-discrimination or affirmative action legislation. This is one situation where the ninth and tenth Amendments to the U.S. Constitution apply: "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people. The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively or to the people 3 (emphasis the author's)." Government should just leave well enough alone in this situation.

<sup>1</sup> Reprinted by permission from *Imprimis*, a monthly publication of Hillsdale College, Hillsdale. Michigan.

<sup>2</sup> Kelly v. Fallin, 127 Wn 2d at 39 (1995)

<sup>3</sup> The Constitution of the United States, Amendments Nine and Ten.

BRIAN McCOY Seattle

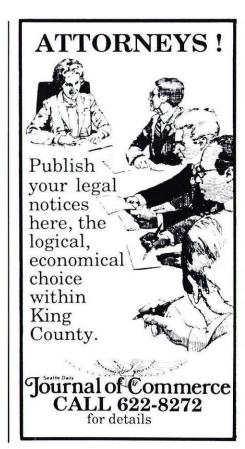
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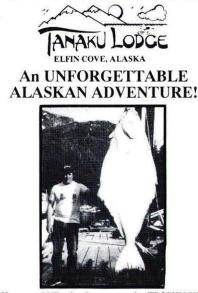
I am writing in response to the August *Bar News* and the article written by Victor B. Flatt entitled "Diversity Discrimination Affirmative Action and the Gay/Lesbian Experience." Mr. Flatt's article is a

very well-written discussion of the topic he has chosen to address. His conclusions follow logically from the premises that he makes; however, his premises are false, therefore the conclusion no matter how logical it might be, is also false.

Homosexuals, although they may be a minority in numbers (only about one or two percent of our population are, in fact, homosexual), do not qualify as a minority for the purpose of having discrimination and affirmative action protections apply to them. Because they choose to have sex with the same sex, they should not be afforded any protection any more than those who choose to have sex with animals, statues, dead bodies, their own children or parents. Their actions are immoral and in many states still illegal. Mr. Flatt wants to fight the fact that morality is an issue for 98 percent of us who are sexually normal. The mere fact that he claims that morality is not an issue is meaningless. Common morals prevent 98 percent of our population from engaging in same sex sexual relations. It is not a matter of mere attraction, it is a matter of morals. Without mores, even cannibalism becomes nothing more than a matter of taste.

It really doesn't matter whether the gay community calls it a matter of choice or an orientation; it still is up to the individual to control his sexual behavior. Whether a person is heterosexual and attracted to 15year-old girls or homosexual and attracted to 15-year-old boys, each would have to control his sexual desires because it is against the law. If an adult male is sexually attracted to his own mother, he would have to control his sexual behavior even if both were consenting adults because it is against the law. Until recently, it was against the law to be involved in homosexual behavior because the law was based on the commonly held moral values of this country. In the late 1960s and early 1970s, as a Los Angeles police officer, I could arrest somebody for a felony if he or she engaged in homosexual behavior. It has only been a matter of 20 years since some of the states in this country have made it a noncriminal act for two adults to consent to homosexual behavior. In those states it may make it legal, but it does not make it moral and certainly doesn't create a federally protected "right." Merely because two or more people consent to homosexual acts, this should not legitimize and establish a suspect class of persons with a

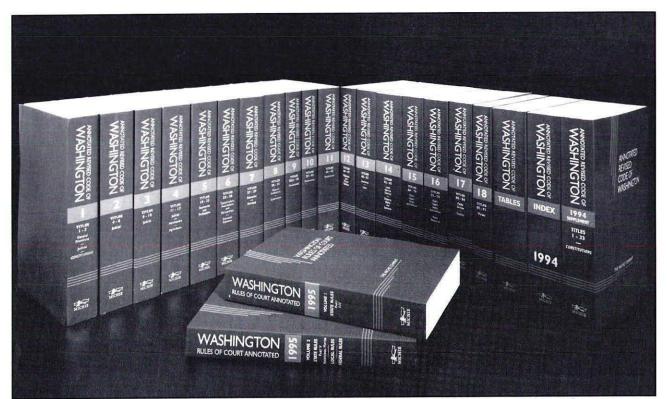




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heightened sense of judicial scrutiny.

Why should anyone be forced to hire or give preference to someone because he or she is engaging in immoral behavior? Mr. Flatt wants to equate a person's religious preference to the preference of being homosexual. Since people cannot be discriminated against on the basis of religion, they therefore should not be discriminated against on the basis of choosing to be homosexual. The failure of that argument is that religions, no matter which one, tend to promote morality, whereas homosexuality is itself immoral behavior. I see no difference in forcing people to hire someone because they are homosexual than forcing people to hire someone because they choose to have sex with an animal. I am sure that those who practice bestiality would have as valid a claim to being discriminated against as those who are involved in same sex sexual behavior.

I am still bewildered as to how the homosexual community manipulated the psychiatric community into removing them from being considered mentally disturbed individuals. Those who are opposed to homosexuality should not be called intolerant as if it were a wrongful reaction. I personally am intolerant of a lot of immorality. What is sad is that it seems that our society, which sets the morals by which we are supposed to abide, is deceived to a large extent through the media and other liberals who are in control of our society into believing that intolerance of immoral behavior by homosexuals is wrong. We should be even more intolerant than homosexuals are accusing us of being. I don't believe in discrimination against people for things they cannot help, such as their race, ethnic background, sex or physical ability. There is a difference, however, in being discriminatory against people who choose to act in an immoral fashion. By being intolerant against homosexuals, you encourage them to behave in ways that are morally acceptable or to suffer the consequences of being a moral deviant.

THOMAS S. OLMSTEAD
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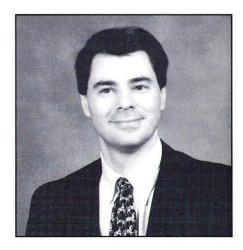
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# And Now For Something Completely Different . . .

by **Hal White** Bar News *Editor* 



Hal White

Now I know how George Selkirk must have felt. Who is this unknown man, you ask?

After many seasons as the New York Yankee's premier player, Babe Ruth finally decided to move on. He had become a baseball legend, and woe to the unfortunate player who had to step into the Babe's shoes and carry on his legacy.

That man was George "Twinkletoes" Selkirk.

After almost eight years, Lindsay Thompson has stepped down as editor of the *Bar News*. His glove, and shoes, will indeed be difficult to fill.

During his tenure as editor, Lindsay brought clarity to Byzantine arguments, humor to self-important topics, and the light of day to obscure matters. On a personal level, I had the opportunity to experience first-hand Lindsay's professionalism during the editorial transition. He will be sorely missed.

Nevertheless, the *Bar News* must go on. As the Babe's—er, Lindsay's—successor, let me tell you a little about my background.

I have lived in Washington for 20 years, attending first Seattle Pacific University, and then U.P.S. School of Law. I graduated from U.P.S. in '83, and passed the bar the following year. Upon admission, I served as attorney for the Easter Seal Society Disability Law Program, which was designed to offer advice and representation to disabled individuals in the

areas of housing, employment, and civil rights.

Subsequent to that position, I signed on as in-house counsel for a real estate/insurance company, where I focused on real property, insurance, and contractual law. Now, nine years later, I have the privilege



Outgoing Bar News Editor Lindsay Thompson (left) and new editor Hal White (right) with the Bar News' first editor, John Rupp, after Rupp received the WSBA Lifetime Service Award at the Sept. 8 Annual Meeting

to serve as editor for the Washington State Bar News.

As with any change in editors there is, of necessity, a change in editorial view-

point and/or magazine layout. Consequently, in the coming months we plan to add regular columns dealing with computerization & the law, and ethical problems facing attorneys. I'll discuss these columns in more detail as they're integrated into the magazine.

We will also incorporate a few minor changes, such as elevating "The Board's Work" and "Calendar" to their own departments, and replacing "News From Home" with specific county breakdowns. The former changes are merited because of the importance of "The Board's Work" and length of the "Calendar," whereas the replacement of "News From Home" will provide a more convenient index for membership news.

Due to the above reorganizations, the Gray Pages (the format, not the content) will be retired. Although some die-hards will lament its pass-

ing more than any personnel change, its raison d'être had lapsed, and I believe the new format will be more convenient to the majority of readers.

I welcome article submissions (if you're a writer in search of a topic, don't hesitate to contact me), submissions to columns, or suggestions regarding improvements to the *Bar News*. Together, we'll see if an excellent magazine can become even better

After all, even after the Babe left, the Yankees still won the World Series.



# Our Future—Together

by Edward F. Shea WSBA President

Whatever your views on the result of the referendum, we have all benefited from the vigor of the campaign and debate. The referendum was costly and time-consuming, but it was necessary to conclude an issue that had been argued for several years. The referendum renewed our appreciation of the reasons for the unified bar, including the power to remain largely self-regulated. It renewed vital interaction among the state, county, minority, and specialty bars and the sections.

We would be disrespectful of the efforts of all involved in the referendum debate if we accepted the result as merely a vote to continue the form of the Association as a unified bar. We must acknowledge that we retained our best opportunity to remain self-regulated. Further, we must also acknowledge that the unified bar has not only the power, but the duty, to carry out the legal profession's responsibilities to both the public and our members.

With that momentum from the vigorous referendum debate and campaign, together we can confront the issues that were deferred during the campaign as well as more recent events which may provide us with the sternest challenges our profession has ever faced. These include external matters, such as federal budget action on legal-service programs. They also include internal matters, such as the quality of member services and budget.

All of us are now aware that the severe cut in federal funding of legal services to the indigent assures a statewide crisis in those programs. We are working with the Access to Justice Board, legal-service organizations and others to find successful strategies to handle that funding crisis. At a minimum, each one of us will have to take a hard look at our case loads and make a personal pledge to "take a legalservice case." This is a burden of the unified bar inherent in our current power to self-regulate. It is hardly coincidence that in a recent letter a member of our Congressional delegation reminded the recipient that some states have imposed on lawyers an annual requirement of more than 25 hours of pro bono service.

In the past, some have urged adoption of an annual, mandatory pro bono requirement of 30 hours for all lawyers, private and public alike. Others have advocated to allow members to buyout of that mandatory obligation. If we are to remain an association with real self-regulation, then we must address these issues. If we do not, the solutions will be imposed on us.

And if a more compelling example is necessary, we need only look to California, where the state legislature has imposed on all lawyers an annual assessment of \$305 to fund the disciplinary system. The total dues for each member of the California Bar are \$478, including the discipline assessment.

In the case of our Disciplinary Board, the ABA review team and our own joint task force recommended substantial changes in our discipline process. While we have yet to adopt them, it was evident that, at a minimum, we had to hire additional lawyers and staff to meet our obligation to both our colleagues and the public. As a partial response to that crisis, we allocated more than \$400,000 in this year's budget. We did so in the full recognition that it would strain our financial capacity. We also remembered the California example and took action to remain self-regulated.

We have instructed our committee studying the Report of the Joint Task Force on Discipline to give us the budget impact for each recommendation of adoption as part of its final report. That report will be discussed at a special meeting on November 3 and 4 and regular Board meetings in December and February. It is highly likely that we will have to increase the budget allocation for discipline.

We will also be considering how to proceed with consideration of the Report of the Task Force on Governance at our October meeting in Everett. There are two recommendations: an expanded Board or a House of Delegates. Both have significant budget impact.

We are now conducting a comprehensive review of Bar finances. It can no longer be postponed. The future is now. We intend to examine whether or not we have taken all prudent action to maximize our dues and non-dues revenue. The original budget proposed for this coming Bar year exceeded revenues by several hundred thousand dollars and would have required the invasion of our recently accumulated surplus. Although the adopted

budget did not exceed projected dues and non-dues revenues, we cut muscle and sinew to be able to say that. There is virtually no contingency money other than a surplus designed to give us several months of operating expenses as recommended by our accountants. Out of a budget of more than \$8,700,000, there is only \$10,000 for contingencies, including possible litigation expenses.

There is also a growing awareness that the Bar has economized to the point that it is having difficulty meeting member demands for services. Both the Disciplinary Board and the Continuing Legal Education Board report the need for increased staff support and additional funding in order to carry out their mandatory functions. Several of our other boards, sections and committees would agree. As we add more than 1,000 members each year, the daily demand by members for bar services has strained our ability to deliver. For example, we receive many complaints from members that the ethics "hotline" is anything but, with delays in response to their calls the rule rather than the exception. Members make similar complaints about requests for MCLE course accreditation. This is not, however, a criticism of the many volunteer attorneys on those boards and the staff assigned to them who are working beyond capacity.

In addition, current Bar offices have been creatively redesigned to accommodate new technologies and personnel, but we are now virtually out of space. In the next few months, we are going to have to seriously consider obtaining additional space for Association offices.

We will be studying these financial issues in the coming months and invite your input. Frankly, we are concerned about our financial capacity to deal with the study of critical issues and to deliver the type and level of service to our members that we all have come to expect. We are cautiously optimistic that the renewed vigor of communication among all our bars, sections and divisions and the positive momentum from the result of the referendum will produce the creative solutions to these issues.

Many complex issues to be resolved? Yes, but if not by us, then who? And if not now, when?



# **Evolution in the Use of WSBA Dues**

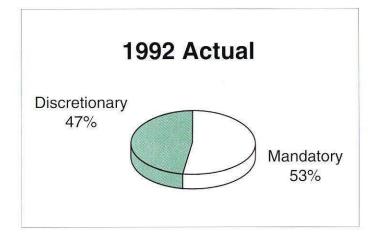
by Dennis P. Harwick WSBA Executive Director

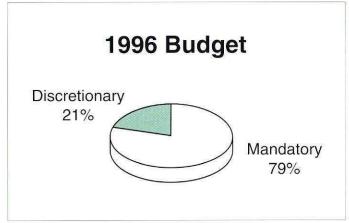
Elsewhere in this issue of *Bar News*, you will find President Ed Shea's first column. Though he has only been back on the Board of Governors as president-elect for the past seven to eight months, Ed studied the big picture facing the WSBA and identified the challenges—especially

the financial challenges. He quickly found out that he has virtually no budget for new or innovative programs—and that some of his favorite programs, like law-related education for the public, no long exist.

Over the past five years, the use of WSBA dues income has undergone a remarkable transformation. During fiscal year 1992, approximately 53 percent of

member dues was used for mandatory and regulatory functions versus 47 percent for discretionary functions. <sup>1</sup> By comparison, the fiscal year 1996 WSBA budget calls for allocating 79 percent of member dues to mandatory and regulatory functions, with only 21 percent allocated to discretionary functions.





There are a number of factors contributing to this dramatic shift:

- Some WSBA programs were eliminated—such as the annual convention, law-related education for the public, and the statewide lawyer referral service,
- Some WSBA programs were redesigned to break-even or make money—such as CLE seminars and publications and the Resources membership directory,
- New non-dues sources of income were developed and existing ones "enhanced"
   — such as bar exam fees, enrollment fees for the law clerk program, user fees for letters of good standing, etc.,
- Lawyer discipline was significantly expanded—discipline staff was increased from 13 in 1991 to 28 at the close of FY 95 (and most of the increase is for new disciplinary counsel to process the backlog of cases).

So what does all this mean? Well, it means that most of the non-dues sources of income have already been tapped. Most of the programs that are capable of producing revenue have already been maximized. And virtually all of the revenues from members' dues is being used for regulatory programs. In addition, the WSBA is facing some major issues with financial ramifications:

- a governance report that recommends creation of a 100+ member house of delegates,
- a lawyer discipline report that recommends the development of significant practice assistance programs to keep lawyers out of trouble, and
- a lease that expires during a tight real estate market.

I know that I have used this column many times to extol the fact that the WSBA has the lowest bar dues—by far—of any

of our peer bar associations. The WSBA also has the leanest staff to member ratio. And it has only had one dues increase since 1981.

Although no one wants to be bar president when a dues increase is considered, I commend Ed Shea for the political courage to ask the tough questions and make the hard decisions during his term of office on whether a dues increase is needed so that the WSBA can continue to meet its obligations to its members and the citizens of the state of Washington.

<sup>1</sup>Mandatory programs—for purposes of this analysis—include the categories of lawyer discipline, bar exam/admissions, MCLE, audits, administration, leadership and membership records. Discretionary programs include CLE seminars and publications, *Bar News*, WSBA Sections, Young Lawyers Division, Court Rules, Communications/PR, Lawyers' Assistance Program, *Resources* directory, Legislative Affairs, Client's Security Program, fee arbitration, Access to Justice coordination, local-bar support, L.A.W. BBS, contributions to the WSBA's reserve and the WSBA contingency budget.

# Assumption of Risk Under Washington Law

#### by Charles H. Van Gorder

#### I. Introduction

he "assumption of risk" doctrine was the subject of a lengthy decision in 1992 by the Washington Supreme Court, Scott v.

Pacific West Mountain Resort, 119 Wn.2d 484, 834 P.2d 6 (1992). Justin Scott was injured while taking skiing lessons when he skied off a practice slalom race course and hit an abandoned tow-rope shack. Scott, a 12-year-old boy, and his parents sued both the ski resort and the ski school for damages resulting from Scott's injuries. The trial court granted summary judgment motions on all claims on behalf of both the ski school and the resort on the basis of an assumption of risk defense.

In a decision containing a comprehensive review of the status of assumption of risk under Washington law, the Court upheld the validity of the express written release signed by Scott's mother, but limited its application to claims on behalf of Scott's parents; claims on behalf of the son were reinstated. The written release pertaining to the ski school, executed only by Scott's parents, was found not to bar Scott's own cause of action. The Court also reiterated the validity of the concept of implied assumption of risk, which could either completely bar recovery or limit a plaintiff's recovery, based upon the facts of the case. The Court remanded the case for a determination of whether there was negligence on the part of the operator of the ski resort and, if so, whether Scott should have recognized the risks that may have resulted from such negligence and caused his injury.

The assumption of risk doctrine has been used by Washington courts to bar or limit recovery on behalf of plaintiffs injured in various recreational activities, including working out at fitness clubs, college cheerleading, BB gun wars, interscholastic athletics, demolition derbys, snow skiing, roller skating, mountain climbing, scuba diving, golfing, and tobogganing. This article examines how the assumption of risk defense may be applied in Washington to limit or bar a claim of negligence, particularly in the context of athletic or other recreational activities, in light of Scott v. Pacific West Mountain Resort and other Washington court opinions following that decision.

#### II. Assumption of Risk in General

In a negligence case, Washington law requires a plaintiff to prove: 1) the existence of a duty owed to the plaintiff, 2) a breach of this duty, 3) a resulting injury or damage to the plaintiff, and 4) a causal relationship between the breach of duty and the damage sustained by the plaintiff. *Pedroza v. Bryant*, 101 Wn.2d 226, 228, 677 P.2d 166 (1984).

As a general rule, assumption of risk may operate to bar a plaintiff from recovering damages where evidence shows that the plaintiff voluntarily assumed a risk of harm arising from negligent or reckless conduct on the part of the defendant. W. Keeton, D. Dobbs, R. Keeton & D. Owen, *Prosser & Keeton on Torts*, § 68, at 495-98 (5th ed. 1984) (cited in *Ridge v.* 

Kladnick, 42 Wn. App. 785, 788, 713 P.2d 1131, review denied, 106 Wn.2d 1011 (1986)). If a defendant is able to prove the plaintiff "assumed the risk" of injury caused by negligent acts on the part of that defendant, there is no duty owed to the plaintiff and a cause of action for negligence is therefore barred. Under certain circumstances (termed "secondary" assumption of risk), assumption of risk may operate only to reduce, rather than to bar, damages to a plaintiff.

#### III. Primary Assumption of Risk

Washington case law distinguishes between "primary" assumption of risk and "secondary" assumption of risk.

> Primary assumption of risk occurs where the plaintiff either expressly or impliedly has consented to relieve the defendant of an obligation or duty to act in a certain way toward him . . . .

Leyendecker v. Cousins, 53 Wn. App. 769, 773, 770 P.2d 675, review denied, 113 Wn.2d 1018 (1989). See also Kirk v. Washington State Univ., 109 Wn.2d 448, 453, 746 P.2d 285 (1987) ("Express and implied primary assumption of risk arise where a plaintiff has consented to relieve the defendant of a duty to the plaintiff regarding specific known risks").

As discussed below, primary assumption of risk can either be express or implied. The distinctions between express and implied assumption of risk were sum-

marized in *Boyce v. West*, 71 Wn. App. 657, 666, 862 P.2d 592 (1993):

Express primary assumption of risk arises out of a contract concept; implied primary assumption of risk arises out of a tort concept. Identical in result to a release of liability which exculpates for ordinary negligence if it occurs, express and implied primary assumption of risk exculpate by shifting the duty of care from the defendant to the plaintiff, thus preventing negligence from occurring. Express assumption of risk bars a claim resulting from risks actually assumed by the plaintiff; implied primary assumption of risk bars a claim resulting from specific known and appreciated risks.

(Citing Scott, 119 Wn.2d at 496-98.)

Primary assumption of risk acts as a complete bar to a plaintiff's recovery on a negligence claim as it acts to remove one of the elements of negligence, i.e., the defendant's alleged duty to the plaintiff. *Leyendecker*, 53 Wn. App. at 773 ("consent operates as a principle of no duty 'hence no breach and no underlying cause of action") (quoting *Codd v. Stevens Pass, Inc.*, 45 Wn. App. 393, 402, 725 P.2d 1008

The key factor in determining if primary assumptions of risk applies is the plaintiff's subjective knowledge of the specific risks to be encountered.

(1986), review denied, 107 Wn.2d 1020 (1987)). See also Kirk, 109 Wn.2d at 453-54 ("The basis of [primary] assumption of risk is the plaintiff's consent to the negation of a duty by the defendant with regard to those risks assumed by the plaintiff"). Although primary assumption of risk acts as a complete bar, it does so only to the extent the alleged damage resulted from the specific risks assumed by the plaintiff.<sup>2</sup>

The key factor in determining if primary assumption of risk applies is the plaintiff's subjective knowledge of the specific risks to be encountered.

The test is a subjective one: Whether the plaintiff in fact understood the risk; not whether the reasonable person of ordinary prudence would comprehend the risk . . . . [T]here must be proof they knew of and appreciated the specific hazard which caused the injury.

Shorter v. Drury, 103 Wn.2d 645, 656-57, 695 P.2d 116 (1985). See also Ridge, 42 Wn. App. at 788 ("assumption of risk involves a knowing encounter of danger and a subjective standard of conduct"). Cf. Scott, 119 Wn.2d at 503 (in the case of a child, "conduct is measured by the conduct of a reasonably careful child of the same age, intelligence, maturity, training and experience").

The elements of a primary assumption of risk defense are as follows:

To establish primary assumption of risk, the evidence must show the plaintiff (1) had full subjective understanding, (2) of the presence and nature of the specific risk, and (3) voluntarily chose to encounter the risk.

Tincani v. Inland Empire Zoological Society, 66 Wn. App. 852, 859, 837 P.2d 640 (1992), aff'd, 124 Wn.2d 121, 875 P.2d 621 (1994) (citing Kirk, 109 Wn.2d at 453). Primary assumption of risk may fall within either of two categories, express or implied primary assumption of risk.

# A. Express Primary Assumption of Risk.

Express primary assumption of risk incorporates an "affirmatively demonstrated, and presumably bargained upon, choice by the plaintiff to relieve the defendant of his legal duty toward the plaintiff." W. Keeton, D. Dobbs, R. Keeton & D. Owen, Prosser and Keeton on Torts § 68 at 496 (5th ed. 1984). The Washington Supreme Court has stated that "courts have generally recognized that, subject to certain exceptions, parties may contract that one shall not be liable for his or her own negligence to another." Wagenblast v. Odessa School Dist. No. 105-157-166J, 110 Wn.2d 845, 848, 758 P.2d 968 (1988).

In *Kirk*, 109 Wn.2d at 453, the Court noted that for primary assumption of risk

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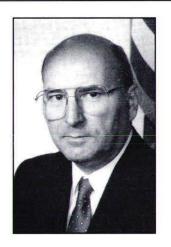
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to apply, the plaintiff's consent must be manifested by an affirmatively demonstrated, and presumably bargained upon, express agreement. In *Scott*, 119 Wn.2d at 496, the Court stated:

Express assumption [of risk] occurs when parties agree in advance that one of them is under no obligation to use reasonable care for the benefit of the other and will not be liable for what would otherwise be negligence. When such a plaintiff is injured by one of the risks for which he or she has agreed to forgo suit, the claim will be barred because that risk was assumed by the plaintiff.

Although an express oral assumption of risk presumably could be valid, most often such express assumptions take the form of a written release or exculpatory clause.<sup>3</sup> The question of the validity of written agreements releasing or "exculpating" a party from potential liability arises frequently.

The general rule in Washington is that exculpatory clauses are enforceable unless (1) they violate public policy, or (2) the negligent act falls greatly below the standard established by law for protection of others or (3) they are inconspicuous.

Scott, 119 Wn.2d at 492. See also Hewitt v. Miller, 11 Wn. App. 72, 77, 521 P.2d 244, review denied, 84 Wn.2d 1007 (1974) ("Absent some statute to the contrary, the generally accepted rule is that contracts against liability for negligence are valid except in those cases where a public interest is involved") (quoting 57 Am. Jur. 2d Negligence § 23 (1971)). Furthermore, "exculpatory clauses are strictly construed and must be clear if the exemption from liability is to be enforced." Scott, 119 Wn.2d at 490 (but the term "negligence" is not essential for an effective release). See also Boyce, 71 Wn. App. at 662.

#### 1. Violation of Public Policy.

Where exculpatory clauses are found to violate public policy, they will not be enforced against a plaintiff.

Although an express oral assumption of risk presumably could be valid, most often such express assumptions take the form of a written release or exculpatory clause.

There are instances where public policy reasons for preserving an obligation of care owed by one person to another outweigh our traditional regard for freedom of contract.

Scott, 119 Wn.2d at 493. The Court in Wagenblast observed that "courts... are usually reluctant to allow those charged with a public duty, which includes the obligation to use reasonable care, to rid themselves of that obligation by contract." Wagenblast, 110 Wn.2d at 849. The Wagenblast Court then set forth the six criteria to be considered in determining

whether an exculpatory agreement should be declared invalid on public policy grounds: 1) The agreement concerns an endeavor of a type generally thought suitable for public regulation; 2) The party seeking exculpation is engaged in performing a service of great importance to the public, which is often a matter of practical necessity for some members of the public; 3) Such party holds itself out as willing to perform this service for any member of the public who seeks it, or at least for any member coming within certain established standards; 4) Because of the essential nature of the service, in the economic setting of the transaction, the party invoking exculpation possesses a decisive advantage of bargaining strength against any member of the public who seeks the services; 5) In exercising a superior bargaining power, the party confronts the public with a standardized adhesion contract of exculpation, and makes no provision whereby a purchaser may pay additional reasonable fees and obtain protection against negligence; and 6) The person or property of members of the public seeking such services must be placed under the control of the furnisher of the services, subject to the risk of carelessness on the part of the furnisher, its employees or agents. Id. at 852-56. See also Boyce, 71 Wn. App. at 663-64 (citing Wagenblast).

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401 2nd Ave. S. Suite 303 Seattle, WA 98104 915 E. Legion Wy Olympia, WA 98501 Examples of exculpatory clauses found to violate public policy include clauses relating to negligence of a bank renting safety deposit boxes, *Sporsem v. First Nat'l Bank of Poulsbo*, 133 Wash. 199, 233 Pac. 641 (1925); to a gas company's duty to inspect pipes and fittings, *Reeder v. Western Gas & Power Co.*, 42 Wn.2d 542, 256 P.2d 825 (1953); to negligence involving a public housing authority, *Thomas v. Housing Auth. of Bremerton*, 71

Wn.2d 69, 426 P.2d 836 (1967); to negligence in a residential landlord-tenant setting, *McCutcheon v. United Homes Corp.*, 79 Wn.2d 443, 486 P.2d 1093 (1971); and to injuries sustained by students engaged in interscholastic sports, *Wagenblast*.

#### 2. Gross Negligence.

Washington courts have recognized that liability releases will be invalid "where the negligent act falls greatly below the standard established by law for the protection of others against unreasonable risk of harm." Conradt v. Four Star Promotions, Inc., 45 Wn. App. 847, 852, 728 P.2d 617 (1986) (quoting Blide, 30 Wn. App. at 574). See also Boyce, 71 Wn. App. at 665 ("If [the defendant's] negligent acts fell greatly below the standard established by law for the protection of others against unreasonable risk of harm, the releases are unenforceable"). In Liberty Furniture, Inc. v. Sonitrol of Spokane, Inc., 53 Wn. App. 879, 882, 770 P.2d 1086 (1989), the Court of Appeals recognized that gross negligence, lying "somewhere between negligence and willful or wanton misconduct," was sufficient to invalidate an exculpatory

Boyce concerned a claim on behalf of a student who died in a scuba diving accident. The appellate court upheld the trial court's summary judgment dismissal of plaintiff's claims because the plaintiff failed to allege gross negligence or to produce substantial evidence of serious negligence. "Since a release of liability exculpates ordinary negligence, if it occurs, the plaintiff must establish gross negligence affirmatively to avoid enforcement of the release." Boyce, 71 Wn. App. at 665.

## 3. Conspicuousness and Opportunity to Review.

The "conspicuousness" of exculpatory clauses deals both with the physical presentation of the clause and a plaintiff's opportunity to review and understand that clause. In Washington, contracts against liability for negligence "are valid unless the releasing language is so inconspicuous that reasonable persons could reach different conclusions as to whether the document was unwittingly signed." McCorkle v. Hall, 56 Wn. App. 80, 83, 782 P.2d 574 (1989). The sufficiency of the language of the exculpatory clause is generally a question of law. Scott, 119 Wn.2d at 490; cf. McCorkle, 56 Wn. App. at 74 (discussed below). In addition to the conspicuousness of the exculpatory clause, the plaintiff must also have had ample opportunity to fully examine the language of the release. McCorkle, 56 Wn. App. at 83.

McCorkle, Conradt, and Baker v. Seattle, 79 Wn.2d 198, 484 P.2d 405 (1971), provide guidance concerning the requisite conspicuousness of an exculpatory clause; the clauses in McCorkle and Baker were found not to be clearly sufficient. McCorkle

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#### William F. Lincoln

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Friday, December 1, 1995 Stouffer Madison Hotel, downtown Seattle (206) 545-5165 involved the interpretation of a release that the plaintiff signed when joining a fitness club. Even though the plaintiff testified that he did not read the liability release before signing the application to join the club, the trial court granted a defense motion for summary judgment, holding that the liability release was controlling. The Court of Appeals reversed and remanded for trial because there was an issue of fact as to whether the plaintiff's signature was "unwittingly" made, and whether "the disclaimer language was so conspicuous that he could not have unwittingly signed the application." McCorkle, 56 Wn. App. at 84.

The exculpatory clause at issue in *Baker* was contained in the middle of a one-page Golf Cart Rental Agreement. Although the size of the print of that clause was no smaller than the rest of the agreement, the court found that the exculpatory clause would have been observed only if the plaintiff had read the entire agreement. Thus, the clause was found not to be conspicuous and did not operate to bar plaintiff's claim. *Baker*, 79 Wn.2d at 202.

In Conradt, the subject release was found to be sufficiently conspicuous and summary judgment in favor of the defendant was affirmed upon appeal. Conradt concerned the validity of a release signed by a driver in a demolition derby. The court found the release was entirely addressed to the obvious and inherent risks and dangers in racing and the voluntary assumption of those risks, and contained **BOLDFACE** emphasis throughout. Further, above the signature line on the release was the "conspicuous statement 'I have read this release." Conradt, 45 Wn. App. at 850. Under these circumstances, the court found there was "no issue of fact as to [the plaintiff's] contemplation of the risk involved." Id.

# B. Implied Primary Assumption of Risk.

The second category, implied primary assumption of risk, is similarly based on consent by the plaintiff, "but without the 'additional ceremonial and evidential weight of an express agreement." *Kirk*, 109 Wn.2d at 453 (quoting *Prosser* at 496). It "arises where a plaintiff has impliedly consented (often in advance of any negligence by the defendant) to relieve defendant of a duty to plaintiff regarding specific *known* and appreciated

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To the extent a plaintiff is injured as a result of a risk inherent in and necessary to a sport or other activity, the defendant owes no duty: and there is, therefore, no negligence.

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risks." *Scott*, 119 Wn.2d at 497 (emphasis in original) (cited in *Tincani v. Inland Empire Zoological Society*, 124 Wn.2d 121, 144, 875 P.2d 621 (1994).

Primary implied assumption of risk acts as a complete bar to a plaintiff's recovery. Scott, 119 Wn.2d at 495 ("Primary implied assumption of risk continues to act as a complete bar to recovery after the adoption of comparative negligence laws"). See also Tincani, 124 Wn.2d at 143 ("Assumption of the risk in this form is really a principle of no duty, or no negligence, and so denies the existence of the underlying action. Therefore, implied primary assumption of the risk remains a complete bar to recovery"); Ridge, 42 Wn. App. at 788 ("this primary type of assumption of risk should continue to bar recovery even after the adoption of comparative negligence or fault because assumption of the risk in this form is, in reality, the principle of no duty—hence no breach and no underlying cause of action") (cited with approval in Scott, 119 Wn.2d at 497); Levendecker, 53 Wn. App at 774; Codd, 45 Wn. App. at 402.

A critical factual issue in applying primary implied assumption of risk is the scope of the risks assumed by the plaintiff, i.e., "what risks were impliedly assumed and which remain as a potential basis for liability." Scott, 119 Wn.2d at 497. "Implied *primary* assumption of risk means the plaintiff assumes the dangers that are inherent in and necessary to the particular sport or activity." Id. at 501 (emphasis in original) (quoted in *Tincani*, 124 Wn.2d at 143). See also Ridge, 42 Wn. App. at 788 ("Those who participate in sports or amusements are taken to assume known risks of being hurt, although they are deemed not to have consented to unsportsmanlike conduct rule violations, which are not part of the game. By taking part in the game, [plaintiff] agreed to accept the risks inherent in the game that were obvious and necessary"). "To the extent a plaintiff is injured as a result of a risk inherent in and necessary to a sport or other activity, the defendant owes no duty; and there is, therefore, no negligence." *Tincani*, 124 Wn.2d at 144 (citing *Scott*, 119 Wn.2d at 498).

# C. Limitations on Primary Assumption of Risk.

As noted above, in order to be effective, exculpatory clauses must not violate public policy or be vague or inconspicuous, nor can they release liability resulting from conduct constituting gross negligence. There are, however, additional limi-



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... to the extent a parent's release of a third party's liability for negligence purports to bar a child's own cause of action, it violates public policy and is unenforceable.

tations on the effectiveness of primary assumption of risk.

The most far-reaching limitation may be the Court's recent determination that a parent does not have the legal authority to execute a release on behalf of a minor child. The Court has held that "to the extent a parent's release of a third party's liability for negligence purports to bar a child's own cause of action, it violates public policy and is unenforceable." *Scott*, 119 Wn.2d at 495. Such a release will operate, however, to bar the parents' cause of action based upon their child's injury. *Id*.

Although primary assumption of risk operates as a complete bar to a cause of action based upon negligence, the risk that allegedly caused the damage must be

a risk that was specifically known and appreciated by the plaintiff.

One who participates in sports "assumes the risks" which are inherent in the sport. To the extent a plaintiff is injured as a result of a risk inherent in the sport, the defendant has no duty and there is no negligence.... A defendant simply does not have a duty to protect a sports participant from dangers which are an inherent and normal part of a sport.

*Scott*, 119 Wn.2d at 498 (emphasis in original). Thus, a plaintiff assumes only those risks that are inherent in and neces-

sary to the particular sport or activity. *Id.* at 501. If a plaintiff is injured as a result of a risk that was not known or appreciated at the time the course of conduct was entered into, the claim will not be barred by this defense.

Assumption of risk may act to limit recovery but only to the extent the plaintiff's damages resulted from the specific risks known to the plaintiff and voluntarily encountered. To the extent a plaintiff's injuries resulted from other risks, created by the defendant, the defendant remains liable for that portion.

Kirk, 109 Wn.2d at 454-55 (quoted in *Tincani*, 66 Wn. App. at 860). Thus in Kirk, the plaintiff was held not to have assumed the risks of, and was not barred from recovering for, injuries resulting from the university's negligent provision of dangerous facilities or improper instruction or supervision.

#### IV. Secondary Assumption of Risk

Secondary assumption of risk occurs when "the plaintiff is aware of a risk that already has been created by the negligence of the defendant yet chooses to voluntarily encounter it." Leyendecker, 53 Wn. App. at 774. Secondary assumption of risk differs from primary assumption in that secondary assumption of risk "is not truly consensual, but is a form of contributory negligence, in which the negligence consists of making the wrong choice and voluntarily encountering a known unreasonable risk." Id. Secondary assumption of risk results in a reduction of damages rather than a complete bar to the recovery of damages. Scott, 119 Wn.2d at 497 (cited in Yurkovich v. Rose, 68 Wn. App. 643, 656, 847 P.2d 925, review denied, 121 Wn.2d 1029 (1993). Secondary assumption of risk has two categories: "implied unreasonable" and "implied reasonable" assumption of risk. Kirk, 109 Wn.2d at 454; Leyendecker, 53 Wn. App. at 774.

# A. Implied Unreasonable Assumption of Risk.

This category "focuses . . . upon the . . . issue of the objective unreasonableness of the plaintiff's conduct in assuming the



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222 Wall Street, Suite 100 Seattle, WA 98121 Email: barry@abcdprint.com Files: printit@abcdprint.com Toll Free: 1/800/443-1875 Ph: (206) 443-1515 FAX: (206) 443-4322 risk." Kirk, 109 Wn.2d at 454. "[O]ne who willingly and unreasonably encounters a known risk created by the negligence of another may be held to have assumed that risk." ITT Rayonier Inc. v. Puget Sound Freight Lines, 44 Wn. App. 368, 373, 722 P.2d 1310 (1986). The Washington courts have determined that it is a jury question whether the plaintiff acted in an objectively unreasonable manner in assuming the risk of the defendant's conduct. If it is found the plaintiff acted unreasonably, Washington law requires a reduction in damages based on the percentage of damage contributorily caused by the plaintiff. Id. at 375-76.4

B. Implied Reasonable Assumption of Risk.

This category of assumption of risk contemplates a situation where the plaintiff impliedly assumed the risk, but acted reasonably in doing so. *Leyendecker*, 53 Wn. App. at 774 n.2. Historically, there have been differing views on how to treat this category of assumption of risk.

(1) **Prosser View.** The Prosser view asserts that implied reasonable assumption of risk should not be allowed to reduce a plaintiff's damage in any way:

It would thus appear odd if the plaintiff's reasonable assumption of the risk to which he was exposed by the negligence of the defendant were treated as an absolute bar. Nor logically should it even factor in to reduce the plaintiff's damages, since his conduct has by definition been free from blame.

Prosser, at 497-98.

(2) Schwartz View. Professor Schwartz argues that implied reasonable assumption of risk is an issue that should be given to the jury for consideration:

When a person's conduct under the facts is truly voluntary and when he knows of the specific risk he is to encounter, this is a form of responsibility or fault that the jury should evaluate.

V. Schwartz, *Comparative Negligence*, § 9.5, at 180 (2d ed. 1986) (quoted with approval in *Kirk*, 109 Wn.2d at 458).

(3) Washington View. Noting that the issue of implied reasonable assumption of

The Court held that implied reasonable assumption of risk, if it was voluntary on the part of a plaintiff, is a matter for the jury to address and is a damage-reducing factor

rather than a complete bar.

risk was the subject of extensive discussion by the courts and legal commentators, the Washington Supreme Court has stated it favors the reasoning of Professor Schwartz. The Court held that implied reasonable assumption of risk, if it was voluntary on the part of a plaintiff, is a matter for the jury to address and is a damage-reducing factor rather than a complete bar. *Kirk*, 109 Wn.2d at 457-58.

#### V. Conclusions and Recommendations

In Washington, courts will apply the defense of assumption of risk as a *complete bar* to a plaintiff's negligence claim if offered, or if the defendant establishes by a preponderance of the evidence the

plaintiff subjectively knew of the risks to be encountered and expressly or impliedly decided to encounter the known risk. For a party to insulate itself, Washington courts will uphold written agreements "exculpating" a defendant from potential liability resulting from activities which may be classified as "risky" or "dangerous," but only if particular public interests are not involved.

When a defendant raises the defense of an express primary assumption of risk, Washington courts will require proof the exculpatory language was conspicuous, the party signing understood the significance of the document, and there was ample opportunity for the injured party to examine the release prior to the signing.

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All contracts that seek to release a party from potential liability should contain clearly written language indicating that the party signing the agreement is assuming all risks of injury or damage resulting from the activity in which he or she seeks to engage.<sup>5</sup> Specific risks that can be anticipated should be itemized in the release. All exculpatory language should be printed in bold format or in a manner that makes it "stand out" on the page. Once the document is prepared in a clear and easily understandable manner, the party signing must be given a reasonable opportunity to read the document and to understand its contents.

#### Endnotes

<sup>1</sup> In a case involving strict liability, however, assumption of risk is a damage-reducing factor rather than a bar to recovery. *South v. A.B. Chance Co.*, 96 Wn.2d 439, 635 P.2d 728 (1981) (cited in *Campbell v. ITE Imperial Corp.*, 107

Wn.2d807,819-20,733 P.2d969 (1987)).

<sup>2</sup> When damages are partly due to a defendant's negligence and the risks thereof were not expressly assumed by a plaintiff, that plaintiff may still recover a portion of his or her damages. *See*, e.g., *Shorter v. Drury*, 103 Wn.2d 645, 695 P.2d 116 (1985) (plaintiff held to have assumed risk of injury from refusing a blood transfusion, but did not assume risk of negligence of physician; plaintiff allowed a recovery reduced by 75%).

<sup>3</sup> Note that an express preinjury release of an employer may operate to release any employees as well. *Boyce*, 71 Wn. App. at 662-63.

<sup>4</sup> In *Tincani*, the jury concluded that the plaintiff voluntarily chose to encounter a risk created by the defendant. The Court held this type of assumption of risk is called "unreasonable assumption of the risk" and did not bar all recovery as the jury may apportion the percentage of the fault attributable to each responsible party.

*Tincani*, 124 Wn.2d at 145 (quoting *Scott*, 119 Wn.2d at 499).

<sup>5</sup> The express assumption of *all risks* in a release has been found to include the risks of negligent instruction and supervision. *See Boyce*, 71 Wn. App. at 666-67 ("... knowledge of a particular risk is unnecessary when there is an express agreement to assume all risk; by express agreement a plaintiff may undertake to assume all of the risks of a particular . . . situation, *whether they are known or unknown to him.*") (quoting Restatement 2d Torts § 496D, com. a; Prosser & Keeton, *Torts* (5th ed. 1984) § 68, p. 482).



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# Washington State Constitutional Research: A Recipe for a *Gunwall* Analysis

by Kelly Kunsch

#### Introduction



tate constitutional interpretation has achieved a growing prominence in the legal landscape over the last decade. This can

be attributed in large part to movements in the judicial, academic and political communities. Because researching state constitutional issues is very different from the usual types of legal research, a discussion of the available resources and strategies for their use is essential before making such arguments.

#### **Background**

The United States Supreme Court recognizes that state constitutions may accord more rights to their citizens than the federal constitution does. In fact, the appellate courts of a majority of states have interpreted their state constitutions to provide greater protection for individual rights than the United States Constitution does.<sup>2</sup>

In Washington, making a state constitutional argument requires a specified type of analysis that the state Supreme Court announced in *State v. Gunwall.*<sup>3</sup> Even if the courts have already determined that a particular provision of the state constitution may be interpreted differently than its federal counterpart, an attorney still must prepare a *Gunwall* argument to support a finding that such an interpretation is appropriate for the facts of a particular case. This article is intended to help attorneys prepare and research for such an argument.

#### History of the Washington Constitution

On July 4, 1889, an elected group of delegates met in Olympia for the purpose of drafting a constitution for the then Territory of Washington. The delegates approved the Washington Constitution on August 22, the people ratified it at an election on October 1, and it became effective upon the state's admission to the union on November 11, 1889. This constitution was based primarily on a model draft constitution prepared by William Lair Hill and on the constitutions of numerous other states (particularly Oregon and California).<sup>4</sup>

The original Washington Constitution consisted of 27 Articles.<sup>5</sup> It has since been amended numerous times throughout the state's history. However, most of the focus in state constitutional interpretation has been on provisions in the original constitution, particularly the Declaration of Rights.<sup>6</sup> Because of that, this article concentrates on researching the provisions in that original version.

#### The Gunwall decision

In 1986, the Washington Supreme Court decided its ground-breaking case on state constitutional interpretation: *State v. Gunwall.* <sup>7</sup> *Gunwall* was a search and seizure case argued under the Article 1, section 7, right to privacy provision of the Washington Constitution. The court found that the privacy provision of the state

constitution did provide greater protection than the federal constitution.<sup>8</sup>

The Gunwall court announced six nonexclusive neutral criteria as relevant in determining whether the Washington State Constitution should be considered as extending broader rights to its citizens than the United States Constitution. The criteria are: (1) the textual language; (2) differences in the texts; (3) constitutional history; (4) preexisting state law; (5) structural differences; and (6) matters of particular state or local concern.9 Later decisions have held that although not all of the factors will be relevant to every case, 10 failure to analyze the Gunwall factors precludes a court from addressing the interpretation of the state constitution.11

The court has said that the proper inquiry under *Gunwall* is not to ask whether state constitutional analysis is necessary, but rather whether on a given subject matter the Washington constitutional provision should afford greater protection than the minimum protection afforded by the federal constitution.<sup>12</sup> Furthermore, there is no presumption of adherence to federal constitutional analysis. With those parameters in mind, an attorney can begin researching and analyzing the factors.

# Researching the Gunwall factors

1. The Textual Language

A detailed discussion of the rules of construction for constitutions is beyond the scope of this article.<sup>13</sup> However, at-

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Because a constitution is an expression of the people's will, its words must be interpreted with the meaning they would have had to ordinary voters rather than lawyers and legislators.

torneys should be aware of the overriding and basic maxim of textual analysis: words used must be given their common and ordinary meaning. <sup>14</sup> Because a constitution is an expression of the people's will, its words must be interpreted with the meaning they would have had to ordinary voters rather than lawyers and legislators. <sup>15</sup>

Since the meaning of a given word may have changed over the history of the state, one must look to the meaning at the time the provision was adopted. <sup>16</sup> Usually, that meaning must be sought from sources extrinsic to the constitution. In a legal context, that usually translates into decisions of the courts contemporaneous with the provision's enactment. <sup>17</sup> A useful re-

source for contemporaneous legal definitions is Bouvier's Law Dictionary. 18 Like current law dictionaries, it gives citations to primary authority as well as giving a definition. For nonlegal definitions, dictionaries dating

back to the enactment of the constitution can be found in most research libraries. <sup>19</sup>

#### 2. Differences in the Texts

Differences in the text of parallel state and federal constitutional provisions can indicate that state founders intended a meaning different from that of the drafters of the federal constitutional provisions.<sup>20</sup> However, even where the Washington Constitution contains language identical to a provision of the United States or some other state constitution, it is possible that the intent of the framers was different from that of the framers of the other constitution.<sup>21</sup> The text of both the federal and state constitution are reprinted in the Revised Code of Washington (among other places).

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# 3. Constitutional History and Common Law History

Probably the best source for researching the history of the Constitutional Convention is: Quentin Shipley Smith, The Journal of the Washington State Constitutional Convention 1889 with Analytical Index (Beverly P. Rosenow, ed. 1962), published by Book Publishing Company. The first part of the work consists of daily summaries of the proceedings. The second major part is an index arranged by Article and Section numbers with references back to the daily summaries. Unfortunately, the journal does not contain verbatim debates. To partially compensate for this, the courts have used newspaper articles to aid interpretation.<sup>22</sup> Many of the state's newspapers at the time covered the Convention. Some even printed verbatim reports of debates for particular provisions. Since the Convention met between July 4 and August 22, 1889, papers from those dates likely have the most significance.<sup>23</sup> However, articles both before and after those dates can be useful in constitutional interpretation. A collection of contemporary newspaper articles compiled by Beverly P. Rosenow is available from the Marian G. Gallagher (University of Washington) Law Library.24

Another technique that can be employed in interpreting the state constitution is to compare and contrast the provisions to similar ones in constitutions that the delegates copied from or referred to in drafting the Washington Constitution. A useful resource for finding parallel state constitutions is Arthur S. Beardsley's Notes on the Sources of the Constitution of the State of Washington (reprinted in Washington's Legislative Manual). The text of other state constitutions can usually be found in the state's code. Other sources of original texts are: William Finley Swindler's Sources and Documents of United States Constitutions (1973) and Francis Newton Thorpe's Federal and State Constitutions (1909). One other valuable text is titled Washington: A Constitution Adapted to the Coming State by William Lair Hill. Copies of this were placed on the desks of the members of the Constitutional Convention and were used as a working basis upon which to build the new state constitution.

In addition to the above sources for

constitutional texts, contemporaneous interpretations of the language used in the constitution can be found in both Hill's Code<sup>25</sup> and Ballinger's Code.<sup>26</sup> The latter's extensive cross-referencing to other state constitutions has not been replicated in any other resource.

#### 4. Preexisting State Law

State law may be responsive to special concerns of its citizens long before they are addressed by analogous constitutional claims. For this reason, preexisting state law can help to define the scope of a constitutional right later established. <sup>27</sup> One Court of Appeals case implies that this factor might, in fact, be the most persuasive factor in compelling expansion of a right under the state constitution. <sup>28</sup>

In 1889, Washington's statutory law existed in the form of the Code of 1881 and the session laws from the ensuing odd-numbered years. The Code of 1881 is not annotated. However, Hill's Code, published shortly after 1889, is annotated and, therefore, might be useful for finding contemporaneous cases interpreting the statutes. In addition, the Washington Digest includes case law predating statehood. Case law for all state and federal case law at the time can be found using the "Century Digest." <sup>29</sup>

#### 5. Structural Differences

The Washington Constitution's differences from the federal Constitution go far beyond particular differences in language and history. The structures of the documents themselves are substantially different. As Gunwall states, the United States Constitution is a grant of limited enumerated powers to the federal government. By contrast, the Washington Constitution imposes limitations on the otherwise plenary power of the state to do anything not expressly forbidden by the state constitution or federal law. 30 Thus, the state constitution, unlike the federal constitution. guarantees fundamental rights rather than restricts them.<sup>31</sup> This overriding structural difference always points toward pursuing an independent state constitutional analysis.32

# 6. Matters of Particular State or Local Concern

Gunwall distinguishes matters of local character from matters where national uniformity is important.<sup>33</sup> A matter of

local character supports an argument in favor of independent state analysis. Matters requiring national uniformity favor state constitutional interpretation in accord with that of the federal Constitution.

Specifically, the courts have held that privacy interests are matters of particular state interest and local concern.34 In addition, the courts have held that state law enforcement measures are a matter of local concern. 35 Conversely, adoption of a uniform law is a clear statement that the matter is not one of special local concern but one for which national and uniform policies are desirable. 36 Thus, in researching this factor, a quick perusal of the index to Uniform Laws Annotated 37 might provide evidence of the perceived need for national uniformity. In addition, an attorney might look to cases discussing the Cooley doctrine and its progeny under the Commerce Clause for analysis of national versus local interest.38

#### 7. Other Factors

*Gunwall* specifically states that its factors are not exclusive.<sup>39</sup> Therefore, in addition to researching the above *Gunwall* 

factors, an attorney should consider whether other factors might also be relevant. One such additional factor that the courts have used is uncertainty at the federal level. 40 Other potential factors will rely on the future arguments of members of the bar.

Finally, to put all of the above within its proper historical context, an attorney arguing a state constitutional claim should be familiar with the national and regional political climate at the time of the Washington Constitution's enactment. The most widely recognized histories of the State of Washington include: Lloyd Spencer and Lancaster Pollard's A History of the State of Washington (various publication dates); Clinton A. Snowden's History of Washington: The Rise and Progress of an American State (1909); and Julian Hawthorne's History of Washington the Evergreen State: From Early Dawn to Daylight (1893).

#### Endnotes

<sup>1</sup> See Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74 (1980).

<sup>2</sup>Robert F. Utter, "Freedom and Diver-



sity in a Federal System: Perspectives on State Constitutions and the Washington Declaration of Rights," 7 *U. Puget Sound L. Rev.* 491, 499 (1984).

<sup>3</sup>106 Wn.2d 54, 720 P.2d 808 (1986).

<sup>4</sup>Arthur S. Beardsley, *Sources of the Washington State Constitution* at Preface (1939), reprinted in: State of Washington, *Legislative Manual* (published biannually). In addition to the constitutions already mentioned, Hill utilized a constitution proposed and rejected by Congress in 1878. This 1878 Constitution can be researched in Edmond S. Meany & John T. Condon, *Washington's First Constitution*, 1878, and Proceedings of the Convention (1989).

<sup>5</sup>A copy of the original version of the Washington Constitution with some annotations to case law can be found at 2 William Lair Hill, *The General Statutes and Codes of the State of Washington* (1891) (commonly known as *Hill's Code*).

<sup>6</sup>Wash, Const. Art. I.

<sup>7</sup>106 Wn.2d 54, 720 P.2d 808 (1986). <sup>8</sup>Gunwall, 106 Wn.2d at 63, 720 P.2d at 813.

<sup>9</sup>Gunwall, 106 Wn.2d at 58, 720 P.2d at 811.

<sup>10</sup>State v. Spurgeon, 63 Wn.App. 503, 505, 820 P.2d 960, 962 (1991).

<sup>11</sup>See State v. Brett, 126 Wn.2d 136, 892 P.2d 29 (1995); State v. Olivas, 122 Wn.2d 73, 856 P.2d 1067 (1993); Clark v. Pacificorp, 116 Wn.2d 804, 809 P.2d 176 (1991); State v. Irizarry, 111 Wn.2d 591,

763 P.2d 432 (1988).

<sup>12</sup>State v. Reece, 110 Wn.2d 766, 777-78, 757 P.2d 947, 953-54 (1988).

<sup>13</sup>An excellent overview of the rules of construction can be found in: Thomas C. Marks, Jr. & John F. Cooper, *State Constitutional Law in a Nutshell* 8-32 (Chapter 2) (West Publishing 1988).

<sup>14</sup>State ex rel. O'Connell v. Slavin, 75 Wn. 2d554, 557, 452 P.2d943, 945 (1969). See also Utter, supra note 2, at 509-511, for additional maxims of textual analysis.

<sup>15</sup>Id. at 510.

<sup>16</sup>State v. Brunn, 22 Wn.2d 120, 139, 154 P.2d 826, 835 (1945), overturned on other grounds, State v. Matuszewski, 30 Wn.App. 714, 637 P.2d 994 (1981).

17See Id.

<sup>18</sup>John Bouvier, *Bouvier's Law Dictionary and Concise Encyclopedia*. There are various editions and dates of publication.

<sup>19</sup>Titles include: The Century Dictionary: An Encyclopedic Lexicon of the English Language; Webster's International Dictionary; Standard Dictionary of the English Language (Funk & Wagnall); and The New English Dictionary on Historical Principles (begun in 1884, this later became Oxford English Dictionary).

<sup>20</sup>State v. Wethered, 110 Wn.2d 466, 472, 755 P.2d 797, 800 (1988).

72, 755 P.2d 797, 800 (1988).

<sup>21</sup>Utter, *supra* note 2, at 514-515.

<sup>22</sup>See , e.g., Yelle v. Bishop, 55 Wn. 2d 286, 347 P.2d 1081 (1959).

<sup>23</sup>For a list of newspapers published at the time, *see*: Quentin Shipley Smith, *The Journal of the State Constitutional convention with Analytical Index* at 931.

<sup>24</sup>Beverly Paulik Rosenow, Washington State Constitutional Convention Journal, 1889, Working Papers (1962). The photostatic copies are available in the library's Rare Book Room. Attorneys are advised to call ahead to arrange a viewing time.

<sup>25</sup>Hill, supra note 5.

<sup>26</sup>Richard Achilles Ballinger, Ballinger's Annotated Codes and Statutes of Washington (Bancroft-Whitney 1897).

<sup>27</sup>Gunwall, 106 Wn.2d at 62, 720 P.2d at 812.

<sup>28</sup>See Spurgeon, 63 Wn.App. at 505, 820 P.2d at 962: "Nor do we believe these [Gunwall] factors, with the possible exception of preexisting state law, will ever compel an expansion of a right under the state constitution."

<sup>29</sup>Century Edition of the American Digest: A Complete Digest of All Reported American Cases from the Earliest Times to 1896 (West 1897).

<sup>30</sup>Gunwall, 106 Wn.2d at 66, 720 P.2d at 815.

<sup>31</sup>Gunwall, 106 Wn.2d at 62, 720 P.2d 812.

<sup>32</sup>State v. Young, 123 Wn.2d 173, 180, 867 P.2d 593, 596 (1994).

<sup>33</sup>Gunwall, 106 Wn.2d at 62, 720 P.2d at 813.

<sup>34</sup>See State v. Boland, 115 Wn.2d 571, 576, 800 P.2d 1112 (1990).

<sup>35</sup>Young, 123 Wn.2d at 180, 867 P.2d at 596.

<sup>36</sup>See State v. McFadden, 63 Wn.App. 441, 447, 820 P.2d 53, 56 (1991).

<sup>37</sup>National Conference of Commissioners on Uniform State Laws, *Uniform Laws Annotated* (Master Ed. West Publishing).

<sup>38</sup>Cooley v. Board of Wardens of Philadelphia, 53 U.S. 299 (1851), required that the court determine whether the subject of a regulation was of a nature requiring uniform nation regulation or diverse local regulation. See also Annotations (in annotated codes) to: U.S. Const. Art. 1, sec. 8, cl. 3.

<sup>39</sup>Gunwall, 106 Wn.2d at 58, 720 P.2d at 811.

<sup>40</sup> First Covenant Church v. Seattle, 120 Wn.2d 203, 225, 840 P.2d 174, 187 (1992).



Kelly Kunsch is a WSBA member and reference librarian at Seattle University School of Law.

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by Lindsay T. Thompson Outgoing Editor, Bar News

#### Seattle, September 7-8, 1995

**Present**: The president and president-elect, governors and governors-elect. Also present: Pamela Cairns (WSBA Young Lawyers Division); Tom Campbell (Washington Association of Criminal Defense Lawyers/South King County Bar Association); Mike Carrico (WSBA Real Property, Probate & Trust Section); Judge Mary Gallagher Dilley (Washington Administrative Law Judges Association); Evelyn Fielding (Government Lawyers Bar Association); Tom Fitzpatrick (ABA State Delegate); Chuck Foster (Office of the Administrator for the Courts); Dan Gottlieb (King County Bar Association); Dennis P. Harwick (WSBA Executive Director); Janet Helson (Lesbian and Gay Legal Society of Puget Sound); Kathy Kafka (King County Bar Association Young Lawyers Division); Jim Kaufman (Washington Association of Prosecuting Attorneys); Kristal Wiitala Knutson (Government Lawyers Bar Association); Nancy Krier (Washington Women Lawyers); Judge Charles Mertel (Superior Court Judges Association); Narda Pierce (Attorney General's Office); Joel S. Summer (Washington Defense Trial Lawyers Association); Lindsay Thompson (Bar News editor); Sandra Watson (Washington Association of Municipal Attorneys); Robert Welden (WSBA General Counsel); and Hal White (Bar News editor-designate).

**President's Report**: President Ron Gould gave a brief report on the winding down of his year in office. He told the board of his "extraordinary" trip to Republic and visit with the lawyers of northeastern Washington, of handling inquiries and putting out a few last-minute fires (as president, not in Republic), and praised incoming president Ed Shea for an effective transition. "It has been a marvelous year," Gould commented, noting that the bar association enjoys a great diversity of membership and points of view: geographic, ethnic, and cultural. It has the beneficial traditions of calling on the advice and support of past bar leaders and a strong and independent judiciary. And it is a unified bar. Gould sees challenges ahead as well: the need to keep the unity of the association in good standing given the increasingly centrifugal forces that pull lawyers into more and more specialty bar groups. He called for consideration of a bar convention every few years, for keeping bar group liaisons active and present at Board of Governors meetings, and called on lawyers to keep in closer contact with their communities.

President-elect Shea thanked Gould for his comments, and gave a brief account of his attendance at the National Conference of Bar Presidents.

Executive Director's Report: After approval of the minutes, Dennis Harwick told the board he is working with some volunteer cyberheads (actually, he called them "lawyers familiar with the Internet") on developing a "web page" for WSBA. A web page is like a specialty channel on cable TV and makes information about the bar and its services available to the public and lawyers.

In response to proposals by lawyers and an article by George Reimer in the *Bar News* on regionalizing bar membership among

the northwest states, Harwick told the board a group of bar association executives from Idaho, Oregon and Washington has been holding meetings to explore the concept of comity between the three states for meeting CLE requirements. The idea is that rather than try to make every state's CLE requirements the same, the states' bars would recognize, say, a Washington lawyer's completion of Washington CLE requirements as sufficient to satisfy that's lawyers requirements as a member of the Oregon or Idaho bars as well. Harwick asked for and received board authority to formally explore this idea, which would make life easier for lawyers who belong to more than one state bar in the region.

Warming Up Her Pitching Arm: The board honored Dennis Harwick's assistant, Jo Morehouse, who retired September 30. Jo, who made all the arrangements for board meetings, says she intends to spend a lot of time throwing rocks at weeds on her Camano Island property.

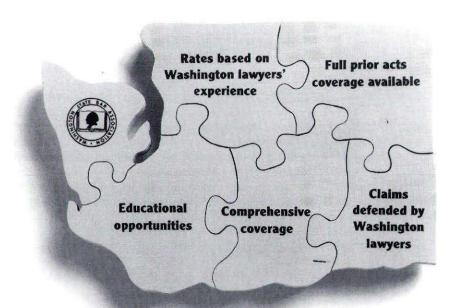
Legal Services in Peril: This story moves so fast by the time this comes out it a hundred new things will have happened, but the Board passed a resolution to be faxed to Washington, D.C. opposing legislation passed out of House and Senate subcommittees earlier in the day. The bills would cut another \$68 million from the legal services budget, terminate the Legal Services Corporation, and make the money available to the states through block grants. The bills would also require that any person seeking legal services assistance would have to sign a waiver of the attorney-client privilege, and prohibited legal services lawyers from taking any cases involving the potential for an award of attorney fees, any cases challenging a federal law or regulation, or involving divorce. The board, expressing astonishment that Congress would require people to give up the attorney-client privilege, let alone impose the other contemplated restrictions, criticized the plans in their resolution and called for the bills' amendment or defeat.

Court Rules: The board approved an amendment of IRLJ 3.3 to make clearer what a defendant has to do to get an officer to a hearing on a traffic infraction. They asked the Court Rules Committee to similarly amend IRLJ 6.6 for consistency's sake.

The board also debated at some length, and then approved, a recommended amendment of SPW 98.1 which would allow greater flexibility in the disbursement of injury and other financial settlements, now required to go through the court registry in a rather cumbersome and (for smaller settlements, financially impractical) manner.

Lawyer Discipline: Governor Jan Peterson presented some alternate schedules for board consideration of the report of the task force on lawyer discipline in Washington (for a summary of the report, see the August, 1995 Bar News, page 15). See the announcement following this report.

Criminal Law Practitioners, Unite! That's the message from assistant U.S. Attorney Bill Redkey, who is chairing a WSBA group looking at how the bar can be more useful to the criminal law bar. Redkey told the board how the WSBA Criminal Law Section swung between being dominated by prosecutors and defense lawyers, then diminished as both groups formed their own organizations. He outlined a plan for the task force to study how to make the section more relevant (or maybe kill it off), and promised a report in September, 1996. The board approved a



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And They'll Still Be Talking About It After We're All Dead: Paul Larson and Steve Tubbs reported on the continuing work of the Unauthorized Practice of Law Committee and the bar's task force developing a report to the legislature on unauthorized practice of law. It's still complicated and intractable.

Wrap-up in Seattle: The board voted to raise fees charged to late-filers for the bar exam, on a report by Bob Welden indicating nearly a quarter of recent bar applicants filed late, and most of them were lawyers in other states (who ought to know better). The drain on staff time is significant, so them as causes it gets to pay for it in future. The board voted not to spend any money supporting the Northwest Minority Job Fair, not because they don't support it, but because there's not enough money to do those sorts of things and meet the basic obligations of the association.

The board nominated Frank Shoichet to a second three year term on the Board for Trial Court Education; offered the Supreme Court nominations for four seats-three lawyers and one non-lawyer- to the Disciplinary Board; four nominations for two seats on the CLE Board; reappointed Kevin Kelly to the board of the Legal Foundation of Washington, and deferred final action on the president-elect's committee chairs, board of governors committees and a couple of others. Notices will appear in the appointments column in this magazine.

Thursday the board lunched with the officers and directors of Washington Women Lawyers and the Legal Foundation of Washington and heard reports from each. During the board's meeting, ABA state delegate Tom Fitzpatrick gave a report on the political maneuvering endemic to that organization: "parliamentary hijinks of the highest order," he called the recent going-on. It sounded like a rejected script from "Dynasty" crossed with C-SPAN coverage of the House of Representatives.

The board also heard reports from the leaders of the Loren Miller, Northwest Indian, Asian, Korean, and Hispanic Bar Associations, as well as the Washington Association of Attorneys With Disabilities and the WSBA Committee on Opportunities for Minorities in the Law, and encouraged all to be active in WSBA affairs.

# THE 106TH ANNUAL MEETING OF THE WASHINGTON STATE BAR ASSOCIATION

by Lindsay T. Thompson
Outgoing Editor, Bar News

Seattle, September 8, 1995

The president called the meeting to order after the conclusion of the WSBA Awards luncheon (see related story, next page). After approval of the minutes of the 1994 Annual Meeting, Lucy Isaki, president of the Legal Foundation of Washington, gave a report on the Foundation's work in 1994-95.

Certificates honoring 50-year members of the bar were presented to: James V. Abbot, Jr., Nelson T. Lee, Robert G. Moch, Robert D. Dellwo and Clarence M. George.

Chief Justice Barbara Durham gave an address, discussing current initiatives of hers in the areas of altering the Supreme Court's size, courthouse security, domestic violence, court funding and judicial selection. She announced the Court's approval of amendment of APR 12, extending the IOLTA fund's reach to include interest on title company trust accounts.

President Ron Gould gave the State of the Bar address, touching on many of the points made in his report to the Board of Governors (see Board's Work, previous page). He introduced the new governors of the association (see related story, page 52).

Executive director Dennis Harwick reviewed highlights from the WSBA Annual Report (*Bar News*, September 1995) and concluded the affairs of the Association were in good order after a year of

notable challenges. Noting that in any organization, member perceptions of it seem about three years out of date, Harwick commented that more and more members seem to be realizing and appreciating that WSBA has, in fact, changed, becoming more efficient, more customerservice oriented, and paying better attention to members' desires. Harwick called the *Washington State Bar News* one of the leading state bar journals in the United States and gave the outgoing editor credit for having built on the legacy of past editors to bring it to its current eminence. He then introduced the new editor, Hal White.

With a formal gavel-passing, Pasco lawver Ed Shea became WSBA president and made a short speech. He said the referendum on WSBA funding in May renewed the spirit of the bar, reminding us that a unified bar is the right way to go. He cautioned, however, that the tendency of the association to spin off functions to quasi-independent boards not only diminishes the role of members' elected governors in the governance of the profession but also "reduces the dialogue" between WSBA members over what the bar association should be for its members. He praised the work of former president Gould, and gaveled the meeting to adjournment.

#### NOTICE OF HEARINGS

The Board of Governors of the Washington State Bar Association has set four days of hearings/debate over the recommendations of the task force on lawyer discipline in Washington. These meetings will be open to the membership and comment is invited, both before and during the sessions

The recommendations of the task force will be broken into functional groups and considered as set forth below. For further information, contact WSBA Executive Director Dennis Harwick's office.

Date of session	Location	Recommendations on Agenda
November 3-4, 1995	Seattle	Programs: recommendations 2, 14, 16, 30 and 31. Process and Rules: recommendations 3, 4, 5, 13, 15, 17, 18, 20, 21, 22, 23, 24, and 25.
December 2, 1995	Seattle	Staffing: recommendations: 7, 8, 9, 10, 11, 12, 19 and 26.
February 10, 1996	Vancouver, WA	Financial: recommendations 1, 36, 37, 40 and 41, and a review of action taken.

# "I'm so proud to introduce . . . "

As part of its Annual Meeting, the WSBA presented nine special awards to individuals and one law firm who the WSBA Board of Governors deemed worthy of recognition and admiration.

Sidney J. Strong, Seattle, received the annual award for professionalism. (For this award, the WSBA defines professionalism as the pursuit of a learned profession in the spirit of service to the public and in the sharing of values with other members of the profession.)

John

Clark

Lish Whitson, new member of the WSBA Board of Governors, presented the award with the comments, "In handling his own cases, Sid is self effacing but extremely straightforward in explaining to a client the merits of the case and its realistic possibilities; he is a teacher and

counselor as well as an advocate. Sid is quiet and unfailingly polite, but his (professional) passion runs deep. People who mistake trappings for success, yelling for passion, and the ability to use big words for intelligence, ... would be uncomfortable with Sid, because with him they get the real thing. They get a lawyer."

Accepting the award, Strong said he took it as a mandate to "keep on doing what lawyers ought to be doing."

Retired District Court Judge Eugene C. Anderson accepted the Outstanding Judge Award. The award is presented for outstanding service to the bench and for special contribution to the legal profession.

Judge Anderson was elected in January 1959 as part-time District Court judge, and became a full-time judge in 1983. He retired on December 31, 1994, as the longestserving District Court judge in the state. Upon his retirement, he was specially recognized by the District and Municipal Court Judge's Association for dedicating "...himself to

the education and training of district and municipal court clerks, administrators, and trial judges throughout the state of Washington by unselfishly sharing his knowledge and experience...'

In presenting the award to Judge Anderson, Commissioner Frank Slak stated, "While serving admirably from the bench, Judge Anderson also was making significant contributions to the legal profession by serving on the State Judicial Ethics Advisory Board and as a member of the Washington State Bar Association's Committee of Law Examiners for 28 years...In

ing the bar through various bar activities. From 1989-90, he chaired the Minorities in the Legal Profession Committee of the King County Bar. He constantly works to increase and improve opportunities for minorities and continues to be one of the most active members of that committee. Gandara has also helped to organize the Minority Clerkship Program, which places minority law students at private firms each summer. In 1992, Gandara was on the

Board for the Washington State Hispanic Bar Association. He also is a member of the Hispanic National Bar Association.

His commitment to affirmative action carries over into his community activities. He is on the Seafirst Bank Hispanic Small Business Advisory Council, the Pacific Corridor Enterprises Coun-

cil and was on the Seattle Public Schools Minority and Women Business Advisory Board between 1993-94.

In presenting the award, Linda Dunn, member of the WSBA Board of Governors, stated that, "It is an honor to present this award to an individual who has contributed so much to increasing diversity in the legal profession and improving opportunities for minorities in this community."

McKay Barbara



Jan Eric Peterson Timothy K. Ford

one fashion or another, he has overseen the testing and admission of thousands of this state's lawyers since 1967."

Daniel Gandara of Seattle received the Affirmative Action Award. It is presented to a lawyer or law firm making a significant contribution to affirmative action in the employment of ethnic minorities, women, and the disabled in the legal profession.

Gandara has been a leader in diversify-



Paul Stritmatter, Eugene Anderson, John Rupp, Sidney Strong

Seattle lawyer Timothy K. Ford, na-

tionally known legal expert on the death penalty, received the Courageous Award. The award is presented to a lawyer who has displayed exceptional courage in the face of adversity.

During an interview in 1994, Ford said, "I became a lawyer because I feel passionate about human beings. I want to equalize power between people and the government and large corporations. I want to keep citizens from being crashed by the state and hopefully, at the same time, have a broader impact by making good law."

Ford is a director in the Seattle firm of MacDonald, Hoague & Bayless. One of his colleagues once said, "He graduated in 1974 and has spent the last 20 years preserving freedom, saving lives and developing a sterling career of national repute." As a result of his work against the death penalty, he has been credited with saving the lives of over thirty people. His work in Washington includes successfully overturning our 1975 and 1977 death penalty statutes and he handled a case overturning part of the 1981 statute. In this state, he has represented over twelve clients in death cases, saving all of their lives. Ford has handled nearly sixty capital cases, and been of counsel to scores more.

In presenting the award, Jan Eric Peterson, a member of the WSBA Board of Governors, old his audience that representing death penalty defendants is, in many respects, the ultimate expression of courage in the practice of law, because failure means the client's execution. Accepting the award, Ford expressed regret that his work has become part of a growth industry, and praised his colleagues for their support.

Hoquiam attorney, **Paul L. Stritmatter**, received the highest honor, the Award of Merit. In general, the Award of Merit



Linda Dunn & Daniel Gandara

is given for long-term service to the bar and/or the public.

Stritmatter, president of the WSBA in 1993-94, clerked for the Washington State Supreme Court before returning to his hometown of Hoquiam. There he joined his father, Lester O. Stritmatter, in the practice of law until Lester's death in 1982. He continues to practice in Hoquiam with the firm Stritmatter Kessler.

Stritmatter also has been president of the Washington State Trial Lawyers Association and the Damage Attorneys Round Table. He has served as a Board member of the Association of Trial Lawyers of America, LAW Fund, Washington State Head Injury Foundation and LAWPAC. During the last year Stritmatter has served as the co-chair, along with former Chief Justice Andersen, of the WSBA and Supreme Court Joint Task Force on Lawyer Discipline. Additionally, the Supreme Court appointed Stritmatter the Chair of the Access to Justice Board.

Edward F. Shea, president of the WSBA, said of his friend, "Paul's expertise as an attorney and his dynamic leadership within the pro bono legal community have made him well known throughout the justice system. Stritmatter exemplifies the best that each member of the legal profession strives to become."

**Richard L. Cease** was presented the Angelo Petruss Award for Lawyers in Public Service. It is given to a lawyer in government service who has made significant contributions to the legal profession, justice system and the public.

In 1970 Cease was selected to begin the Public Defender's Office for Spokane County. He was then appointed the first Public Defender, a position he held until his retirement in 1994. He is a Fellow in the American College of Trial Lawyers and a past recipient of the Justice Douglas Award from the Washington Association

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of Criminal Defense Lawyers.

While nominating Cease, Judge John A. Schultheis from the State of Washington Court of Appeals said, "He is an outstanding lawyer, both in and out of the courtroom. Ican truly say that Dick Cease is one of the most outstanding attorneys ever to have appeared before me."

Court of Appeals Judge Dennis Sweeney recalled Cease as his "first boss" and praised Cease's tireless work as an advocate for legal services at a time and place when the idea was hardly popular.

John N. Rupp, currently of counsel with the Preston Gates and Ellis law firm, was given the Lifetime Service Award. This award has only been given on two other occasions and is presented for a lifetime of service to the WSBA and the legal profession.

Rupp was admitted to the Washington State Bar in 1937. He clerked with the Washington Supreme Court before joining his father Otto Rupp and Al Schweppe (founder of the WSBA) in the private Dennis Sweeney & Richard Cease



practice of law. He has practiced law for nearly 60 years.

Rupp was the founder of the *Bar News*, and its first editor (1947-57). He has continued to contribute articles periodically to the publication to the present day. Rupp has preserved much of the WSBA and the legal profession's history through his stories and articles. He has served as both a member of the Board of Governors and as president of the State Bar. "In addition to his official titles with the WSBA, John has been its most dedicated historian, raconteur, and story teller," said Dennis P. Harwick, Executive Director.

In presenting the award Harwick said, "John Rupp's lifetime contributions to the WSBA spans every decade of the WSBA's existence. We have been honored to stand in the sunlight of John's service to the legal profession and to the Washington State Bar Association. He is a treasure. He is our treasure."

Accepting the award, Rupp noted he did so with trepidation. "There's something pretty terminal-sounding about a lifetime service award," he commented. "But ... I ain't gonna turn it down," he added with a twinkle in his eye.

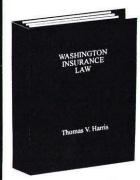
Seattle attorney **John McKay** received the Pro Bono Award. The award is presented each year to a lawyer, non-lawyer, law firm or local bar association for outstanding efforts in providing pro bono services to the poor.

McKay, a managing partner with Cairncross & Hempelmann, currently serves as chair of the newly established Equal Justice Coalition. The EJC was formed to organize a statewide grassroots effort to help save funding for the corporation which provides legal services to the nation's poor. The EJC was instrumental in getting the \$4.5 million biennial filing fee appropriation restored to the state budget after the WA House of Representatives voted to remove it. Based on this phenomenal victory, the EJC now is viewed nationally as a viable model for other states to follow as they organize

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# BRIEFLY NOTED

their own statewide efforts to save the Legal Services Corporation.

Barbara C. Clark, Executive Director of the Legal Foundation of Washington, presented the award. "For nearly a decade he has demonstrated a profound commitment to access to justice. This year alone he has eagerly and enthusiastically devoted hundreds of volunteer hours to the cause of providing access to our court system to *all* the people of this state... The struggle to save the Legal Services Corporation has not ended, nor has John commitment on behalf of the poor. He is inspirational."



P. Cameron DeVore & Ronald M. Gould

The President's Award went to the Seattle law firm of **Davis Wright Tremaine**. The award is given in recognition of "special accomplishment or service to the WSBA during the term of the current President."

Earlier this year, Davis Wright Tremaine successfully concluded its voluntary representation of the WSBA in a case of separation of powers of the three branches of government. In presenting the award, President Ron Gould stated, "The victory that you have achieved in the subject litigation has importance...this decision will help for many years, perhaps even many generations to come, because it will stand as a landmark case protecting the independence of the judiciary and of the Bar."

P. Cameron DeVore, partner and chair of the firm's communications and media law department, accepted the award on behalf of the firm. "I am delighted to accept this wonderful honor on behalf of Davis Wright Tremaine. It gives us great professional satisfaction to assist the Bar, particularly in the context of briefing and arguing a significant constitutional case," DeVore said.

#### Notices of Interest to Bar Members

#### Disciplinary Notice

Suspended: Spokane lawyer Dennis O. McMullen (WSBA No. 8242, admitted 1978) was ordered suspended for a period of one year effective June 29, 1995, by Supreme Court opinion, In the Matter of the Disciplinary Proceedings Against Dennis O. McMullen, filed June 29, 1995. The discipline related to McMullen's substantial unsecured loan transactions with a client, without compliance with the conflict of interest rules, RPC 1.7(b) and RPC 1.8 (a).

In 1985 an eighty-five year old client retained McMullen to assist her in breaking a family trust of which she was a lifetime beneficiary. McMullen had drawn the client's wills in 1980 and 1984. Under the trust the client had received \$200 per month since its inception in 1929. The client's adult children were residual beneficiaries of the trust, and their consent was necessary to release the remaining trust corpus to the client. McMullen advised the trustees and the children that he would be responsible and see that the client properly handled the trust funds once they were released. McMullen's assurances formed the basis on which the consents were given by the trustee and two of the client's children to release the trust corpus to the client. In late November 1985 the entire trust corpus of \$62,000 was released to the client and deposited in McMullen's trust account. In the fall of 1985 McMullen had investigated possible investments for the client including government bonds and mutual funds. A financial consultant had recommended to McMullen that any investment be diversified, with approximately 30% short-term and 70% long-term. The client was of limited financial sophistication and had no other assets.

In January 1986 McMullen borrowed \$30,000 from the client, on an unsecured basis, with interest at 12% per annum and payments of interest only of \$300. In August 1986 McMullen borrowed another \$10,000 from the client on an unsecured basis with interest at 12% per annum with interest-only payments of \$100 per month. Both notes were due January 3, 1989. On both occasions the client signed a written statement stating that she had had an op-

portunity to seek separate counsel and consented to the transactions.

In January 1988 the two loans were consolidated and restructured with the following terms: The interest was reduced from 12% to 9%; a single consolidated monthly payment was \$500; McMullen could deduct legal fees charged the client from the principal loan balance; with normal amortization, the approximate payoff was in ten years; and the loan was unsecured. An unsecured replacement promissory note was executed, which McMullen retained. The client signed an acknowledgment that the loan was unsecured and that she had an opportunity to seek counsel.

In the summer of 1988 the client suffered a stroke requiring long-term nursing care, and at that time, her family learned of the loans. The client died in September 1988. Beginning in the summer of 1988 a family member, who held the client's power of attorney, contacted McMullen regarding paying off or securing the loan. A resolution was not reached. McMullen filed a Chapter 7 bankruptcy proceeding in 1991. After a grievance was filed with the Association McMullen entered into a reaffirmation agreement to pay the obligation.

The Association filed disciplinary charges against McMullen in July 1992 relating to the three loan transactions, charging that the transactions violated Rules of Professional Conduct (RPC) 1.7(b), which prohibits a lawyer from representing a client in a matter in which he reasonably believes his interest and the client's interests conflict, and 1.8(a), prohibiting a lawyer from entering into a business transaction with a client, unless certain terms and conditions are met.

Following a disciplinary hearing in September 1993, the hearing officer filed findings and conclusions and recommended McMullen's disbarment. Upon review by the Disciplinary Board in January 1994, the Board by a vote of 8 - 3, adopted the Hearing Officer's recommendation of disbarment. Two members of the Board dissented and recommended that McMullen be suspended for a period of two years, and that McMullen's reinstatement be conditioned on proof of payment of restitution or compliance with his

reaffirmation agreement in his personal bankruptcy. One lawyer member recommended that McMullen be suspended for a period of six months, plus a plan of restitution not inconsistent with McMullen's reaffirmation agreement.

McMullen then appealed to the Supreme Court. The Court suspended McMullen for a period of one year, and determined that McMullen's unsecured loan transaction with his client was not fair and reasonable on its terms nor did it comply with RPC 1.7 (b) and 1.8(a) in that the written disclosures provided to the client did not indicate that McMullen was not a good credit risk, nor his precarious financial status and whether the debt was dischargeable in bankruptcy. The Court concluded that with respect to the loan transaction McMullen did not rebut the presumption that such transactions are prima facie fraudulent and 1) failed to show that no undue influence occurred, using his position and friendship to borrow 64% of the money released from trust within a year of its release; 2) that he did not give the same advice an uninterested attorney would have in the circumstances; and 3) that had his client dealt with a stranger she would have received a higher rate of return, a secured investment and been able to access the money if she needed it. The Court suspended McMullen from practice for one year and imposed an order of restitution. The Court further imposed two years probation, effective upon McMullen's reinstatement to active status.

The Association was represented by disciplinary counsel, Maria S. Regimbal. Respondent McMullen was represented by Kurt M. Bulmer. The Hearing Officer was Thomas Heye of Richland.

For a complete copy of any disciplinary decision, call the Washington State Disciplinary Board at (206) 727-8280 leaving the case name and your address.

#### **WSBA Presidential Selection**

The Board of Governors of the Washington State Bar Association (WSBA) is seeking applicants to serve as President of WSBA for 1996-1997. Pursuant to Article IV(A)(2) of the WSBA, the President for that term shall reside in King County.

Applications will be accepted through November 15, 1995. Applications should be limited to a current resumé, a concise application letter, and may attach selected references. Applications should be sent to WSBA Executive Director, 500 Westin Building, 2001 Sixth Avenue, Seattle, WA 98121-2599. Endorsement letters received before November 30, 1995 may be considered by the Search Committee and the Board of Governors. Interviews will be conducted as soon thereafter as possible at the offices of the Washington State Bar Association.

The Washington State Bar Association member selected to be the State Bar President will have an opportunity to provide a significant contribution to the legal profession.

While prior experience on WSBA's Board of Governors may be helpful, there is no requirement to have been a member of the Board of Governors or to have had previous experience in Bar activities. The candidate must be willing to devote a substantial number of hours to State Bar affairs and be capable of being a positive representative for the legal profession. The position is unpaid. Some expenses, such as State Bar-related travel, are reimbursed.

The commitment begins as President-Elect. On September 6, 1996, at the WSBA's annual business meeting, the candidate will assume the position as President of the Association. The candidate will be expected to attend two-day Board meetings every six weeks, as well as attend numerous subcommittee, section, regional, national and local meetings. During his or her service, the candidate will also be required to meet with members of the Bar, the courts, the media, and public and legal interest groups, as well as be involved in the Bar's legislative activities. Appropriate time will need to be devoted to communicating by letter and telephone in connection with these responsibilities.

#### Rules Committee Seeks Your Comments

The WSBA Court Rules and Procedures Committee is scheduled to consider the Civil Rules for Superior Court and for Courts of Limited Jurisdiction during its 1995-96 review year. Your comments and suggestions about these rules are invited. (Comments on the Mandatory Arbitration Rules and Special Proceeding Rules are also invited.) Please send them to: Steven Rosen, Staff Attorney, WSBA, 500 Westin Building, 2001 Sixth Ave., Seattle, WA 98121-2599.

#### Mandatory CLE Update

The MCLE reporting period, January 1, 1993-December 31, 1995, is reaching its close and Group 1 members (admitted

through 1975 and in 1991) are reminded that it is time to begin assembling data for the three-year CLE certification, due January 31, 1996. The certification will be included with the licensing fee packet to be mailed in mid-December.

To all those admitted in 1991, a word of caution from the Licensing Department — it is up to each individual member to keep track of their own attendance records; the CLE Board does not do it for you. Another reminder — members are allowed to obtain one-third of the credit requirement via audio-video tapes.

# Notice of Proposed Availability of Competitive Grant Funds

Under an Appropriation Bill passed by the U.S. House of Representatives, the Legal services Corporation (LSC) grants would only be made on a competitive basis for 1996. The Senate has not yet acted and, until final Congressional action late this fall, the amount of funds available and the date and terms of their availability will not be known.

LSC is providing anticipatory notice of the possible availability of competitive grant funds to provide civil legal services to eligible clients during calendar year 1996. If competition goes forward, LSC expects that a Request for Proposal will be available on or about September 15. Contact: Legal Services Corporation, Competitive grants, 750 First Street N.E., 11th Floor, Washington, D.C. 20002-4250, phone (202) 336-8900, fax (202) 336-8959, Internet: URL:http://www.lsc.gov/, Handsnet: HN3555, LSC BBS: (202) 336-8950.

#### Supreme Court arguments on TV

TVW, Washington state's public affairs network, has announced that it will provide regular coverage of oral arguments before the Washington State Supreme Court. TVW is a private nonprofit corporation providing unedited television coverage of all three branches of state government as well as public policy events of statewide significance. TVW produces four hours of original programming per day; it is distributed either by local cable operators or access channel operators to the public over cable. TVW will show at least four cases a week while Court is in session. Call TVW for local availability, (360) 786-0111.



#### October 1995

- **2** Seattle: Business and Legal Considerations in the Formation and Management of Foreign Subsidiaries. *Sponsored by NSCC*.
- 5 Spokane: Tort Law Update. Sponsored by WSTLA. Also in Seattle October 6.
- **6** Seattle: Environmental and Endangered Species Act Issues. *Sponsored by WSBA CLE*.
- **9** Seattle: Customs Harmonization and Strategic Planning. *Sponsored by* NSCC.
- **10** Seattle: Washington Women Lawyers 25th Anniversary Dinner. *Contact:* Tiffanie Kilmer, (206) 821-6117.
- 12 Seattle: The Paralegal's Role in the Real Estate Transaction in Washington. Sponsored by Institute for Paralegal Education. *For information*: (715) 835-7488.
- 12 Spokane: Wrongful Discharge. Sponsored by WSBA CLE. Also

#### in Seattle October 19.

- 13 Seattle: Environment/Endangered Species/Sweet Home. *Sponsored by* WSBA CLE.
- 12-13 Seattle: The Pacific Northwest and the Global Economy—The Americas. *Sponsored by* Institute for Professional and Business Organization. *For information:* Leland Shepherd, (206) 285-5325.
- 16 Seattle: Patents and Intellectual Property. *Sponsored by NSCC*.
- 18 Olympia: Valuing the Closely Held Business. *Sponsored by* WSBA CLE. Also in Seattle October 19.
- **18-19** Yakima: 1995 Fall Training Conference. *Sponsored by* WA Correctional Association. *For information:* Donna Larson, (206) 847-4732.
- **20** Renton: Insurance Law Basics. *Sponsored by* WSTLA.
- **23** Seattle: Contract Formation and Dispute Resolution. *Sponsored by* NSCC.

- **26-27** Seattle: The 40th Annual Estate Planning Seminar. *Sponsored by* WSBA CLE and Estate Planning Counsel.
- **27** Renton: Annual Family Law Seminar. *Sponsored by* WSTLA.
- **27-28** Portland, Oregon: Memory and Trauma, Clinical, Research, and Legal Issues. *Sponsored by* Forester & Associates. *For information*, call Barbara Rubin, (503) 687-8702.
- **30** Seattle: International Negotiations. *Sponsored by NSCC*.

#### November 1995

- 3 Seattle: Antitrust. *Sponsored* by WSBA CLE and Antitrust Section.
- 3 Olympia: Ultimate Jury Guide. Sponsored by WSBA CLE. Also in Seattle November 10.
- **6** International Tax Issues. *Sponsored by* NSCC.
  - 9 Spokane: Eighth Annual In-

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King County Bar Association CLE (KCBA) (206) 340-2579

Northwestern School of Law of Lewis & Clark College (503) 768-6642

National Business Institute, Inc. (NBI) (715) 835-7909

National Education Network (NET) (800) 637-0020

National Employment Law Institute (NELI): (415) 924-3844

National Institute of Trial Advocacy (NITA) (800) 225-6482. BBS registration, messages, etc.: Set communication program to 8 bits, no parity, 1 stop bit, then call (219) 234-7348.

North Seattle Community College Continuing Education (NSCC) (206) 527-3600

Professional Education Systems (800) 843-7763; fax (715) 836-0105

Spokane County Bar Association (SCBA) (509) 623-2665

Tacoma-Pierce County Bar Association (206) 383-3432

University of Washington School of Law (UW CLE) (206) 543-0059; (800) CLE-UNIV Washington Association of Criminal Defense Lawyers (WACDL) (206) 623-1302

Washington Association of Prosecuting Attorneys (WAPA) (206) 727-8202

Washington Defense Trial Lawyers (WDTL) (206) 233-2930; fax (206) 628-6611

Washington State Bar Association CLE (WSBA CLE) (206) 727-8202;

fax (206) 727-8320

Washington State Trial Lawyers Association (WSTLA) (206) 464-1011, (800) 732-9251 World Trade Club (206) 448-8803

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Send cover letter and resume by October 31, 1995 to Sandra Madrid, Ph.D.; Assistant Dean; University of Washington School of Law; 1100 NE Campus Parkway; Seattle, Washington 98105-6617. EOE.

surance Law Seminar. Sponsored by WDTL. Also November 10 in Seattle.

- **9-10** Chicago: 1995 Employment Law Conference. *Sponsored by* The National Employment Law Institute. *For information*, call (415) 924-3844.
- 10 Seattle: Administrative Law. Sponsored by WSBA CLE and Administrative Law Section.
- 13 Seattle: International Environmental Issues. *Sponsored by NSCC*.
- 16 Spokane Family Law Mandatory Forms/Drafting. *Sponsored by* WSBA CLE. **Also in Seattle November 17.**
- **16-17** San Francisco: 1995 Employment Law Conference. *Sponsored by* the National Employment Law Institute. *For information*, call (415) 924-3844.
- 17 Seattle: Commercial & Residential Real Estate Conference. *Sponsored by WSBA CLE*.
- **20** Seattle: Export Licensing and Compliance. *Sponsored by NSCC*.
- **27** Joint Ventures and Licensing. *Sponsored by* NSCC.
- **30** Federal Tax Controversies. *Sponsored by* WSBA CLE and Taxation Section.
- **30-Dec. 1** Washington, D.C.: 1995 Employment Law Conference. *Sponsored by* The National Employment Law Institute. *For information*, call (415) 924-3844.

#### December 1995

- 1 Laguna Niguel, CA: American Bankruptcy Board of Certification exam. *See September 14 entry*.
- 4 Seattle: Foreign Representatives and Distribution. Sponsored by NSCC.
- 7 Seattle: Collection of Judgments. *Sponsored by* WSBA CLE and Creditor/Debtor Section. **Also in Spokane December 14**.
- 7-8 New Orleans: 1995 Employment Law Conference. *Sponsored by* The National Employment Law Institute. *For information*, call (415) 924-3844.
- 8 Seattle: Distribution Law. Sponsored by WSBA CLE.
- 8 Seattle: How to Draft Wills. Sponsored by WSBA CLE and Young Lawyers Division. Also in Vancouver December 15.
- 11 Immigration. *Sponsored by* NSCC.
- 15 Seattle: Best of CLE. Sponsored by WSBA CLE and General Practice Section.
- **28** Seattle: How to Probate (VIACLE). *Sponsored by* WSBA CLE and Young Lawyers Division.

# CHANGING THE OFFICE OF CHIEF JUSTICE: THE STORY OF SJR 8210

by William H. Gates

n November, one of the general election ballot issues will be SJR 8210, an amendment to the State Constitution which would replace the current system whereby the office of Chief Justice is rotated among the members of the Supreme Court every two years with one where the justices elect a Chief for a term of four years. Here is the story of how this important reform measure got to the ballot box.

In 1990, then Chief Justice Keith Callow appointed a commission to study a number of proposals for improving the work of the trial courts of the state. This commission was denominated the Commission on Washington Trial

The group studied a number of specific proposals but at the same time, took a bird's-eye view of the states judiciary.

# Looking at the Chief Justice's Job

In this process, the group noted the considerable disparity in the approach and accomplishments of different Chief Justices. The Commission also observed how difficult it is for a Chief Justice to exert any leadership and to accomplish significant goals during a two-year term. Likewise, it was apparent that many who become Chief

have no real aptitude for performing a leadership role.

The American Bar Association standards relating to court organization state that a chief judge's term of office should be not less than five years and that he/she should not be selected by seniority or rotation. Currently, under the Washington constitution in Washington the selection of the Chief Justice is based upon an unusual rotation system in which the Chief is chosen for a two-year term from among

the three justices with just two years remaining on their six-year terms. The choice among the three is determined by the remaining justices. However, there is a uniformly observed understanding that the one who has not been Chief will be elected and, if there are more than one, then seniority is applied to break the tie.

The view of the Commission was that the judicial branch of the state government, like any other institution, needs strong, effective leadership. The judiciary has problems and challenges and requires an effective spokesperson. Specifically, the judiciary must relate almost continuously with the state legislature on a broad

Would anyone
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important institution be
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by rotation from among a
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for management?

basis. Would anyone suggest that an important institution be provided with a leader chosen by rotation from among a group in which many have little or no aptitude for management? What would a stockholder of the Boeing Company say to a board of directors who set up a system like that as a basis for choosing the company president?

#### The 1991 Legislature

The Commission made a unanimous recommendation that the manner of selec-

tion and the term of the Chief Justice be changed. This recommendation was made in December of 1990. At the following meeting of the state legislature, Marlin Appelwick, then Chair of the House Judiciary Committee, drew up legislation for the constitutional amendment. He also took up the matter with the justices of the Supreme Court. To his dismay, it appeared that there would be substantial opposition from many of the justices, including those whose voices were particularly credible on court administration subjects.

It was clear that the needed two-thirds vote in both houses could not be obtained

over substantial resistance from members of the Court and the attempt to make this improvement in the state constitution was abandoned.

#### **Chief Justice Durham**

In the fall of 1994, Acting Chief Justice Barbara Durham began planning for her term as chief, which would begin in January 1995. She identified a number of possible changes in the judicial system that needed to be studied. She quickly realized that it would be difficult for her to accomplish what she hoped in just two years. Recalling the 1990 recommendation of the Commission on Trial

Courts, she contacted me to discuss the possibility of reviving the effort to obtain an amendment of the constitution to lengthen the term of the Chief Justice and to eliminate the rotation system in favor of having the Court choose its chief.

#### Justice Robert Utter

In light of the very clear disappointment of the 1990 effort to obtain legislation for the amendment, it was obvious that the threshold requirement for winning legis-

BE IT RESOLVED, BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE STATE OF WASHINGTON, IN LEGISLATIVE SESSION ASSEMBLED: THAT, At the next general election to be held in this state there shall be submitted to the qualified voters of the their approval and ratification, or rejection, an amendment Tor their approval and ratification, or rejection, an amenument to Article IV, section 3 of the Constitution of the state of

Article IV, section 3. The judges of the supreme court shall be elected by the qualified electors of the state at large at the general state election at the times and places at which Washington to read as follows: state officers are elected, unless some other time be provided by the legislature. The first election of judges of the supreme by the registature. The risk election which shall be held upon the court shall be at the election which shall be at the elec court snarr pe at the erection which sharr pe here upon the adoption of this Constitution and the judges elected thereat shall be classified by lot, so that two shall hold their office for the term of three years, two for the term of five years, and one for the term of seven years. The lot shall be drawn by the one for the term of seven years. The for sassemble at the seat of judges who shall for that purpose assemble at the seat of the shall shal Judges will shart tor that purpose assemble at the seat of the government, and they shall cause the result thereof to be government, and they shart cause the result thereof of state, and filed in his office.

The certified to the secretary of state, and filed in his office. The ((judge having the shortest term to serve not holding his office by appointment or election to fill a vacancy, shall be) Supreme court shall select a chief justice from its own membership to serve for a four-year term at the pleasure of a majority of the court as prescribed by supreme court rule. The chief justice((,and)) shall preside at all sessions of the conter juscice ((and)) snall preside at all sessions of the supreme court ((and in the case there shall be two judges having Supreme courcil, and in the case there sharr be the other judges of the in like manner the same short term, the other judges of the in like manner the same short term, the other judges of the in like manner the same short term, the other judges of the in like manner the same short term, the other judges of the interest of the interest of the other judges of the interest of th Supreme court shall determine which of them shall be chief supreme court snarr decermine which of the snarr pe chief justice, the justice)). In case of the absence of the chief justice. Justice). In case of the absence of the chief justice, the (judge having in like manner the shortest or next shortest term to serve shall preside)) majority of the remaining court shall Select one of their members to serve as acting chief justice. Select one of their members to serve as acting the first election the terms of judges elected shall be After the first election the terms of Judges in Tanana Mandau in six years from and after the second Monday in January SIX years from and after the second monday in the office of succeeding their election. If a vacancy occur in the office of succeeding their election. a judge of the supreme court the governor shall only appoint a a juage of the supreme court the governor shall the office as specified by the person to ensure the number of judges as specified by the person to ensure the number of judges as specified by the person to hald the office and the of person to ensure to hold the office until the election and legislature. To hold the fill the manner of any and the state of any and the fill the manner of the fill the mann registrature to note the office until the election and which election of a judge to fill the vacancy, and a judge to fill the vacancy, and a judge to fill the vacancy. guarrication of a judge to that the vacancy, whiten erection, and shall take place at the next succeeding general election, the judge so elected shall hold the office for the remainder of the unexpired term. The term of office of the judges of the Supreme court, first elected, shall commence as soon as the state Supreme court, first erected, Shart commence as Soon as the State for the Shall have been admitted into the Union, and continue for the Shall have been admitted into the Union, and continue for the Shall have been admitted into the Union, and continue for the Shall have been admitted into the Union, and continue for the Shall have been admitted into the Union, and continue for the Shall have been admitted into the Union, and continue for the Shall have been admitted into the Union, and continue for the Shall have been admitted into the Union, and continue for the Shall have been admitted into the Union, and continue for the Shall have been admitted into the Union, and continue for the Shall have been admitted into the Union, and continue for the Un term herein provided, and until their successors are elected and term merern provided, and until their successors are effected and qualified. The sessions of the supreme court shall be held at

quartited. The Sessions of the Supreme Court shart be new the seat of government until otherwise provided by law.

lative approval was to obtain the support of members of the Supreme Court. In the course of polling the Court, Justice Robert Utter, whose role was critical because of his long history of activism in judicial administration matters, indicated his support for the project and added the suggestion that it include measures to reduce the size of the Court from nine to seven. This change had been planned in 1969 when the Court of Appeals was created but was never acted upon.

The suggestion for pairing these measures was attractive to both Justice Durham and me. It was anticipated that the reduction of the Court with the attendant saving in costs would be appealing to the legislature and to the public who would have to approve the amendments at the general election in the fall. Obtaining voter approval of the amendment to change the selection and term of the Chief seemed more risky because of the traditional tendency of voters to be against something they do not fully understand. This risk would be offset by the appeal of reducing the Court from nine to seven, something the voters would understand very clearly.

#### The Legal Setting

Article IV, Section 2 of the State Constitution fixes the size of the Court at five and authorizes the legislature to increase that number. In 1905, the legislature increased the Court to seven and then in 1909 increased it further to nine. In State *ex rel Murphy v. McBride* (1902), 29 Wash. 355, 70 P. 25, our court held that the legislature, having exercised its authority to increase the size of the Court, has the power to decrease the size of the court to a number not less than five.

The group strategizing for the proposed amendments concluded that it would be both prudent and appropriate to add to the Constitution the express authority for the legislature to decrease the size of the Court. An amendment was drawn to cover both the changes in respect to the Chief Justice and giving explicit authority to the legislature both to increase and reduce the size of the Court. At the same time legislation was drawn for a statute to reduce the court to seven and provide for the reduction to occur at the time of the next two vacancies caused by death or resignation.

#### **Unexpected Controversy**

In the course of attempting to have the legislature pass the proposed Constitutional Amendment and the statute, con-

siderable controversy arose as to the wisdom of reducing the court membership to seven. To deal with this controversy the legislation to accomplish the reduction was withdrawn, leaving just the resolution for the constitutional amendment (which required a two-thirds vote to pass out of the legislature to a vote of the people). Notwithstanding the withdrawal of the proposed statute, the controversy continued in respect to the resolution for the amendment because opponents of the reduction felt that if the people adopted language in the Constitution explicitly authorizing the reduction then it would be very difficult to stop the adoption of a statute in the next legislature effecting the reduction. In a second concession made to obtain the approval by the legislature of the amendment for the changes having to do with the Chief Justice, it was agreed that the language of the proposed amendment would be changed to delete the explicit authorization to the legislature to decrease the size of the Court.

To allay any remaining concerns about the effort to reduce the size of the Court, the Chief Justice has now appointed a study group under the chairmanship of retired Chief Justice Vernon Pearson to make a study and recommendation on this subject.

#### Filling Vacancies

The section of the Constitution which would be amended currently has in it a clause which directs the Governor to make an appointment to the Court to fill any vacancy. All seem to agree that if there ever is a reduction it should be accomplished by attrition as vacancies occur. The resolution passed by the legislature as SJR 8210 does contain language which changes the unconditional authorization to the Governor to appoint to fill vacancies so that the appointment power is to be exercised only if the vacancy reduces the Court to a number below that which is fixed by the legislature.

#### What Now?

SJR 8210 has been passed by the legislature with more than the necessary two-thirds vote and will be on the ballot in November. A committee is being formed to campaign for its adoption.



Seattle attorney William H. Gates is a former WSBA President.

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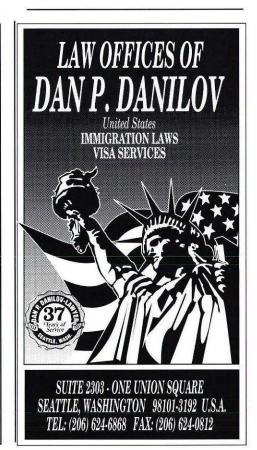
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# A Debate on the Wisdom of

# **Splitting the 9th Circuit:**

#### It Is Time to Create a New 12th Circuit Court of Appeals for the Pacific Northwest

by Michael D. McKay and Robert G. Chadwell

#### The New 12th Circuit Court of Appeals

The 9th Circuit Court of Appeals Reorganization Act of 1995 was recently introduced by a group of senators from the Pacific Northwest, including Senator Slade Gorton who is the prime sponsor. The proposal divides the 9th Circuit, which is the largest in the country, into two separate circuits of more manageable size and responsibility. The new 12th Circuit would be composed of Washington, Alaska, Idaho, Montana and Oregon. The new 9th Circuit would be composed of Arizona, California, Hawaii, Nevada, Guam and the North Mariana Islands. Amazingly, the new 9th Circuit would still be the largest circuit in the country.

This measure, which is being proposed for the fourth time, has received considerable support over the years. As early as 1973, the Congressional Commission on the Revision of the Federal Court Appellate System recommended that the 9th Circuit be divided. Previous efforts to divide the 9th Circuit have earned the support of attorneys and judges in the 9th Circuit, the American Bar Association, the Washington State Bar Association, attorneys general of the western states, the Department of Justice, and the former Chief Justice of the United States Supreme Court, Warren E. Berger.

#### The 9th Circuit is Too Large

There are currently 45 million residents living within the 9th Circuit. This represents 60% more than are served by the next-largest circuit. Worse, the population in the states and territories that comprise the 9th Circuit is the fastest growing in the nation. Geographically, it is huge. The 9th Circuit stretches from Alaska to Mexico, and from Montana and Idaho to Hawaii, Guam and the Northern Marianas. One commentator reminds us that, as a land mass, the 9th Circuit is comparable to all of western Europe.

The sheer size of the Court's jurisdiction results in obvious and not-so-obvious-problems. Judges traveling throughout the Circuit are expending time and money which could be better used reducing the Court's growing caseload. Also, it is difficult for a judge to understand such a large community. Washington Judge Eugene Wright testified to Congress on this subject,

See "Yes" on page 49

#### Splitting the 9th Circuit Would Be the Wrong Decision for the Wrong Reasons

by Kevin Swan and Thomas Hillier II

As he has done three times in the last 12 years, Sen. Slade Gorton, R-Wash., has introduced a bill in the United States Senate to divide the 9th Circuit in two. In its place would be a new 12th Circuit, which would consist of Alaska, Idaho, Montana, Oregon, and Washington and have nine circuit judges; and a smaller 9th Circuit with 19 judges covering the remaining jurisdictions of the current 9th Circuit. This renewed proposal should be rejected, just as its predecessors were.

#### Splitting the Ninth Circuit Would Create Problems, Not Solve Them

Supporters of this latest proposal typically allege two practical problems they say a division would solve: slow resolution of appeals, and intracircuit conflicts. However, it is not clear that either problem exists to the extent the sponsors assume. Moreover, to the extent there are such problems in the Ninth Circuit, the proposal would actually make caseload and conflict issues worse.

#### Caseload & Cost

Some who support a circuit split seem to assume that the size of the Ninth Circuit has created a caseload crisis. The facts do not bear that assumption out. According to the Office of the Circuit Executive for the Ninth Circuit, the relative caseload of three-judge panels of the Ninth Circuit is comparable to that of other circuits. And once judges in the Ninth Circuit get a case, the time from oral argument to disposition is about 20% shorter than the national average.

Most people would agree that the entire federal court system is under stress. But according to the Federal Judicial Center, this problem is caused by an increasing caseload generally, and not by circuit size. Sen. Gorton's proposal, which merely divides up current judges and staff, ignores the obvious solution to a growing caseload: increase the number of judges. After all, it is judges (and not circuits) that decide appeals.

In fact, far from being a liability, the size of the 9th Circuit has allowed for significant economies of scale. The two new proposed circuits would have to duplicate many administra-

See "No" on page 49

"Yes" — continued from page 48

"Judges whose background and experience lie in places a thousand miles from a given Court are unlikely to have a full appreciation of regional aspects of an issue, even if they are aware of them." (Hearings on S. 1156 before the Subcommittee on Courts of Senate Judiciary Committee, 98th Congress, 2nd Session (1984), at p. 19.)

#### The 9th Circuit is Inefficient

The 9th Circuit is one of the slowest in the country. The Court's 1994 caseload, viewed on a per judge or per panel basis, is average when compared with the other Circuits. (Position Paper in Opposition to S. 956—Ninth Circuit Court of Appeals Reorganization Act of 1995, p. 5-6.) Yet, a comparison of the 1994 disposition time (filing notice of appeal to final disposition) reveals that, but for the 11th Circuit, the 9th Circuit is the slowest in the country. (1994 Annual Report, 9th Circuit, at p. 59.) Two circuits, the 3rd and the 8th, are nearly twice as fast as the 9th.

The 9th Circuit's executive office recently asserted "The Court is functioning well and has devised innovative ways of managing its caseload that are models for other circuits." (Position Paper, Executive Summary.) The 9th Circuit's own statistics show that in spite of its average caseload, it is unable to dispose of its cases in a timely manner.

#### There Are Too Many Inconsistent Decisions in the 9th Circuit

Another reason why the 9th Circuit should be divided is the continuing problem of inconsistent rulings from the different panels. This has resulted in a growing body of unpublished opinions which give no reliable guide and leave the impression that stare decisis has perished as a guiding principle in the 9th Circuit. This problem has been discussed for many years but will never be resolved until the Court size is reduced. Judge Wright said:

[S]ome of the judges on the 9th Circuit are now no longer able to remain current with the law of the Circuit as it develops. [Because of] the volume of . . . printed material, judges are obliged to rely upon law clerks, staff attorneys, librarians, and the eternal hope that their opinions do not stray too far from the current law of the Circuit.

(Hearings, at p. 17.) One would also suspect that collegiality, a critical element in a successful court, is much harder to maintain when there are 28 judges spread out over so many states.

This same problem in the Southeast was successfully addressed in 1980 when the 5th Circuit (originally encompassing Texas, Louisiana, Mississippi, Alabama, Georgia and Florida) was divided into two circuits with the new, smaller 5th Circuit now including Texas, Louisiana, and Mississippi. 5th Circuit Chief Judge George Clark reported to Congress on its success:

The principal benefit gained remains that judges, lawyers, and litigants can better cope with a smaller,

See "Yes" on page 50

"No" — continued from page 48

tive functions and facilities currently managed by one. Substantial employee time would also be required to accomplish the division of the Circuit.

This costly idea comes at a time of fierce competition for government funding, with the judiciary already struggling to pay current costs. Given the immense budget cuts this year and in years ahead, creating and then maintaining a new Twelfth Circuit seems a foolish extravagance.

#### Complexity and Inconsistency

Dividing the extended Western coastline between two jurisdictions would *create* the inconsistent rulings that Sen. Gorton says he wants to prevent. The states in the Ninth Circuit share numerous issues, such as admiralty issues involving West Coast ports, and the application of utility rates by the Bonneville Power Administration. If the Ninth Circuit were divided, these broad legal issues would inevitably be subject to differing rulings by two different circuits. Lawyers and clients would have to be concerned with the law of *two* circuits for every potential cross-circuit transaction. Moreover, the inconsistencies would now be *intercircuit* conflicts, which could be resolved only by a decision from the Supreme Court, rather than by an *en banc* panel. This result seems especially irrational in light of increasing regional trade with Asia.

Perhaps these inconsistencies that Sen. Gorton's proposal would create would seem less troubling if there were actually a current inconsistency problem in the Ninth Circuit. The evidence says there is not. The Circuit's use of the limited *en banc* panel has been highly effective in resolving intracircuit conflicts. In addition, a 1993 study by the Federal Judicial Center found that intracircuit conflict is "not characteristic of Ninth Circuit jurisprudence generally." The study also found "little evidence" of any link between intracircuit conflict and circuit size.

# The Proposal to Divide the Ninth Circuit Is Inappropriate

Co-sponsors of the proposed division cite concerns about local economic issues, and state their belief that the Ninth Circuit fails to appreciate issues that affect the Northwest. These politically inspired appeals to regionalism are ill-considered, and do not provide reasons to support this proposal.

Sen. Gorton has been very concerned with the Endangered Species Act and the death penalty. His focus on those issues and his efforts to change the law are quite appropriate functions for a Senator.

However, it is *not* appropriate to seek to accomplish these political aims by legislating changes in the structure of the courts. Whether one agrees with the underlying political objectives or not, this effort by one branch of government to encroach on the independence of another — to constrain and direct its functions and decisions — is reason enough to oppose the proposal. This proposal today to split the Ninth Circuit in support of conservative positions is, in truth, no better than FDR's proposal in the 1930's to pack the Supreme Court in support of liberal positions.

See "No" on page 50

"Yes" — continued from page 49

more predictable universe of case law. Effective conduct and management of litigation requires mastery of the corpus juris. Circuit judges must know its status on a daily basis to keep the law consistent.

(Hearing, at p. 96.) Judge Clark also observed that "the law of the circuit would be more consistent if all of the judges charged with making the law participated in the en banc court." (Hearing, at p. 90). Such a device is not a viable solution for our 28 member 9th Circuit Court.

Judge Clark's comments help us to understand why the U.S. Judicial Conference found that any more than 15 judges in any circuit is an unworkable situation.

#### The Pacific Northwest Needs Its Own Circuit Court

It is time for the Pacific Northwest to have its own circuit court. No doubt, the headquaters will be in Seattle, an added convenience for many us. The new 12th Circuit will be smaller, fairer, and more efficient. Who, other than Tom Hillier, can argue with that?

Michael D. McKay and Robert G. Chadwell are with the Seattle law firm of McKay, Chadwell & Mathews.

"Yes" — continued from page 49

This effort to regionalize a federal appellate court is also contrary to the nature of a national body of law meant to be uniform across the country. Sen. Gorton's former colleague, Pete Wilson, noted that it is the role of state and local courts, not federal courts, to "abide by a sense of localism." As former Chief Justice Warren Burger stated in opposing an earlier proposal to split the Ninth Circuit: "I find it a very offensive statement to be made that a United States judge, having taken the oath of office, is going to be biased because of the economic conditions of his own jurisdiction."

The political changes Sen. Gorton desires can be properly attempted only through changes to the law or the Constitution. In contrast, the legislative powers of Congress should not be used to carve up judicial territory in an effort to obtain those changes by redirected judicial decisionmaking.

#### Conclusion

Sen. Gorton's proposal is bad for the legal system and for individuals and businesses in the Western states. It is a bad precedent for the balance and separation of power between Congress and the courts. It is not going to solve the problems its sponsors assume exist, but rather will merely create problems of its own. In summary, the proposal is bad legislation, bad government, and bad for the independence of the judiciary.

Kevin Swan is an attorney with Smith & Leary in Seattle. Tom Hillier heads the Federal Public Defender's office in Seattle.

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# WSBA President Ed Shea Sees More Challenges for Bar . . .

#### by Lindsay T. Thompson

Pasco attorney Edward F. Shea, 53, took office three weeks ago at the Washington State Bar Association's Annual Meeting in Seattle, succeeding Seattle lawyer Ron Gould. The WSBA presidency rotates between eastern Washington, western Washington outside King County, and King County; elected by the Board of Governors after a public search, Shea will serve a one year term.

A partner in Pasco's Shea, Kuffel & Klashke, the president has long been active in ABA, WSBA and local bar association affairs. He chaired the WSBA Young Lawyers Section, as it was then known, in 1974. Shea's interest in how Washington lawyers govern themselves began with his service on the association's Committee on Organization and Government of the Bar the same year. He sat on the bar's Long-range Planning Committee in 1985 and was called upon to lead the Board of Governors' planning retreats in 1990 and 1993.

Shea served on the Board of Governors, representing the Third Congressional District, from 1986 to 1989. After his term on the board ended, he chaired the Bar's Resolutions Committee for two years and served as the WSBA member of the ABA House of Delegates from 1989 to 1994.

Involvement in American Bar Association work has been another strand of Shea's legal career. His term in the House of Delegates was actually his second time there: in 1980 he was elected to the House by the Bar's Young Lawyers Section. In the 1970s he served as a member of the ABA Young Lawyers Section's executive council, and he chaired the board of editors of *Barrister*, the ABA young lawyers' magazine, for three years. Since 1992, he has served on the ABA's Commission on Public Understanding About the Law.

Shea has also spent two terms on the Board of Governors of the Washington State Trial Lawyers Association and has won awards for



Edward F. Shea

his leadership of the Benton-Franklin County Bar Association's Law Day programs. He is a board member and vice president of LAW Fund, which supports legal services for the poor in Washington; a past board member of Evergreen Legal Services, he is an active member of the Equal Justice Coalition, which has been fighting to preserve legal-service funding this year.

In his community, Shea has been a member of the board of the Fund for Educational Opportunities, which supports the Pasco schools; the Franklin County Boundary Review Board, and St. Patrick's School, both of which he also chaired; he has been chair of the Franklin County Democratic Party Central Committee.

A graduate of the University of Massachusetts in Boston and Georgetown University Law Center, Shea clerked for Judge Harold Petrie of the Court of Appeals, Division II, before starting his practice in Pasco nearly a quarter-century ago. He is married and has four children, two of whom are also Washington lawyers. Son Edward F. Shea, Jr. practices with his father in Pasco, while Jacqueline Jeanne, his daughter, practices with Peick, Lingenbrink & Magladry in Bellevue.

Shea sees the challenge of the coming year as one of trying to meet WSBA member service expectations in a time when resources are short. "The Bar Association has had one increase in licensing fees in 16 years," Shea points out. "Essentially, it has gotten by on the increase in revenues from charging separate fees for things and the increase in revenue arising from increasing Bar membership. This year's budget is only 45 percent funded by member licensing fees, for example." At some point, Shea notes, WSBA membership has to get past the finger-pointing and sloganeering of the last decade and arrive at some sort of consensus about how to pay for the services members say they want. He hopes to start that dialogue in the coming year.



Stephen E. Crossland

The new president also plans to continue his push for more public and attorney support for legal services for the poor, in terms of personal financial support for state programs, support of state and federal funding continuation, andfor lawyers—more pro bono activity. "A great many lawyers tend to be happy to let others of their colleagues carry the pro bono load," Shea commented recently. "Or they tune out the subject entirely as another thing the Bar lectures them about all the time. But the fact is, the need for legal services is not going away; the state and federal governments are trying to turn their backs on it, and someone has got to step up to the plate. If we as lawyers don't show more interest in this problem and its solution, legislative bodies are liable to simply dictate that we start doing it-and how much, and on what terms—as part of shifting the burden elsewhere."

As the use of electronic mail and other computerized research services by lawyer explodes, Shea wants to increase the amount of useful information the WSBA electronic bulletin board carries. He knows whereof he speaks: in February 1991, Shea chronicled his introduction to computers in a *Bar News* article he titled, "One Lawyer's Journey from Computer Ignorance to Computer Bliss."

Finally, Shea hopes to restore the Bar's interest in Law Day, the annual May event commemorating the rule of law in America. "I hope that every local bar will undertake significant Law Day activities of general information to the public," he told a writer for WSBA's *Bar News* insert, "FYI...State Bar Highlights," last month. Many county bars have let Law Day die on the vine in recent years; Shea thinks we can do better. And again, he speaks from experience, not just exhortation: in 1994, the American Bar Association honored Shea and the Benton-Franklin County Bar Association for organizing one of the best Law Day programs in the United States.



Dennis J. La Porte



Patrick McMullen



Lish Whitson

# . . . Governors Begin Three-year Terms

Washington lawyers have elected four of their colleagues to the eleven-member WSBA Board of Governors. The Four—Stephen R. Crossland of Cashmere, Dennis J. La Porte of Federal Way, Patrick McMullen of Sedro Woolley, and Lish Whitson of Seattle—took office at the close of the WSBA Annual Meeting September 8. Each will serve a three-year term and is ineligible for reelection.

Succeeding West Campbell in the Third Congressional District, Crossland, 49, is a graduate of Stanford University and Northwestern School of Law of Lewis &Clark College. Besides a stint as a Chelan County deputy prosecuting attorney, Crossland has spent over twenty years practicing law in Cashmere. He is currently a member of Johnson, Gaukroger & Crossland. Active in WSBA affairs, he is a past chair of the Unauthorized Practice of Law Committee, the WSBA General Practice Section and the Computerization of Law Division, as well as a former member of the Real Property, Probate and Trust Section's executive committee. Over the last year he has served as a member of the WSBA Task Force on Nonlawyer Practice. Married 27 years, he has four children.

**La Porte**, 53, is the first person to serve a full, three-year terms as governor from

the Ninth Congressional District. The outgoing governor, Jim Handmacher, was elected when the congressional district was created after the 1990 census, and served two and a half years. La Porte hold degrees from Seattle University and Gonzaga University School of Law. In 1968-69 he clerked at the Washington Supreme Court for Justice Robert Hunter, after which he went into private practice in Tacoma. He is a member of the law firm of Thompson, Krilich, La Porte, Tucci & West. His past experience includes a stretch as an associate professor of civil trial procedure at the former University of Puget Sound School of Law (now Seattle University), and service on various state and county bar association committees. His practice concentrates in personal injury, probate and domestic law. La Porte has been married 24 years and is the father of four children.

McMullen has been with the Sedro Woolley and Bellingham law offices of Knies, Robinson & McMullen since 1991 and is a partner. Prior to that he was a partner in the Mount Vernon law firm of McMullen, Reed, Reilly & Weyrich.

He graduated from the University of Washington 1996 and its School of Law in 1969. From 1969 to 1972 he was assistant attorney general for Washington state. He then moved into private practice for two

years before again returning to public duty as prosecuting attorney for Skagit County from 1975 to 1980. He was Skagit County Bar president in 1985-1986.

McMullen also has been active in politics, serving as a member of the Washington State House of Representatives from 1983 to 1987, as House Majority Leader in 1987, as a member of the Washington State Senate form 1987 to 1992 and as Senate Minority Floor Leader form 1991 to 1992. He also served as a member of the Washington State Fish and Wildlife Commission from 1994 to 1995.

Whitson, 53, is a member of the Seattle firm of Helsell, Fetterman, Martin, Todd & Hokanson, joining it in 1976 after a three-year tour as a Seattle public defender. He succeeds Jan Eric Peterson as governor for the Seventh Congressional District. A graduate of Pennsylvania State University and the University of Washington School of Law, Whitson serves on the boards of Seattle Downtown Emergency Service Center, Seattle Youth Symphony, and Allied Arts of Seattle, as well as the UW Law School Alumni Association. Whitson's practice is concentrated in commercial litigation, personal injury, medical malpractice and environmental law. His work for women with breast cancer earned him the King County Bar Association's Pro Bono Award in 1993.

# FYI . . . State Bar Highlights

# Annual meeting's cheap cle seminar packs 'em in

Cheap CLEs are the center of the WSBA
Annual Meeting, and this year's \$25 CLE,
"Establish Good Connections Through Client
Communications," brought out more than 200
participants on Sept. 8. They discussed everything from "The Original Great Communicator
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and Nothing but the Truth."

But the whole crux of the seminar could be boiled down to "Effective Communication = Client Satisfaction (and fewer discipline complaints)" presented by Mike Huston of lawyer liability program Kirke-Van Orsdel.

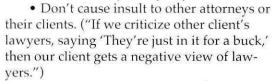
Huston has been out of the practice of law for a while, but when he talks to other lawyers, they tell him, "It's just not as fun as it used to be. Things have changed. Clients are different."

Part of that change is an increasing demand on lawyers' time, as well as their clients' time, and the miscommunication that often results. When a lawyer doesn't return a phone

maximize their profit? Well, says Huston, you start with the little things.

- Return phone calls ASAP.
- The first interview is the key. ("Clients don't understand that the practice of law is episodic. They think that you get their case and then

it's their case all day, every day.")



- Treat all your clients wealthy corporate clients and pro bono clients with the same dignity and respect.
- Don't get into business with a client. ("The ice is so thin out there anymore that we just can't skate on it.")

"We have learned you cannot over communicate with your client."



vid De Orto

Top photo, left to right: Michael E. McNeff, Law Office of Michael E. McNeff, Bellingham; Peter Jarvis, Stoel Rives Boley Jones & Gray, Portland; Prof. Thomas E. O'Connell, Bellevue Community College; Susan Thompson, Speech Power, Seattle; Mike Huston, Kirke-Van Orsdel, Des Moines, Iowo; Evelyn Fielding, WSBA Public Relations Committee Chair.

Bottom photo: Susan Thompsor of Speech Power.



call, it may seem like a small thing at the time, but it can lead to a charge of ethics violation by a very frustrated client. Huston says 80 percent of claims against lawyers are brought on by poor client relations.

One of the questions a lawyer must ask herself is this: "Is the bond between us and our clients a sacred trust? Is it something very special, or has it become a commercial encounter?"

Four main categories define public perception: lawyers lack caring and compassion; their ethics can be questionable; most lawyers are greedy; the public has a general dislike for lawyer advertising. So, how do you change the common perception that a lawyer is only out to

# Florida bar spends \$\$\$ so we don't have to

**T** he Public Relations Committee of WSBA has been dutifully trying to fulfill its mission that was set out several years ago but not funded. The P.R. Committee designed the Annual Meeting CLE "Establish Good Connections Through Client Relations." In 1993 the name of the WSBA Public Affairs Department was changed to

the Communications Department because the Bar no longer had any money for "public relations." The Committee reinvented itself and focused on improving the public image of attorneys by improving attorneys' communication.

The Committee's focus evidently is right on target, according to a 1995 Florida Barcommissioned study, "Perceptions of Lawyers: The Client's View," which reports that while 42 percent of people who have had contact with a lawyer in the past year had a favorable impression of attorneys, 25 percent held an unfavor-

Continued on page 55



#### The lawyers' fund for client protection

Lawyers step up to the plate to protect clients defrauded by other lawyers

**T**he WSBA has maintained some form of client's security program since 1960. Over the past 35 years, the WSBA has paid out approximately \$300,000 to members of the public who were victims of the dishonest conduct of lawyers. (See *Bar News*, August 1993, p. 22).

Beginning in 1991, the WSBA's Clients' Security Program Committee began exploring alternatives to funding such a program out of bar dues in order to stabilize its funding base. The Committee looked at such things as insurance, requiring lawyers to be bonded, or even limiting which lawyers could handle client funds. After much research, the Committee concluded that the least expensive way to fund this program, while continuing to meet our obligation to protect the public, would be through a modest assessment on members of the Bar. Many states impose assessments for client protection funds, and this was the recommendation of the Joint Task Force on Lawyer Discipline. In 1993 the Committee recommended establishment of the Lawyers' Fund for Client Protection funded by a small assessment on each active Bar member and the Board of Governors made that recommendation to the Supreme Court.

After many years of study and work by the WSBA, the Supreme Court recently approved the creation and operation of the *Lawyers' Fund for Client Protection* (*new APR 15*). The Court has approved a member assessment of \$10 to be included with the 1996 bar license fee statement. This \$10 per member will provide an initial fund of nearly \$200,000, double the amount the Board of Governors has been able to budget from Bar dues.

The Lawyers' Fund for Client Protection is established as a trust with the members of the Board of Governors acting as trustees and will be administered by a committee of lawyers and nonlawyers appointed by the Board. All actions of the Fund will be reported annually to the Supreme Court.

Establishment of the *Lawyers' Fund for Client Protection* means that those few clients who are the victims of a dishonest lawyer may continue to receive a letter opening with the words "On behalf of the lawyers of the State of Washington. . ." While, in reality, it cannot fully compensate for the losses caused by the

breach of trust by "one of our own", the *Lawyers' Fund* can help to restore faith in and respect for the legal system and the lawyers who maintain it.

# Law clerk program: is "reading for the law" an idea whose time is past?

In 1984 the Supreme Court adopted APR 6, Law Clerk Program, to provide an alternative legal education for people who do not take or complete a law school course of study. This "codified" the practice of "reading the law" which predates the establishment of formal law schools. Now, the Board of Governors is considering whether or not it should be continued.

APR 6 sets out a rigorous four-year course of study under the tutorship of a Washington lawyer or judge. It is administered by a committee of lawyers with the assistance of state bar staff. Washington is one of only 8 states that offers such a program. Because of the time and financial demands on the program, the Board of Governors is considering whether it should be continued.

The committee meets annually with each law clerk and his or her tutor to monitor the clerk's progress. Throughout the year, committee members review the examinations administered to the clerks to determine whether they are complying with the rule and demonstrating acceptable progress.

One WSBA staff member devotes approximately 40% of her time to administering the Law Clerk Program. In 1985, there were 5 law clerks enrolled in the program. By the end of 1995, there will be 49 enrolled law clerks in the program. By the year 2000, we could have as many as 70 clerks if current enrollment trends continue.

Overall, 104 clerks have enrolled, 33 have withdrawn, and 26 have graduated; 80% of the graduates from the Law Clerk Program have passed the bar exam.

The view of the Law Clerk Committee is that while the availability of a legal education has improved in Washington now that there are 3 in-state law schools, economic accessability has become a much bigger point. The program principally serves three groups: (1) family members of lawyers; (2) foreign lawyers; and (3) office paralegals. There is little

continued on page 55



If you have timely Barrelated news, activities or
business, or a funny story
that would be of interest
to your co-members, call,
mail or fax it to us and
we will help spread the
word in upcoming FYI
editions. Call us at (206)
727-8203 or fax us at
(206) 727-8320.

#### Florida Bar — Continued from page 53

able view and 28 percent were ambivalent. The ambivalents were generally favorable toward attorneys but expressed negative comments concerning fees or the attorney-client relationship.

According to the report, "(T)he ambivalent 28 percent expresses a strong desire for improvements and enhancements to the attorney-client relationship which would directly address their concerns and negative impressions of attorneys.... It's significant to note that people in this group tend to be opinion leaders who help shape the attitudes of others within their sphere of influence. Furthermore, the research has shown that enhancements to the attorney-client relationship result in a direct improvement in overall perceptions of attorneys."

The Public Relations Committee is working on more ways to improve communications between attorneys and their clients. To show your commitment to a positive working relationship with your clients, you may receive an Attorneys Commitment to Clients, printed on parchment paper and suitable for framing. Contact Sharlene Steele, WSBA, 500 Westin Bldg., 2001 - 6th Ave., Seattle, WA 98121-2599.

Law Clerks — *Continued from page 54* racial or ethnic diversity in the class of enrolled clerks.

The current enrollment fee is \$500 annually. This year, revenues of about \$20,000 were received from the Law Clerk Program. Direct expenses to administer the program are about \$8,000. The expenses of salary and overhead are about \$25,000. The expenses of running the Law Clerk Program clearly exceed revenues.

Does an average of 2.6 law clerk graduates per year over the 10-year history of APR 6 justify the expenditure of WSBA resources, both in money and volunteer time, required to administer the program?

The Board of Governors will be reviewing this issue at its meeting on December 1 and 2, 1995. If you have comments or opinions that you wish the Board to consider, please mail them to WSBA General Counsel Robert D. Welden, Washington State Bar Association, 2001 Sixth Avenue, Suite 500, Seattle, WA 98121-2599, or FAX them to (206) 727-8320, before November 10, 1995.

# The fight for legal services funding and access for all people to our courts continues

The fight to save the federal Legal Services Corporation continues. The Senate Appropriations Committee voted two weeks ago to eliminate the LSC funding and provide block grant funding to the states, with restrictions. This information was announced at the September 12 judicial conference. Access to Justice chair Paul L. Stritmatter explained current developments to members of the judiciary present at the special seminar concerning the funding crisis. "For years we have placed our hands over our hearts and pledged 'and justice for all.' Our representatives in Washington have forgotten that pledge. They have forgotten the principals upon which this country was founded. We, the lawyers and judges of Washington, can't forget. We must do everything we can to bring justice for all back into focus as the essence of who and what we are."

WSBA President Ed Shea wrote a letter on behalf of the Board of Governors to the entire Washington State Congressional Delegation, part of which reads: "If allowed to stand, these actions would destroy the model public-private partnership which provides critical legal services to thousands of low-income citizens of our state. Not only would federal funding be virtually eliminated, but this legislation includes onerous regulations designed to make legal representation of the poor impossible for ethical lawyers. Private fundraising (non-tax dollars) will be regulated out of existence, resulting in an unfair second class legal system for low-income citizens of Washington state.

"As representatives of Washington state's lawyers, we are profoundly disturbed by this development, and urgently seek your assistance in preserving access to our State's justice system for tens of thousands of people in need. Oppose the block granting of these funds and the accompanying regulations which would dismantle the Legal Services Corporation."

During the seminar presented by the Access to Justice Board, a petition was circulated. The petition asked for funding for LSC and a lifting of the severe restrictions which have been placed on the use of LSC funds. Ninety-five judges signed the petition which was then faxed to Washington where John McKay, chair of the Equal Justice Coalition, presented it to Sen. Slade Gorton.

In the two weeks since this article was written the landscape of legal services in Washington state has undoubtedly been rewritten. For an update, contact Joan Fairbanks at the WSBA (206-727-8282).

FYI

Editor's Note: This is one of those rare instances of synchronicity wherein both the Editor and the Communications Staff independently considered the same idea; to wit, a fax poll of our members' opinions on current topics. If it proves popular, then it was technically the Editor's idea; if not, then it is the fault of the Communications Dept. Thus, with that understanding, we present to you:

#### The First

#### **WASHINGTON STATE BAR NEWS**



What is your opinion regarding the proposal to divide the Ninth Circuit Court of Appeals into a new Twelfth Circuit, comprised of Washington, Alaska, Idaho, Montana and Oregon, as discussed on pages 49-51? Please check the statement which most reflects your opinion, along with any comments which you may have, and fax this entire page to the number below. Please, only one vote per attorney.

1	I strongly support the division of the Ninth Circuit.
2	I somewhat support the division of the Ninth Circuit.
3	I strongly oppose the division of the Ninth Circuit.
4	I somewhat oppose the division of the Ninth Circuit.
5	I think the proposal is worthy of study, but additional research is required before I can form an opinion.
Commen	ts:
(This will b	faxing attorney:  e kept confidential, unless your comments are chosen for publication along with the poll results in ber <i>Bar News</i> .)

Fax your response by October 10 to: (206) 860-0379

(Please note: This is not the WSBA fax number.)

Or, mail your response by the above date to:
Washington State Bar Association
Attn: Hal White, Bar News Editor
2001 Sixth Ave., Suite 500
Seattle, WA 98121-2599

Please send suggestions for future fax polls to the above address.



# A New Lease on Life

My son called about 10 a.m.. We talk two or three times a week. He is at work, and I am getting ready for the day at the office, but often asleep at the kitchen table with last night's paper and a cold cup of coffee. You see, I suffer from an insidious disease called sleep apnea.

On this occasion, he was very serious and urged me to see the doctor for help. The father of one of his coworkers was using a machine that forced air into his nose while he slept. He told me in a straightforward, loving way that my symptoms were getting worse. He wouldn't let me go until I agreed to make an appointment.

I sat back and thought about my condition; I realized I was missing out on a normal life. I awoke hourly during the night for no good reason, and after dinner, fell asleep in my chair. I slept there until midnight, or later, and then went to bed.

I couldn't drive my car more than 35-40 miles without my eyes growing heavy. I drove with the radio on high and all the windows open, and I still got drowsy. I would be forced to stop, to sleep or walk.

Afternoons were nap time. My secretary woke me when she left the office at 5:30 and, if I didn't immediately get up and start moving, I would fall back to sleep. One night I planned to meet my wife for dinner at 6 p.m. but woke up at 7. She was already home, upset and worried about my whereabouts.

Movies were out, and I missed my favorite television shows — "NYPD Blue," "Rumpole." I was among the living dead.

My cure started with a full lung exam and an overnight stay at a sleep clinic. They fitted me with a nose cone connected to a pump at midnight and woke me at 6 a.m. I felt like a new man. That evening, my breathing machine, "CPAP" was delivered, and the nose piece and headgear fitted. I now sleep all night without the benefit of vivid, disruptive dreams.

How different my life is! I am wide awake all day and evening. I feel like doing my yardwork, even 12-hour stints (except for lunch). I can drive without fear of a catastrophe. I can read as long as I wish and watch what I enjoy. I am thrilled with my new lease on life.

The cost of the machine is little compared to the result. The hospital charged \$1,200 for the study and fitting of the CPAP machine, which was \$1,100.

If you suffer the symptoms I have described, get help. Get a new lease on life. You owe it to your family, clients and friends. You owe it to yourself.

John Henry (206) 542-3138

#### Nota Bene

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

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

Call Joyce Elven at (206) 727-8268 for information and a newsletter.



#### THE JUDICIARY

Robert H. Whaley is the new judge in Eastern District, United States District Court. Whaley is a native of Georgia who moved to Spokane in 1971. He was a federal prosecutor and then entered private practice at Winston & Cashatt. He moved to his new position from the Spokane County Superior Court bench.

**Paul A. Bastine** was appointed by Governor Mike Lowry to the vacancy in the Spokane County Superior court.

#### **CLARK COUNTY**

Vancouver's Keep Kids Healthy Funday recently honored attorney MarCine Miles for her time and effort of the past 11 years on behalf of the organization. She codeveloped the annual event, which features car safety seat inspections and has been expanded to include bike, fire and personal safety.

#### KING COUNTY

Don Paul Badgley, a senior partner with Bogle & Gates in Seattle, has been selected to author an article in Arthur Andersen's The General Counsel Advisor. The spring 1995 General Counsel Advisor focuses on management related issues facing corporate counsel in the 1990s. Badgley's article, titled "Dispute Resolution Strategies: Mechanisms to Avoid, Contain and Resolve Disputes," focuses on avoidance techniques for businesses to integrate into their operations to help anticipate disputes and save time and money. Matthew Lattimer has joined the firm as an associate. A former law clerk with Deloitte & Touche, he has also worked for the United States Securities & Exchange Commission, conducting legal research and translating Chinese documents.

Geoffrey G. Revelle, formerly executive vice president for operations and general counsel for Attachmate Corporation, has joined Stoel Rives Boley Jones & Grey in an of counsel capacity. Revelle is associated with the firm's Seattle office and will continue to serve Attachmate as chief outside counsel.

Seattle lawyer **Mike Withey** has been installed as the new president of Trial Lawyers for Public Justice. The organization was created to answer a challenge from consumer advocate **Ralph Nader** to form a national public-interest law firm. Withey is a partner in the firm of Schroeter, Goldmark & Bender.

The Seattle University School of Law's Professional Responsibility Integrative Component Clinic, run in conjunction with WSBA, involves law students in the investigation of disciplinary complaints against lawyers. The program is a recipient of the 1995 E. Smythe Gambrell Professionalism Award conferred by the American Bar Association. The awards recognize bar associations, law firms, law schools and not-for-profit, law-related organizations that substantially contribute to professionalism among lawyers.

Kevin Y. Jung attended a five-day meeting of the council on Peaceful Unification of Korea in Seoul September 3-7. Jung, an attorney with Seattle's Miller, Nash, Wiener, Hager & Carlsen, was recently appointed to a two-year term as foreign advisor to South Korean President Young-Sam Kim's council on reunification.

Former Washington Supreme Court Chief Justice **Keith Callow** will join American Arbitration Association as an arbitrator and mediator in civil matters

William E. Pierson, formerly with Cozen & O'Conner has joined the Seattle office of Bullivant, Houser, Bailey, Pendergrass & Hoffman. He will continue to focus his practice in the areas of large-property loss subrogation, complex commercial litigation and property coverage litigation.

**Craig Gannett**, former senior counsel to the U.S. Senate Committee on Energy and Natural Resources, where he worked on major bills to reform the Endangered Species Act and the wetland provisions of the Clean Water Act has returned to Davis Wright Tremaine's Seattle office. He will focus on government-regulated fields, including solid-waste management, telecommunications, electric utility and naturate

ral-resource issues and land use.

**Shiela F. Osborne** has joined the law offices of Herman, Recor, Kaufman & Simmerly as an escrow paralegal and will work with partner **Stephen T. Araki** in the area of residential/commercial closings and business opportunity closings.

Linda A. Wandell, counsel for R.W. Beck, a national engineering firm based in Seattle, recently was elected to a two-year term as cochair of the General Counsels Forum of the American Consulting Engineers Council.

Seattle attorney **James L. Magee**, of Graham & Dunn, was elected a fellow of the International Society of Barristers on August 1. The Society, with a membership limited to fewer than 600, honors attorneys nationwide for their advocacy skills and professionalism.

Karr Tuttle Campbell shareholder **Diana K. Carey** is the tenth Seattle attorney—and the first woman attorney in the city—to receive national certification in business bankruptcy law from the American Bankruptcy Board of Certification.

A mediation and arbitration program specifically designed for insurance claim disputes, including environmental claims required to be mediated under WAC 284-30-900, is now available in Washington through Insurance Dispute Resolution, Ltd. (IDR). The panel includes attorneys R. Jack Stephenson, Margaret E. Wetherald, William P. Hight, Frederick M. Meyers, Frankie Crane and Sidney R. Snyder, all of Seattle firms.

Roland L. Hjorth has been appointed as dean of the University of Washington School of Law through the 1997-1998 academic year. Hjorth has been at the law school for 30 years; he teaches courses in tax law. He is a member of the WSBA, the New York Bar, the U.S. Tax Court, and the ABA, where he was elected a Fellow and became a Life Fellow in 1993.

**Keith U. Kuder** has joined Lane Powell Spears Lubersky's Seattle office as a tort and insurance associate. He will continue to concentrate his practice in defense litigation.

Michael G. Martin, former assistant federal public defender for the Western District of Washington, is now of counsel to the Liderius Lonergan law firm of Seattle. His practice will continue to focus on the area of federal criminal defense, specifically white-collar defense.

#### KITSAP COUNTY REPORT by JOAN CASE

On the homefront, the summer doldrums set in: everyone dreams of palmier climes and fewer court dates, especially those of us whose vacations are but filmy memories. Meanwhile, the fall crush is upon us. We can all join the eternal chant popularized if not immortalized by the Seattle Mariners—Wait 'til next year. But of course we don't even have a wildcard berth to hanker after.

Sanchez, Paulson, Mitchell and Laurie has a new associate (**Renee Davis** having gone on to greener pastures in her hometown of Seattle). His name is **Sydney D. Vinnedge**. However, he has been christened Sid Vicious by **Mike Kirk**, apparently in retribution for the moniker, "Scooter," aptly applied to the newest Tolman and Kirk associate.

Also new to Kitsapland are **Bridget Kenefick** to Olsen and Olsen in Bainbridge Island; **Rachel Felbeck** in **John Jackson**'s office; **Joanne Dantonio** in the Crawford, McGilliard, Peterson and Yelish firm. Leaving for other venues, **Randy Keyes**. Both leaving and coming, and a record holder in that category, is **Patrice Cable**, who has been retiring for the past six months.

Last, but not least: A special thank-you to photographer **Steve Landau** for his excellent Law Day pictures, which appeared on pages 60 and 61 of the July *Bar News*.

LAWYERS' CAMPAIGN FOR HUNGER RELIEF REPORT by BOB MUSSEHL

**Brad Doyle**, co-chair or chair of the Lawyers' Campaign for Hunger Relief since its beginnings in 1991, has "retired" from the board. He is leaving the area to pursue his interest in philosophy and a

career in teaching. He gave tirelessly to the campaign for four years. Brad, we owe you a great deal and wish you well.

The early fall has been a busy time for the Campaign. We have been considering a few ideas for major fund-raising events, reconstituting our board and gearing up for a renewed effort. Your reporter was elected chair at the August meeting, where we also initiated a handful of new board members from the legal community. Welcome to the board, Jay Rossiter, Vicky Lai, James Gorham, Adonica-jo Wada and Steve Parkinson.

Calendar project: With the guidance and support of Amica International, we are preparing a four-color, 1996 calendar designed to be sold within the Washington legal community. Benefits will go directly to feed hungry children and families. It features the artwork of children from this area on the theme of worldwide hunger relief. Lawyers and their firms will be proud to hang these heartwarming collections in their offices and give them to clients as gifts. An insert announcing the calendars will be in the November Bar News, but you can order them now by calling the offices of **Bob Mussehl**, (206) 622-3000.

Finally, we are proud to announce that the Superior Court Judges Association has joined an impressive list of groups that sponsor and support LCHR. SCJA President **Evan E. Sperline** commends the Campaign and says the SCJA is "pleased to participate."

For more information on the LCHR, call (206) 622-3000.

# LAW FUND REPORT by LAUREN MOORE

Congratulations to LAW Fund Board member Paul Stritmatter and his bride Mary Elizabeth St. Clair on their wedding at the end of September, and thank you to Paul and Mary Elizabeth for sharing your special day with LAW Fund. Gifts in honor of the bride and groom are still rolling in.

Thank you to the law firms and lawyers who have contributed already to the LAW Fund 1995 Annual Campaign. Your participation this year is particularly important due to the devastating attack on federal funding for the civil legal-service programs we support: Evergreen Legal Services, Puget Sound Legal Assistance Foundation and Spokane Legal Services Center.

There are many firms that have given generous annual gifts to LAW Fund every year since our first campaign in 1992, and have made their contribution already for 1995 (as of 8/15/95). We would like to thank these "early and often" friends for their participation: the lawyers at Perkins Coie; Bogle & Gates; Davis Wright Tremaine; Preston Gates & Ellis; Davies Pearson; Foster Pepper Shelfelman; Gordon Thomas Honeywell Malanca Peterson & Daheim; Graham & Dunn; Keolker & Swerk; Reed McClure; Knappe & Knappe Inc.; Paul N. Luvera & Assoc.; Mikkelborg, Broz, Wells & Fryer; Mills Cogan Meyers Swartling; and Stritmatter Kessler. Your stalwart support is recognized and appreciated.

Many other firms have given to LAW Fund for the past three years, including 1995, and we would like to thank those firms for their continued support as well. They include (as of 8/15/95): Anderson Hunter; Baumgartner & Henderson; Black & Yund; Law Office of Ann Forest Burns; Danielson Harrigan & Tollefson; Dano Miller Ries; Law Offices of James A. Degel; Finer & Pugsley; Gordon & Shogan; Law Offices of Lowell K. Halverson; Heller Ehrman White & McAuliffe; Herman Herman & Jolley; Horenstein & Duggan; Lane Powell Spears Lubersky; Linn & Schisel; Law Offices of Jo-Hanna Read; Law Offices of James S. Rogers; Rush Hannula & Harkins; Shea Kuffel & Klashke; Sinnit & Sinnit; Laurel Smith & Associates; Vandeberg Johnson & Gandara; Weber & Gunn; and Woeppel Hoover & Kamitomo.

The early support of firms and individuals is always appreciated. Now that October is upon us, the busiest time of year for LAW Fund's annual campaign is here. Help us make the 1995 campaign our most successful ever. The need has never been greater.

Please send your contribution to LAW Fund, 1326 Fifth Avenue, Suite 815, Seattle, WA 98101.

#### **OREGON**

Thomas P. Harbolt has joined the Portland firm of Tonkon, Torp, Galen, Marmaduke & Booth as an associate. His practice will focus on general business, commercial transactions and corporate securities law.

#### SOUTH KING COUNTY BAR ASSOCIATION REPORT by RONALD C. MATTSON

Back in May some time, there was an election of officers in the South King County Bar. My recollection of the events is dimmed by the passage of time and the fact that I was energetically, enthusiastically, and *quite financially* involved in the heat of the campaign; myself a candidate for the esteemed office of Secretary. (But more on that later.)

The current officers (pursuant to the aforesaid election) of the South King County Bar Association are president, Thomas A. Campbell; vice president, Theresa Ahern; treasurer, Bonnie Lindstrom; secretary, Hon. Judith Eiler; past president, Jane Rhode.

Our current Board of Trustees comprises (go ahead, look it up; I bet I used "comprises" correctly!) the following: Kenlynn Gallinger, Richard (Dick) Jackson, Robert (Bob) Kuvara, Paula Pridgeon, Jennifer Stevens, Hon. Linda Thompson, Robert (Bob) Thompson, and David Tracy.

So, you say, what's this about the hotly contested race for position of Secretary of this esteemed organization? Well, I'll tell you what, 'cuz I wuz down there in the trenches, fightin' it out with none other than the countenance of King County District Court, Federal Way Division, Judge Eiler, who has long coveted this position to write her witticisms regarding our little association (Did you catch her at the Funniest Lawyer comedy play-offs? She's a regular!) Well, so, after I shake every lawyer's hand in South King County (I think I may have even kissed a baby or two!), and spending . . . geesh, I think, \$0.17, on this elaborate campaign, the Judge wins!

So, you say, why are we reading what YOU have to say? Good question. It appears that, after the aforesaid hard-fought campaign, the said victor (the Hon. Judge Eiler) had some commitments that could not be postponed and asked if I'd "do the honors."

Here I am. I'm late. I'm sorry. I've been a very busy person this season and I should have got this out earlier.

Our "annual" cruise on Lake Washington in conjunction with the East King County Bar Association was really nice: my wife, **Astrida**, and I had fun on the dance floor (was that what they call the "fantail"?), acting crazy with virtually any music we requested. The biggest problem was the fact that about 90% of the South End failed to show up. I don't blame the EKCBA if they don't invite us next year (and *that's* why I put "annual" in quotes above).

The annual SKCBA (and I can use that acronym with impunity, now that the KCBA is the KCBA) golf tournament has been delayed to August 11. Of course, by the time you read this, the winners will be one month old (or more) news.

Our next meeting is September 21, 1995, at Anthony's Home Port in Des Moines. On our schedule are the "new" Supreme court justices: Philip Talmadge, Gerry Alexander, and Roselle Pekelis.

And now, Judy (Ooops! I'm sorry!) Judge Eiler, are you ready to re-assume the reigns of "secretary"?

#### SPOKANE COUNTY

**John A. Riherd** is a new partner in the Spokane office of Perkins Coie. Formerly with Medical Service Corporation of Eastern Washington, he brings experience in the area of healthcare law.

**Todd Reuter** has become associated with the Spokane office of Preston Gates & Ellis. He formerly was associated with the Spokane firm of Stamper, Sherman, Stocker & Smith.

Hollie J. Westley, formerly with Layman, Loft & White, has become an associate with Chase, Hayes, & Kalmon. Her practice involves corporate and business law and healthcare litigation.

Gonzaga University School of Law was

recently awarded a three-year, \$240,140 grant from the U.S. Department of Education's Fund for the Improvement of Postsecondary Education to fund a project designed to increase skill training in law schools nationwide. The school plans to develop curricula, produce teaching materials and teach prototype classes for skill labs in conjunction with eight traditional law school courses.

George Marlton became the new District 1 Spokane County Commissioner in June. A WSBA member since 1972, Marlton was a public defender for 19 years and has been in private practice since 1992 and performed as a part-time pro tem judge in the Spokane County District Court.

#### WASHINGTON WOMEN LAWYERS STATE BOARD REPORT

by TIFFANIE KILMER

Chief Justice Barbara Durham attended the August WWL board meeting to discuss SSJR 8210 and to ask for WWL's support of the resolution. The State Board has also approved its nominations slate for the 1995-1996 board year, to include: Colleen Kinerk, president; Susan E. Keers, president-elect; Joanna C. Allen, 1st vice president special projects; Sandra Meadowcroft, 2nd vice president special projects; Myrna Contreras-Trejo, vice president minority liaison east; Millicent Newhouse, vice president minority liaison west; Suzanne Thomas, 1st vice president gender & justice; Linda Walton, 2nd vice president gender & justice; Mary Gallagher Dilley, 1st vice president leadership development; Joyce Shui, 2nd vice president leadership development; Carmen Delgado, vice president membership; Patricia Kaiser, vice president public relations/history project; Janet Jacobson, secretary; Jeanne M. Clavere, treasurer; Melisa Evangelos, newsletter editor.

The WWL Annual Dinner will be held on Tuesday, October 10, at the Stouffer-Madison Hotel in Seattle. For more information, please contact **Tiffanie Kilmer**, executive director, at (206) 622-5585.

#### IN MEMORIAM

#### **Philip Burton**

Seattle lawyer Philip Burton, 79, died July 29, 1995. A native of Topeka, Kansas, Burton worked on the initial filing of the landmark 1954 *Brown v. Topeka Board of Education* case while attending Washburn University Law School. He moved to Seattle in 1948 and practiced law there until his retirement in 1990. In 1963 he helped lead the city's first desegregation effort in the Seattle School District. He was influential in obtaining passage of the state's 1967 Fair Housing Act. He was a former president of the Seattle chapter of the National Association for the Advancement of Colored People, and was described by Seattle Mayor Norm Rice as one who "dedicated his life to the fight for equality and opportunities for all people. He was a tireless champion for civil rights and he was an eloquent spokesman for those whose voices are often not heard—the disadvantaged." Survivors include his wife.

#### Charles Elicker

Former Washington state senator Charles Elicker, 69, died August 12, 1995, in Bremerton. A native of Pittsburgh, Pennsylvania, Elicker graduated from the University of Washington in 1944 and its law school in 1949. He took a graduate degree from the University of Michigan.

The Poulsbo resident, described by *The Seattle Post-Intelligencer* as a "witty Teddy Roosevelt look-alike," was elected to the state house of representatives in 1966 and the senate in 1968. He retired in 1972. In 1970 he ran against incumbent U.S. Senator Henry Jackson to fly the flag for the Republican party. Jackson won with 83 percent of the vote, a victory so certain Elicker announced he was holding a defeat party on election night.

Lt. Governor Joel Pritchard called Elicker "a wonderful citizen." Of his former high school classmate, Pritchard remarked, "he was bright and creative, a fine state senator."

Survivors include his wife, two sons and three daughters.

#### Warren Shattuck

Former University of Washington law professor, Warren Shattuck, 86, died June 27, 1995, in San Francisco. He retired from Hastings College of Law in San Francisco in May 1995 after 60 years of teaching.

Shattuck graduated from the University of Washington School of Law in 1934 after serving as *Law Review* president. He was a Sterling Fellow at Yale Law School and obtained his doctorate at Yale in 1936. Throughout his career he was active not only in teaching but also in critical writing and in consulting with members of the practicing bar. He was an expert in commercial transactions and, although a Washington lawyer, was for many years the author of the contract questions on the California Bar Exam. He was also an acknowledged authority on the interface between Japanese-American commercial law and taught seminars on that subject in Japan.

Hastings Dean Mary K. Kane described Shattuck as "the quintessential teacher and mentor whose seemingly gruff exterior belied his deep concern for his students. They not only learned the law of contracts from him, but were taught by his example how to be ethical lawyers and compassionate human beings." Shattuck was also profiled by a former student, Russell Austin, Jr., in the May 1993 issue of the Washington State *Bar News*.

Shattuck's survivors include three children and four grandchildren.

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