The Official Publication of the Washington State Bar

Washington State Bar News

Vol. 49, No. 4, April 1995

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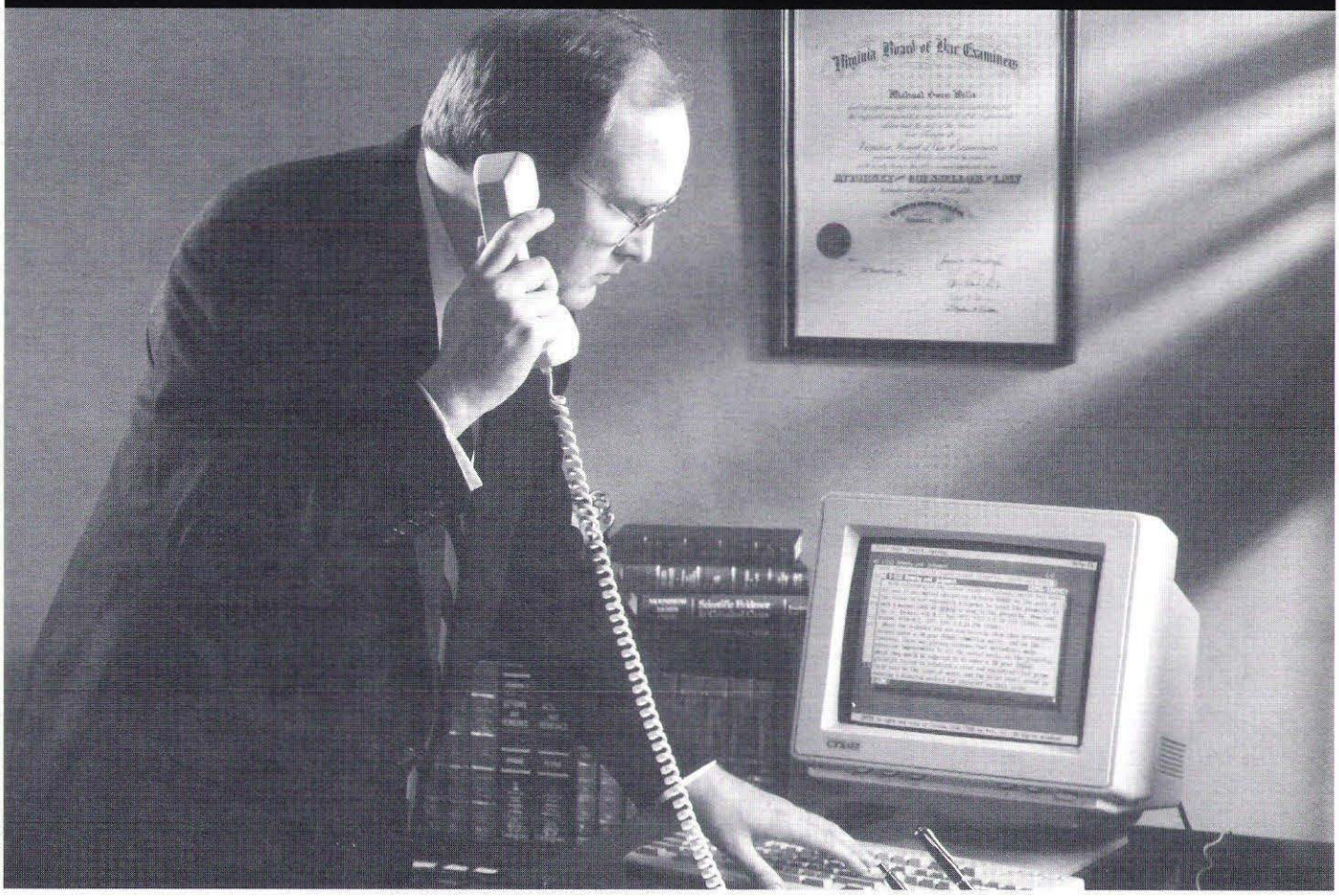

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FEATURES

ART CREDIT

Cover and pages 18-19 : "The Jury" art poster is a reproduction of a batik by Washington state artist **Catherine Conoley**. The posters were printed under a grant from the US West Foundation by the Washington State Minority and Justice Commission.

The Commission was created by Supreme Court order in October 1990. The goal of the Commission is the elimination of racial and ethnic bias, where it exists, in Washington courts. Commission members include judges, lawyers and laypersons; it is cochaired by Supreme Court Justices Charles Z. Smith and James M. Dolliver. Its work is accomplished through its four subcommittees: Bar Liaison, Education, Work Force Diversity and Research.

Several Commission members represented Washington state at the first National Conference on Eliminating Racial and Ethnic Bias in the Courts, held in Albuquerque, New Mexico.

Posters may be obtained at a nominal cost from Vicki J. Toyohara, Executive Director, Washington State Minority and Justice Commission, (360) 705-5327.

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Legal	(206) 727-8207	Communications	(206) 727-8203
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Lawyers' Assistance Program	(206) 727-8268		

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DEPARTMENTS

After accepting the resignation of the incumbent, to take effect in September, the WSBA Editorial Advisory Board is accepting applications for the position of editor. The *Bar News* editor is a part-time, independent contracting position. Applicants must be licensed members of the WSBA in good standing. Submit writing resumé and writing samples, if available, to *Bar News* Editor Search, Washington State Bar Association, 500 Westin Building, 2001 Sixth Avenue, Seattle, WA 98121-2599. Applications must be received not later than April 15, 1995. Information on the duties and compensation of the editor can be obtained from the *Bar News*, WSBA Communications Department, (206) 727-8215.

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.

A Piece of Immigration Law History

Editor:

I enjoyed the piece on page 51 of the January *Bar News* regarding the American Immigration Lawyers Association (AILA). By the way, I found it to be an incredible coincidence that the article was written by Frank H. Petman, in light of the fact that one Frank H. Retman is a prominent member of the Washington Chapter. I am sure the two must often be confused with each other. [in cyberspeak: :-)]

However, the saga of the name change is more interesting than that which was reported. It is true that the American Immigration and Nationality Lawyers was founded in 1947. However, the catchy acronym of AINL (not anil but same pronunciation) remained in effect for nearly 40 years.

In the mid 1980s, the organization held a plebiscite wherein it was decided to abandon the old name. I recall that the proposed names included NAIL (National Association of Immigration Lawyers), INAL (Immigration and Nationality Lawyers Association) as well as AILA.

After the vote was taken, the organization changed its name to INLA. However, this change was to be short-lived (just a few months). It turned out that objections were raised that INLA was also the acronym for the Irish National Liberation Army. Without making any comment on the Irish "troubles," shall we say that INLA was not as pacifist as the

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7 credits (+1.5 A/V credits) $175 (by 3/24; $190 thereafter)

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Spokane – Cavanaugh's Inn at the Park – 4/14
Seattle – WA State Convention & Trade Ctr. – 4/21
3.75 credits $85

The Annual Civil Litigation Institute
Seattle – Sheraton Seattle – 4/14
6.75 credits $145

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Seattle – WA State Convention & Trade Ctr. – 4/19
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Financial and Retirement Planning for Professionals and Executives
Seattle – Washington Athletic Club – 4/26
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Seattle – Washington Athletic Club – 4/28
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Seattle – King County Courthouse – 4/28-4/29
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MAY

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Seattle – WA State Convention & Trade Ctr. – 5/4 (DOS Users)
Seattle – WA State Convention & Trade Ctr. – 5/5 (Windows Users)
7 credits $175 (by 4/20; $195 thereafter)

Construction Law Midyear
Seattle – Washington Athletic Club – 5/5
7 credits $149 (by 4/21; $169 thereafter)

WSBA Skills Training Course
Bothell – St. Thomas Conference Ctr. – 5/8-5/13
(5/13 will be held at King County Courthouse)
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Eastsound – Rosario Resort – 5/11-5/13
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Bellevue – Hilton Hotel – 5/19-5/20
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provisional IRA? Without a further vote the organization's name was then quickly changed to its present one.

I have found that there is one immutable law: the law of unintended consequences. The above vignette is but one example.

Take it easy, but take it.

STUART I. FOLINSKY
Los Angeles

Did you also check the flower pots?

Editor:

I wish to report a very disturbing experience I had while representing a client, a defendant, during his deposition. The deposition took place at the office of plaintiff's counsel. My client was the last in a series of depositions of fellow employees. Plaintiff's counsel used a small "private" conference for all depositions. Toward the end of each deposition, plaintiff's counsel and the plaintiff would excuse themselves to consult one last time before dismissing the witness. They would leave the conference room to me, the witness, the court reporter and the attorney representing the employer.

Near the conclusion of my client's deposition, plaintiff's counsel excused himself and the plaintiff, as had become routine. My client and I were left to confer. I went to the conference room credenza to fill my water glass and noticed the "microphone" light was illuminated on the conference room telephone. I showed my client, the court reporter and co-counsel. I then pushed the microphone button and the light went off. Co-counsel and I adjourned to the hallway where plaintiff's counsel then passed through offering his office if we wanted privacy. Plaintiff's counsel said "it's not bugged." Oh, the disclosures of a guilty mind.

This is to caution lawyers that such invasions and tricks are being employed, and may have been employed, without us even knowing it. The next time, the attorney may simply disconnect the microphone light and no one will be the wiser. Conferences with our clients should always be held in a private and secure place. Beware!

J. GARY NECE
Seattle

How do I execrate thee? Let me count the ways . . .

Editor:

I read with interest President Ron Gould's statement of WSBA goals in the January *Bar News*. Isn't the list too abbreviated? From past *Bar News* accounts of Executive Director Dennis Harwick's activities, I thought one of the Bar's major goals was to avoid recognizing its employees' labor union. If my impression is correct, maintaining a "right to work" work place should be added to the President's list of goals. If it is incorrect, then the Executive Director should give up and recognize the union. I for one find his anti-union stance a personal and professional embarrassment.

As an aside, thank you for reporting in the December *Bar News* that for the last four years the Bar has spent $2.58 per member annually fighting the employ-

ees' union. Can I still apply for my *Keller* deduction for this expenditure? When are we going to get our mandatory dues referendum ballots? I hope the executive director doesn't put bum instructions on these ballots like he did with the dues roll-back referendum, so he doesn't have to count the votes.

The executive director should also have a little more respect for Alva Long than was indicated by Jean Godden's account, in her *Seattle Times* column, of the memo the executive director circulated to WSBA staff after Long's death. What was he thinking when he warned that "some of [Long's] supporters will file the referendum and use Alva as a martyr," and "I think the WSBA staff should understand that Alva's death may not mean there won't be a referendum"? Was he hoping? If the executive director keeps making boo-boos like this, someone new will assume Long's leadership role on the truth squad, and he will be counting votes in a "three strikes, you're out" referendum on his continued employment.

ELIZABETH R. MITCHELL
Seattle

The Referendum

Editor:

I am writing this letter concerning the new referendum proposed to limiting the extent of which dues can be applied to functions of the Washington State Bar Association.

The major concern I have is that the funding for the Lawyers' Assistance Program would be adversely affected. I am wondering if the readers or even the proponents of this referendum realize what a tremendous help the Lawyers' Assistance Program has been to the general public at large.

The purpose of the Lawyers' Assistance Program is to help lawyers who are afflicted with alcohol and drug problems and also stress related matters. The whole purpose of the Lawyers' Assistance Program when it was started in 1987 was to help lawyers out before they became disciplinary problems. The major cost of our dues all along has been the discipline process, and the Program, which is now the leader nationally, is to help circumvent discipline problems.

It would be a sad commentary on our Bar to discontinue this tremendously helpful program. I am hoping that your readers will realize what an important program this has been and how much national recognition it has gotten. As a matter of fact, Bar Associations from all over the United States are calling our LAP program to get help.

JEROME L. JAGER
Seattle

Editor:

While the availability of the Lawyers' Assistance Program (LAP) to help Bar members in a variety of ways is no longer the "best kept" secret in town, there are still many of our lawyers who are only vaguely aware of it and its vital role.

LAP, for starters, is funded by you as members of this bar at a cost of about $9

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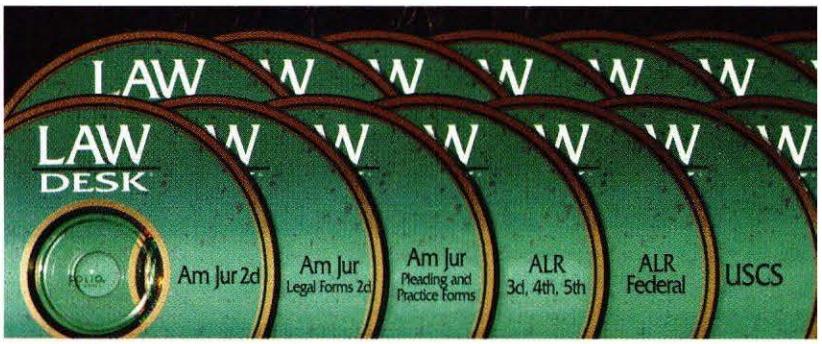

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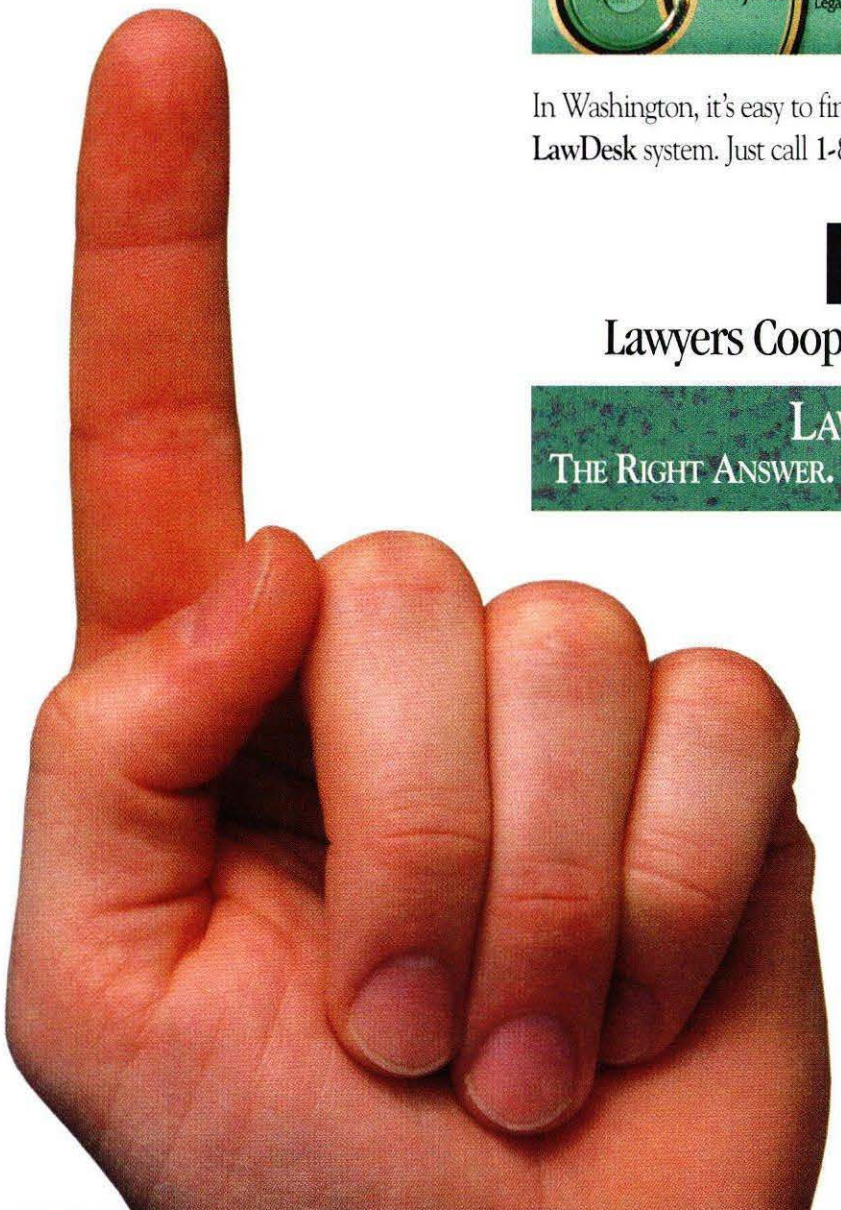

per member. Since LAP's establishment in 1987, hundreds of lawyers have been helped in their struggles to overcome alcoholism and other drug addictions as well as depression and the myriad of other problems they have.

Thus, many of these people have been saved from being disbarred and ruined in their personal and professional lives. Aside from the economic losses they would have suffered, their personal lives involving their families, have often been salvaged.

As a volunteer, unpaid peer counselor for eight years, I can vouch for many recoveries under LAP and have the utmost respect for this fine program and the need to continue it.

LAP and many other important Bar programs and functions appear to be threatened in the upcoming referendum for an extremely barebones Washington State Bar Association passes.

Our humanitarian instincts, our compassion for the wounded members of our profession, if nothing else, urge a resounding NO to this ill-conceived referendum.

JACK HEPFER
Seattle

Editor:

Rumor has it curmudgeons are again at work. It mystifies me that members of this helping profession are unwilling to have any portion of their Bar dues help their fellow lawyers. The Washington State LAP Program is among the most successful in the nation and the envy of most states. Lawyers helping lawyers recover from addictions, stress, overload, depression, irrevocable losses, and other difficulties seems to me to also be in the interest of the membership, in general. Preventing the devastation of the future for troubled lawyers not only improves our Association but also the public's perception of us.

Why in the world would we want to throw out something that actually works?

MICHAEL HOFF
Seattle

Editor:

I note with some concern the ongoing debate regarding the referendum on the resolution to limit the expenditure of association funds. I am particularly concerned about the impact the passage of such resolution would have on present services provided by the Bar for the benefit of members of the association and the public generally.

Programs such as the WSBA's Lawyers Assistance Program would no longer be funded and undoubtedly would lapse. Founded in 1987, this program has provided invaluable assistance to impaired lawyers over the last seven years.

As stated in the report of the Budget and Audit Committee of the WSBA Board of Governors in its "Sunset Review":

"By acting to prevent deterioration of an attorney's proficiency, LAP provided an effective barrier to degradation of services to the point where malpractice, discipline, or both became inevitable. It is that public benefit which provided the theoretical underpinnings for the program, and which justify its continuation."

Although funded through Bar dues, LAP is also the beneficiary of substantial efforts (estimated to be 4,600 hours annually) by volunteers who are the driving force of the program.

The melding of volunteer efforts with a bar-financed administrative structure is a perfect example of how bar funds can be properly used in conjunction with voluntary effort to provide a much needed benefit to the members of this association and the public at large.

It would be a shame if this program were dismantled.

PATRICK C. COMFORT
Tacoma

Editor:

Answering the call contained on pages 20-21 of the February *Bar News*, herewith are my comments.

Because I have always felt it a fundamental right not to have others force or compel me to do anything I do not otherwise have any obligation to do, I intend to vote *in favor* of the subject resolution. I don't think it right that a mandatory ("unified") bar association has any business telling its members that they MUST contribute to activities that are peripheral to the reasons for the association.

Having said that, I *fully intend to pay my full dues*, even if the referendum passes because I believe that I *receive full value* for the "extras" which my dues help pay for. In the vernacular: "I'm satisfied with the bang I'm getting for my buck!" (The Alaska Bar Association charges me $150 per year to remain inactive, a *nonvoting* status [so they can raise my dues on whim and I can't even vote on it!], and all I get is a bimonthly rag [aptly called *The Alaska Bar Rag*] which cannot hold a candle to the KCBA's *Bar Bulletin*!)

Keep up the good work! I'll keep paying my full dues! I just don't want to hear any more carping from members who feel they're forced to support nonmandatory functions!

R.C. MATTSON
Renton

Re: "Democratic Reform and The Rule of Law in Cambodia"

Editor:

I read with great interest Col. Lorenz's article regarding legal reform in Cambodia in the February issue. My wife, Somara, grew up in Phnom Penh, though her family was originally from Svay Rieng province, hard by the Vietnamese border. It is especially appropriate to consider the experiences of those refugees who made it out of the Killing Fields to this country in light of the current attempts to deny S.S.I. and other such entitlements to some members of that community.

The work of Col. Lorenz and other members of the bar is commendable. The people of Cambodia are entitled to determine their own governmental and legal systems, but some sort of rule of law is crucial to the reconstruction of that country.

TIMOTHY J. BLAKE
Phoenix, AZ

Ronald M. Gould

VOTE NO

by **Ronald M. Gould**
WSBA President

We are faced with a threat to professionalism from a referendum that would limit the WSBA's use of dues—which are mandatory in our unified-bar system—to the functions of admissions, discipline and regulation.

Members should vote "NO" on the ballot to be mailed May 15, 1995, because this limitation would threaten all of our nonregulatory programs.

The referendum would terminate programs such as the *Bar News*, the Young Lawyers Division, the Computerization of Law Division, our efforts toward providing opportunities for women and minority lawyers, our legislative program and our other contributions to improving access to justice, court rules and professionalism. It would also impair, if not eliminate, our support of sections.

I see good signs that many lawyers, experienced or new to practice, those who are leaders of the Bar and those who simply mind their own business, will oppose this referendum, which would strip all common sense of professionalism from our association. I ask for your vote of "NO" on the referendum. I ask to save the WSBA. I ask for your valued advocacy with your friends and colleagues who need to hear your personal counsel opposing this referendum. Call a friend or two now to urge a vote of "NO." It would be tragic for lawyers if they lost the effective organization that has nurtured, trained and strengthened so many established practitioners.

As I have sought your support thus far, I have found it in leaders from all types of practice and all across the state, from those who value professionalism and understand the contributions of a unified bar. Working together, we will inform our fellow members, and we will debate the issues on the merits.

Once informed on this issue, lawyers statewide will see that they have had enough of the proponents' extravagant criticisms of the unified bar, enough of negative attacks on the Association without constructive solutions.

In the end, with your help, the Bar's collective wisdom will set this matter to rest. As with any human institution, the WSBA is not perfect, and from time to time it needs reform of programs and procedures. All who recognize the virtues of unified professionalism may work with us to improve whatever has disturbed them. But the members will not, I think, accept the referendum proponents' anarchic plea for dismantling the system that has served us for a century. In a real sense, we are all trustees of our bar association, preserving it for future generations of lawyers.

In the end, with your support, we will keep our self-governance for the benefit of our clients, our colleagues and the public.

Vote "NO."

IT IS TIME TO GET RID OF PEREMPTORY

by Judge **David A. Nichols**
Whatcom County Superior Court

It is time to get rid of that aspect of voir dire we presently know as the peremptory challenge. Unless we do, we risk destroying the very foundation of the jury system. In my view, we have already significantly eroded, at least in high-profile and big-money cases, the chance of achieving a verdict which truly represents both the will and the truthful opinion of a representative panel of our peers.

I have written somewhat extensively on the subject of voir dire.[1] In an effort to get voir dire out of the morass of time-consuming, rhetorical and uninformative jury questioning, the state judiciary has been backing the so-called "struck jury system" in the hope the process would become really meaningful. For the most part, I think practitioners are now pretty well used to the system and feel it is an improvement, and some attorneys use it well. The view we should scrap peremptory challenges is a different issue altogether. My view comes from my growing concern that through peremptory challenges based on spurious, stereotypical,

CHALLENGES AND TREAT JURORS WITH DIGNITY

outcome-based and discriminatory reasons the very foundations of our system are threatened.

We have come a far distance from a jury of twelve men picked totally at random from whoever was handy, to where we now have Ph.D.-trained people telling us exactly what juror profile is best for a given case to achieve a particular verdict desired. The O.J. Simpson trial has nothing to do with truth-finding by a representative jury. Both sides blandly and freely admit this. Today's jury selection is about seating jurors who are most likely to voice their inborn prejudices to the benefit of one side and the detriment of the other. When one thinks about it, this notion is truly monstrous and flies in the face of every notion of fair play and substantial justice which we advertise is the linchpin of our system.

We are all familiar, *ad nauseam*, with what has gone on in high-profile or big-money cases in the last few years. Every conceivable personality type, racial group, gender tendency, age propensity, and the like has been quantified, qualified and profiled; statistical probabilities have been published; mock juries have been studied, all to the end of eliminating anyone

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who might be against a party's position or too knowledgeable or independent not to follow the party line. Because it has become "conventional wisdom" that certain people tend to react in certain ways, we are deliberately promoting and glorifying, even raising to a "scientific level" stereotyping, racial discrimination, gender, age, and education bias, etc. that we as educated, presumably sensitive, people ***abhor*** in every other context in society. Only in jury selection do we ***encourage*** bias and demean people by their juror profile. What hypocrisy! We say we believe in the individuals and their worth, but we have no compunction about rejecting them publicly from a jury if they fail to answer a question in a way which seems favorable or if they fit a stereotype we don't like.

I used to think that the federal courts had it all wrong. Federal judges ask all the questions, and the lawyers can recommend only that the judge ask what they wish. But now I think the federal bench, England, Canada, and many other common-law countries in fact do have it right. They eliminate jurors only for actual and demonstrated bias, a notion which we in Washington have broadened to an unconscionable degree by means of the peremptory challenge. The jury selection process has, in any kind of a big case, become a bastardization of the original premise. In the quest for sympathetic jurors, or the rejection of unsympathetic jurors, both sides spend large amounts of money to develop detailed, intrusive questionnaires, answerable on pain of contempt, which are then subjected to the microscope of the psychologists, all with the end of finding favorable jurors and eliminating unfavorable ones, not on the basis of real prejudice (unless we can find it for our side), but to control the outcome of the case other than on the merits of the evidence. A fair trial was never intended to include the right to pick a jury of one's friends. Moreover, jurors are becoming outspoken in their dislike of the process, which threatens to be a strong disincentive to jury service.

This is, of course, not to deny that many questions a juror may be asked do in fact go to bias of a tangible nature. It is certainly legitimate to find out if someone has been raped before allowing that person to sit on a rape jury. It is insulting, however, to eliminate young women because they tend to vote against a perpetrator, or to seat older women because they tend to require a higher standard of morality from victims. Put plainly, no system deserves support which enables counsel to inject the jury with calculated prejudice.

Only in jury selection do we encourage bias and demean people by their juror profile. What hypocrisy! We say we believe in the individuals and their worth, but we have no compunction about rejecting them publicly from a jury if they fail to answer a question in a way which seems favorable or if they fit a stereotype we don't like.

I believe there is another major flaw in our criminal system: ***the requirement for a unanimous verdict.*** This requirement directly encourages the kinds of abuses of jury selection which I abhor. The number of jurors necessary to reach a guilty or not guilty verdict can be debated, but no one juror should be able to thwart the will of a sizeable majority, be it ten or twelve. Many jurisdictions have done well with less-than-unanimous verdicts for years. As matters stand now, we reward discriminatory jury selection by allowing an "outlaw" juror to dictate the outcome of a trial. In athletic judging, we throw out the high and the low scores and take a reasonable average. Why should it be so different in a jury trial?

So, at the risk of sounding like a Cervantes "hero" out of touch with reality, I propose that we make a number of rather major changes in our approach to jury selection and orientation:

1. After the panel has been called and generally oriented, the lawyers and judge would talk to the jurors and thoroughly describe the case from all angles, giving counsel a chance to educate the jurors on the issues and about any problems affecting fairness like race, drunkenness, and so forth. Each counsel could lecture the panel on the importance of certain concepts in the case such as burden of proof. The jurors would then be queried as to any reservations they may have about being fair to both sides in the case they have heard described, and challenges would be taken for cause based on any reservations expressed. Understand that I am not opposed to the crucial role that attorneys play in sensitizing the jury to important issues and to counsels' ability to dissipate the accumulated knowledge and bias jurors may have formed out in society. Good presentations from counsel and court will induce a better commitment to the law and the juror's role as a fair fact-finder. This is a much more honest and straightforward approach then doing it during voir dire "questioning" in the traditional manner. [2]

2. Once the initial jurors are called to the box, only questions going to actual bias leading to the usual challenges for cause would be propounded, asked by the judge, much as the federal system works now. Counsel would be permitted follow-up questions to any persons who suggest an actual bias by questioning on that issue only.

3. After challenges ***for cause*** have been taken, no further challenges would be permitted. Peremptory challenges would be erased from the lexicon altogether.

4. Criminal cases would be decided by a 10-person majority, civil cases by a nine-person majority (four-person majority in six-person juries).

5. Before the trial begins, as part of the opening statements or as part of the judge's instructions, the jury would be thoroughly indoctrinated on its role, the issues in the case, and given the essential instructions normally given only at the end of the trial on the laws and how to deal with the testimony.[3]

6. In every case, jurors would be provided with materials for taking notes without limitation except as to communication before deliberations. Wherever it was reasonable, jurors would be given

notebooks of documents, outlines of issues, lists of witnesses—whatever would make the case clearer and more logical to them.

7. In an appropriate case, counsel should be allowed to address the jury to sum up evidence during the trial. As the evidence changes, the preliminary instructions should be revised mid-trial.

8. Questions should be permitted by jurors at the close of any evidence phase of the case. Jurors should be told they may pose questions relating to clarification of the testimony only, in writing, to be forwarded to the judge by the bailiff, who in turn would give them to counsel. The jury would be told the questions might or might not be answered, but no explanation would be given.[4] This premise is in keeping with my firm conviction that jurors should be more educated and aware, not less so. The conventional notion that only an ignorant, unopinionated juror is a good juror is nonsense. One of the reasons why arbitration and private judging are gaining in popularity is that the litigants can select a person who has some knowledge about the subject area. We should be lucky to find knowledgeable people on the jury panels. Their potential for swaying the rest of the jurors needs to be taken care of by indoctrination on issues of fairness, not by eliminating them from participation. [5]

9. Final instructions to the jury must be delivered in language which is understandable. More important, the concluding instruction (WPI 1.08, WPIC 151) needs to be rewritten and stressed. The jury needs to be instructed specifically as to ***how*** they should deliberate the case beyond simply having a "discussion carried on in a sensible and orderly fashion," I would propose the following:

> You have heard over the course of the trial testimony by witnesses and have had introduced into evidence exhibits for your consideration. You have been instructed by the court on the issues for you to decide and the law, which you must accept. Each of you, separately and with your fellow jurors, has the solemn duty to examine, piece by piece, all the evidence in the case ***before*** you finally make up your mind. By this the court means that all evidence must be examined and reexamined by you to determine its relevance, credibility and believability, and the weight to be given the evidence in terms of the crucial issues in the case. The court suggests that the jury, after selecting a juror to act as chair, critically review each item of evidence and attempt to reach consensus as to what actually happened. The opinions of ***all*** jurors should be sought even though they may be reluctant to express their opinions. Aggressive and opinionated jurors should not be allowed to dominate the discussions. Everyone needs to listen very attentively to every other juror. None of us is infallible. No juror should be unwilling to listen to other jurors and to reevaluate an opinion if a juror thinks he or she was wrong. All evidence should be examined from all angles. If the jury is convinced that the case should have a certain outcome, the evidence should nevertheless be measured against other theories presented so the jury can be confident all possibilities have been carefully considered prior to reaching a final verdict. Juror opinions or conclusions not based on evidence at the trial should be rejected. Neither sympathy nor prejudice has any place in a jury verdict, which means that it would be unfair to let emotions like anger, compassion, vengeance, irritation and the like interfere or play any role in your objective consideration of the evidence.

Final instructions to the jury must be delivered in language which is understandable. . . The jury needs to be instructed specifically as to* how *they should deliberate the case beyond simply having a "discussion carried on in a sensible and orderly fashion . . ."

In summary, I would like to see jury manipulation in the voir dire process eliminated; people rejected for jury service only for obvious bias or problems and the abolition of the peremptory challenge; thorough explanations of the issues of jury service, matters in controversy in the case, and legal standards to be applied; a participating jury treated like intelligent human beings capable of setting aside extrinsic matters when advised of the reasons to do so, able to take notes and ask questions; and a jury told exactly by what standards they should judge the case and instructed precisely on how their deliberations should be carried on. Only in this way do I think we can stop the trend toward manipulative jury selection, the fostering of the worst stereotyping in society, and the demise of a true verdict of one's peers.

Endnotes:

[1] "Some Thoughts on How to Use the Struck Jury System in Jury Voir Dire," *Wa. State Bar News*, July 1992; "Struck Jury Voir Dire - A Case Study," *Wa. State Bar News*, March 1994.

[2] An interesting article on the benefits of counsels' sensitizing the jury is Singer, "Voir Dire by Two Lawyers: An Essential Safeguard," *Judicature*, April 1974.

[3] The usual argument made on this point is that evidence may prompt additional or different instructions. The jury should be told that final instructions will be given at the close of evidence and these are preliminary. They are intended as a framework on which to place the evidence. The Committee on Juries of the Judicial Council of the Second Circuit in its 1984 report listed the following advantages to pretrial instructing:

1. enhancement of the jury's ability to remember evidence resulting from the fact that attention and memory are more acute when an individual understands what he or she is looking for;

2. improving a jury's ability to assimilate evidence and relate it to relevant issues by providing a table of contents for the trial;

3. helping jurors to identify and thereby resist prejudices they may bring into the courtroom;

4. assisting the jury in evaluating credibility and drawing reasonable inferences by providing guidance on these subjects before, not just after, the jurors are required to perform these tasks.

[4] Common objections usually revolve around time-wasting and irrelevant or embarrassing questions. This conventional wisdom is ever more being questioned. *See*, for example, R. Landry, "Let the Jurors Ask," *National Law Journal*, January 1990. Landry cites many instances where juror questioning has been approved and applauded. Military jurors have traditionally asked questions.

[5] Former FCC chair Newton N. Minow wrote a provocative editorial for the *Wall Street Journal*, June 5, 1990, entitled "An Impartial Jury, Not an Ignorant One." He says, in part:

> If it is to safeguard liberty, protect against official malfeasance, and represent the community—as well as determine the guilt or innocence of the accused—the jury must be composed of members with diverse backgrounds, experience and views. This is why cases are decided by juries and not individual jurors. The jurors should also be active, informed members of the community. In fact, the skills of discernment that most citizens exercise and refine daily in evaluating the barrage of news, advertising and rhetoric presented by the media may help jurors to be both impartial and capable . . . .
>
> As Mark Twain said:
> "In this age, when a gentleman of high social standing, intelligence, and probity swears that testimony given under solemn oath will outweigh, with him, street talk and newspaper reports based upon mere hearsay, he is worth a hundred jurymen who will swear to their own ignorance and stupidity, and justice would be far safer in his hands than in theirs. Why could not the jury law be so altered as to give men of brains and honesty an ***equal*** chance with fools and miscreants?"

✣ ✣ ✣

Judge ***David A. Nichols*** *has served on the Whatcom County Superior Court bench since 1985.*

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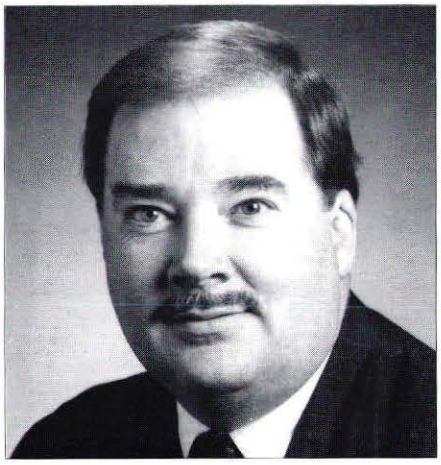

Dennis P. Harwick

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

Each year at this time, I ask members of the Washington State Bar Association to look around and identify those members of our profession and the public who deserve the recognition and thanks of the Washington legal profession. If you know of someone who fits the criteria set forth below, please send me a letter of nomination and relevant information ***by June 1, 1995,*** so that I can forward that information to the Board of Governors' Awards Committee for consideration. Awards will be presented at a luncheon on Friday, September 8, 1995, immediately preceding the annual business meeting.

Award of Merit	This is the WSBA's highest honor. It was first given in 1957. In general, the Award of Merit is given for long-term service to the bar and/or the public, although it has also been presented in recognition of a single, extraordinary contribution or project. It is given to individuals only —both lawyers and nonlawyers.
The President's Award	As the name implies, this award(s) is given for special accomplishment or service to the WSBA during the term of the current President.
Board of Governors' Award for Professionalism	This honor is awarded to a member of the WSBA who exemplifies the spirit of professionalism in the practice of law. "Professionalism" is defined 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.
The Angelo Petruss Award for Lawyers in Public Service	This award is named in honor of the late Angelo R. Petruss, a Senior Assistant Attorney General, who passed away during his term of service on the Board of Governors of the WSBA. The selection criteria looks for a significant contribution by a lawyer in government service to the legal profession, the system of justice, and the public.
Outstanding Judge Award	This award may be presented to a judge from any level of court. It is presented for outstanding service to the bench and for special contribution to the legal profession.
WSBA Pro Bono Award	This award is presented to a lawyer, nonlawyer, law firm, or local bar association for outstanding efforts in providing pro bono services to the poor. This award is based on cumulative efforts as opposed to a lawyer's or law firm's pro bono hours or financial contribution.
WSBA Courageous Award	This award is presented to a lawyer who has displayed exceptional courage in the face of adversity, thus bringing credit to the legal profession.
The Affirmative Action Award	This award is made to a lawyer or a law firm making a significant contribution to affirmative action in the employment of ethnic minorities, women, and the disabled in the legal profession within the State of Washington.

It is important to note that presentation of these awards is made only when there are truly deserving recipients. Some years no award is given in some categories. ***Send nominations to:***

WSBA Executive Director, ATTN.: Awards, 500 Westin Building, 2001 Sixth Avenue, Seattle, WA 98121-2599

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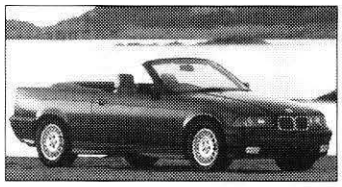

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Notices of Interest to WSBA Members

WSBA Disciplinary Notices

Expanded Disciplinary Notices Policy Adopted by Board of Governors: At their February 1995 meeting the Board of Governors, with the concurrence of the editor of the *Bar News*, adopted the following policy:

1. That expanded discipline notices be drafted by Disciplinary Board Counsel.

2. Disciplinary notices include reporting all public discipline actions:
   - the attorney disciplined;
   - bar number;
   - admission date;
   - location (i.e., Seattle, Olympia, etc.);
   - the discipline imposed;
   - effective date;
   - The RPC(s) violated and a concise statement of the conduct (i.e. neglect, non-cooperation etc.);
   - a synopsis of the facts;
   - the hearing officer, if any; bar counsel; respondent's counsel.

3. Expanded disciplinary notices should specifically *not* include:
   - identification of the grievant;
   - names or identification of any clients.

4. Private admonitions may be included, but without the names of anyone, as they are not officially disciplinary sanctions (RLD 5.5(a)).

5. At the end of each page of expanded disciplinary notices, the following language should be included: "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."

Reprimand/Censure: Tacoma lawyer **Thomas G. Krilich** (WSBA #2973, admitted 1967) has been ordered reprimanded, censured and placed on probation for two years pursuant to a Stipulation for Discipline approved November 22, 1994, by the Disciplinary Board.

The reprimand is based on Krilich having agreed to file a lawsuit on behalf of a client, and then making a series of misrepresentations over a two-year period designed to make his client believe that the lawsuit had been filed and was moving toward some resolution, when in fact he had not filed the lawsuit. This conduct violated RPC 1.4(a) requiring that a lawyer keep a client informed about the status of a matter and RPC 8.4(c) prohibiting conduct involving misrepresentation.

The censure is based on Krilich having neglected to pursue litigation on behalf of another client such that the client's lawsuit was dismissed after the statute of limitations had run for refiling the suit. This conduct violated RPC 1.3 requiring that a lawyer act with reasonable diligence and promptness in representing a client.

The discipline is based on the aggravating factor of multiple incidents of misconduct and various mitigating factors. Krilich has been placed on a two-year period of probation during which he must comply with a number of conditions including meeting with a practice monitor to ensure that Krilich limits his caseload to a manageable level, timely prosecutes client matters and keeps clients reasonably informed about the status of their matters.

Suspended: Seattle lawyer **Santiago Juarez** (WSBA #5685, admitted 1974) was suspended pursuant to a stipulation by order of the Supreme Court of Washington on February 15, 1995, effective immediately. The suspension is for one year with a conditioned reinstatement and a two-year probation. The suspension arose from Juarez's failure to pay sums due the Department of Labor & Industries which Juarez received as part of a settlement of a client's claim. Juarez stipulated that this conduct violated RPC 1.14 (trust account rules) and 8.4(d) (conduct prejudicial to the administration of justice). The suspension also resulted from Juarez's conduct in receiving and using funds from the Immigration and Naturalization Service without determining actual ownership, in violation of RPC 1.3 (diligence) and 1.14 (trust account rules). The funds were refunds of cash bonds Juarez had posted on behalf of immigrants several years before.

The Supreme Court ordered that Juarez pay costs and expenses of $250. Juarez's reinstatement is conditioned, *inter alia*, on providing the Bar Association with reasonable plans of repayment, acceptable to the debtors, of the sums owed to his clients and the Department of Labor & Industries.

Suspended: Phoenix, Arizona, lawyer **Michael S. Manning** (WSBA #9486, admitted 1979) has been ordered suspended for a period of four years, effective December 9, 1994, from the practice of law in the State of Washington, pursuant to order of the Supreme Court of Washington entered December 9, 1994. The Court ordered reciprocal discipline pursuant to RLD 12.6 and the discipline imposed by the State Supreme Court of Arizona. He was disciplined by the State Supreme Court of Arizona for his lack of diligence, failure to maintain adequate communication; failure to expedite litigation; for engaging in the unauthorized practice of law; for his conduct involving dishonesty, fraud or deceit, or misrepresentation; for his violation of a disciplinary rule or order; for his failure to notify his clients of his suspension; for his failure to furnish information or respond promptly to any inquiry; and for evading service or his failure to cooperate with the State Bar of Arizona's investigation.

Commission on Judicial Conduct Notices

Stipulation and Agreement and Order of Admonishment: The Commission on Judicial Conduct and Hon. **Andrew L. Monson**, judge of the Pacific County North District Court, stipulated to an admonishment based on the following facts: Monson was at all relevant times a part-time district court judge in Pacific County. In January 1993 he was contacted, in his capacity as an attorney, by a defendant at the Pacific County jail. He discussed implied consent law and let the defendant make her own decision. In April 1993 he conducted a hearing involving the person he had spoken with in January. In November 1992, Monson signed a bench warrant for another defendant. In January 1993 he was that defendant's attorney when the defendant was arrested based on that bench warrant. Monson resigned from his position in July 1994 for unrelated reasons. In October 1992, he was admonished by the Commission for failing to promptly dispose of the business of the court.

Based on these facts, Monson stipulated and agreed that he violated Canons 1, 2(A) and 3(C)(1)(b,c, and d(ii)) of the Code of Judicial Conduct, and agreed that in future when practicing as a lawyer or judge he will disqualify himself where his impartiality might be reasonably questioned. *In re the Matter of Hon. Andrew L. Monson, Judge, North District Court, Pacific County*, No. 93-1568-F-50, January 27, 1995. The Commission was represented by its counsel, David Akana. Judge Monson represented himself.

Commission Decision of Censure: The Commission held a fact-finding hearing on November 4, 1994, in Tacoma in the matter of Hon. **A'lan Hutchinson**, judge of the Pierce County District Court No. 3. The Commission found the following facts by clear, cogent and convincing

evidence: Hutchinson was a part-time Pierce County District Court judge in Eatonville. In August 1993, he conducted a hearing in which two men submitted name change petitions based on their being involved in gender-reassignment therapy. He declined to grant the petitions until the gender reassignment was completed. In October 1993 he presided over a motion to reconsider, for which he initiated an ex parte, independent factual investigation about gender assignment surgery. In a crowded courtroom he announced the results of his investigation and commented that he felt such surgery was "maiming" and potentially a felony, both in Washington and in most states. Expert testimony presented at the hearing was not rebutted by the judge, establishing that some of his conclusions were incorrect, or, at best, disputed by knowledgeable experts.

In the courtroom Hutchinson made disparaging remarks about the petitioners and their reasons for a name change petition, commenting he felt it was immoral, among other things. His reply to a notice from the Commission that it was making initial inquiries into the matter was "sarcastic and disrespectful, and evidenced a continuing lack of insight."

The Commission concluded that Hutchinson volunteered ex parte communications initiated and considered by him on matters pending before him. To the extent these communications related to his opinions on the law, in addition to factual information, Hutchinson did not receive such communications on the law through amicus briefs. The Commission held his conduct violated Canons 1, 2(A) and 3(A)(4) of the Code of Judicial Conduct. The Commission found that the misconduct was an isolated event; deprived the petitioners of an unbiased forum; and was likely to recur if Judge Hutchinson were faced by a similar issue, based on his comments; that his misconduct occurred in the courtroom, in his official capacity; that he felt his conduct was not a violation of the Canons of Judicial Conduct; and that he testified he would change his conduct if the Commission ordered it.

The Commission found Hutchinson's conduct undermined the public's expectation that judges will act impartially and will treat citizens with the respect, dignity and courtesy the Code requires; and that he imposed his moral views on others through his official position. His conduct was detrimental to the high standards of behavior expected from a judge.

The Commission ordered Hutchinson to read and follow the Code of Judicial Conduct; treat all persons appearing before him with respect, courtesy and dignity regardless of their differences and refrain from all impermissible ex parte

contacts; that he disqualify himself where his impartiality might reasonably be questioned; attend the next available offering of a cultural diversity program sponsored by the Minority and Justice Commission; write a letter of apology to each petitioner, such letters to be filed with the Commission and forwarded by it to them; and that he will refrain from conduct that could cause a repetition of the violations found herein. Three members of the Commission filed a separate opinion explaining why they felt a reprimand would have sufficed. Judge Hutchinson was represented by John J. O'Connell. The Commission was represented by David D. Hoff and Kathleen J. Hopkins. *In re the Matter of Hon. A'lan Hutchinson, Pierce County District Court No. 3*, Case No. 93-1652-F-47, February 3, 1995.

Public Notices

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

The average coupon equivalent yield from the first auction of 26-week treasury bills in February 1995 is 6.29%. ***The maximum allowable interest rate permissible for April 1995 is therefore 12%.***

Compilations of the average coupon equivalent yields from past auctions of 26-week treasury bills, and past maximum interest rates of the past 10 years appear on page 48 of the June 1994 *Bar News*.

Revision of WAC 458-20-207—B&O taxation of attorneys:

The Washington Department of Revenue is currently in the process of revising WAC 458-20-207. This rule discusses how B&O taxes are determined for attorneys. Because of statutory changes made in chapter 25, Laws of Washington, 1st Special Session to RCW 82.04.055 and 82.04.290 introducing the selected business services rate, the rule must be revised. The revision discusses the new rate and how attorneys engaged in multiple tax classifications will be taxed. Copies of the rule are available from, and comments concerning it may be submitted to Edward Ratcliffe, Department of Revenue, Legislation and Policy, PO Box 47467, Olympia, WA 98504-7467; phone (360) 586-3505; fax (360) 664-0693.

A public hearing (CR 102) will be held concerning Rule 207 in late May or June of 1995. The location will probably be Olympia, but meetings may be scheduled in more locations if supported by the legal community's response and interest in commenting upon the rule.

Summary of Changes to the Vaccine Injury Table

Effective March 10, 1995, the following revisions will be made to the Vaccine Injury Table and the Qualifications and Aids to Interpretation of the Table. 42 U.S.C. §300aa-14(a) & (b).

• Chronic arthritis will be added as an on-Table injury for the vaccines against rubella (MMR, MR, R). This addition to the Table creates the rebuttable presumption that chronic arthritis was caused by the MMR vaccines, where the first symptom or manifestation of the arthritis occurs within 42 days after the administra-

tion of the MMR vaccines. 42 U.S.C. § 300aa-14.

• Because the addition of chronic arthritis may significantly increase the likelihood that a petitioner alleging a rubella vaccine-related chronic arthritis will obtain compensation, an individual alleging that an on-Table chronic arthritis occurred *on or after* March 10, 1987, has until March 10, 1997, to file his or her claim with the U.S. Court of Federal Claims. This limitation period is an exception to the general-limitations rule that a petitioner must file a claim for a vaccine-related injury within 36 months after the first symptom or manifestation of the injury. See 42 U.S.C. § 300aa-16(a).

• The statute of limitations bars the claims of persons whose first symptom or manifestation of chronic arthritis occurred *prior* to March 10, 1987. 42 U.S.C. § 30aa-16(b).

• Hypotonic-hyporesponsive episode (HHE) and Residual seizure disorder (RSD) have been deleted as Table injuries for the diphtheria, tetanus and pertussis vaccines.

• As a result of the deletions of HHE and RSD, the presumption that HHE or RSD was caused by the vaccines will no longer exist, and an individual filing a petition on or after March 10, 1995, and alleging these injuries, must prove that the DTP vaccine was the cause-in-fact of the RSD or HHE.

• The Qualifications and Aids to Interpretation of the Vaccine Injury Table have been revised. See 42 U.S.C. § 300aa-14(b). Generally, these revisions amplify and clarify the medical terms used in the Vaccine Injury Table. The revisions to the Qualifications and Aids to Interpretation apply to all petitions filed on or after March 10, 1995.

[Submitted by Richard J. Riseberg, Chief Counsel, Public Health Division, U.S. Dept. of Health & Human Services]

Attorney General's Office Opinion Released

The Attorney General's Office has issued the following opinion:

Department of Agriculture-Department of Health-Agriculture-Health-Authority to Embargo Food Grown in A "Food Control Area": neither the Department of Agriculture nor the Department of Health has authority to administratively designate a "food control area" (such as the area surrounding the site of a chemical or nuclear accident) and embargo all food grown within the area without some particularized determination of the products which are contaminated or are likely to pose a threat to human health.

Cite as AGO 1995 No. 1. Maureen Hart, Senior Assistant Attorney General, is author of the opinion. [January 18, 1995]

Notice of Deadline for Filing WSBA Resolutions:

Pursuant to Article VII, Section F—"Resolutions" of the WSBA Bylaws, any ten (10) active members of the Washington State Bar Association may present a written resolution to the Board of Governors for consideration at the WSBA Annual Business Meeting, which will be held this year on Friday, September 8, 1995, beginning at 2:00 p.m. at the Seattle Sheraton in Seattle.

Resolutions must be filed with the executive director at least ninety (90) days before the Annual Meeting (by 5 p.m. on Friday, June 9, 1995) and must be accompanied by a written report explaining the resolution. The resolution and explanatory report together shall not exceed a total of one thousand (1,000) words. The executive director's office is at 500 Westin Building, 2001 Sixth Avenue, Seattle, WA 98121-2599.

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

The Resolutions Committee will hold a public hearing to consider the views of the proponents and opponents of resolutions on Friday, September 1, 1995, beginning at 1:30 p.m. at the offices of the WSBA (500 Westin Building, 2001 Sixth Avenue, Seattle). Proponents and opponents of resolutions are urged to attend the hearing or to present their views in written form for consideration by the Committee.

Proposed resolutions will be published in the July 1995 *Bar News*.

Members of the WSBA Resolutions Committee are: Gary D. Gayton, chair; David D. Hoff; Jon C. Iverson; James T. Johnson; V. Lee Kraft; Jill R. Kurtz; Teresa M. Morris; John M. Riley, III; John G. Schultz; Stacy L. Smythe; Phillip L. Thom and Ted D. Zylstra.

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- Asian Law (May 12)
- 28th Annual Pacific Coast Labor Law Conference (June 8-9)

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CALENDAR

April 1995

3 Deadline for receipt of questionnaires from lawyers and judges interested in being interviewed by the WSBA Judicial Recommendation Committee for appointment to appellate court vacancies. *See details in "Digest," March 1995* Bar News, *page 37.*

7 Tukwila: On-line: Records Management in an electronic age. *Sponsored by* ARMA. *For information:* Suzann Lombard (206) 483-8928/Barbara Benson (206) 543-7950.

7 Seattle: Sixth Annual International Law Institute. *Sponsored by* WSBA CLE.

12 Seattle: Recruiting Staff—Brown-bag Round Table. *Sponsored by* WSBA LPM Section/ALA. *For information:* (206) 789-2111.

14 Spokane: Attorney General's Update. *Sponsored by* SCBA.

15 Deadline for applications for *Bar News* editor position.

15 Deadline for June 1995 *Bar News* copy.

15 Seattle: New Defense Lawyer Workshop. *Sponsored by* WDTL.

20 Seattle: Lawyer as Detective II. *Sponsored by* KCBA.

20 Seattle: Sexual Harassment. *Sponsored by* GSLSA. *Contact:* Shari Morisset, (206) 382-1000/Denise Hoopes (206) 386-7693.

20-22 Long-term Services in the '90s: Life-affirming or Life-limiting? National Legal Center for the Medically Dependent & Disabled 10th anniversary special program on elder-law issues. *For information:* (414) 288-3802.

21 Seattle: Expert Persons or Expert Witnesses. *Sponsored by* KCBA in conjunction with KCBA Labor Law Section.

21 Seattle: Auto Cases: Winning is No Accident. *Sponsored by* WSTLA.

25 Seattle: Northwest Women's Law Center 1995 Gala, keynoted by Naomi Wolf. *Reservations* (must be received by April 18) (206) 682-9552.

27 Seattle: Nuts and Bolts of Insurance, Part 2A. *Sponsored by* KCBA.

27 Seattle: Recent Developments

Business Advisory Services, Inc. (206) 223-5400
CLE International (206) 621-1938
Davis, Wright, Tremaine (DWT) (206) 622-3150
Idaho Law Foundation (208) 342-8958
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.
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

and Assorted Issues in Real Estate and Construction Finance. *Sponsored by* DWT.

27 Seattle: Cultural Diversity—joint ALA-WSBA LPM Section meeting. *For information:* (206) 789-2111.

28 Spokane: General Real Estate. *Sponsored by* SCBA.

28-29 Seattle: Trying Cases to Win: Moving to the Master's Level with the Honorable Herbert J. Stern. *Sponsored by* UW CLE.

May 1995

3 SeaTac: Head Injury. *Sponsored by* WSTLA.

4 Seattle: How to Create a DOS Document System for Your Law Practice. *Sponsored by* WSBA CLE.

4-5 Spokane: Washington State Paralegal Association (WSPA) 20th annual convention, "Law Office Technology in the 1990s and Beyond." *Registration brochure:* Darlene Klister, (509) 455-6000.

5 Seattle: Estate Planning for Midsized Estates and Small-business Owners. *Sponsored by* KCBA.

5 Seattle: How to Create a Windows Document System for Your Law Practice. *Sponsored by* WSBA CLE.

9 Seattle: Appellate Practice (NOTE: new date). *Sponsored by* KCBA.

11-12 Seattle: The Pacific Northwest and the Global Economy—Asia. *Sponsored by* Institute for Professional and Business Organization. *For information:* Leland Shepherd, (206) 285-5325.

12-13 Spokane: WSBA Board of Governors meeting.

12 Seattle: Washington State Society of Health Attorneys 22nd Annual Hospital and Health Law Seminar. *For information*: Theresa Boschee, (206) 552-1107.

15 Deadline for July 1995 *Bar News* copy.

18 Seattle: Treatment of Unexpired Leases and Executory Contracts in Bankruptcy. *Sponsored by* DWT.

18 Seattle: Evidence. *Sponsored by* WSTLA.

18 Seattle: The Jury System. *Sponsored by* GSLSA. *Contact:* Shari Morisset, (206) 382-1000/Denise Hoopes (206) 386-7693.

19 Spokane: Family Law Update. *Sponsored by* SCBA.

20-21 Lake Chelan: WSBA Bar Leader Conference.

25 Seattle: World Trade Club annual dinner and presentation of George E. Taylor Trader of the Year award. *For information:* Lisa Kjaer, (206) 553-5615.

June 1995

8-9 Seattle: 28th Annual Pacific Coast Labor Law Conference. *Sponsored by* KCBA/UW CLE.

9 Deadline for filing resolutions to be presented at the WSBA Annual Meeting, September 8, 1995. *See details in "Digest," page 31 of this issue.*

9 Seattle: Tom Chambers' Legal Update for the General Practitioner. *Sponsored by* WSTLA. Also June 12 in Vancouver and June 21 in Spokane.

15 Deadline for August 1995 *Bar News* copy.

16-17 Lake Chelan: WSBA Board of Governors meeting.

22 Seattle: New Article 8 of UCC. *Sponsored by* DWT.

23 Spokane: Federal Law Update. *Sponsored by* SCBA.

30 Seattle: Products Seminar. *Sponsored by* WDTL.

30 Seattle: Health Law: *Sponsored by* UW CLE.

July 1995

11-12 Seattle: Law of the Sea. *Sponsored by* UW CLE.

15 Deadline for September 1995 *Bar News* copy.

28-29 Winthrop: WSBA Board of Governors meeting.

August 1995

3-6 Whistler, B.C.: WSTLA Annual Meeting & Convention.

10-11 Tacoma: Northwest Regional Legal Writing Conference. *Sponsored by* Seattle University School of Law. *For information:* (206) 591-2227.

15 Deadline for October 1995 *Bar News* copy.

September 1995

6 Seattle: Elements of Trial with Judge Coughenour (first of 15 sessions). *Sponsored by* UW CLE.

7-8 Seattle: WSBA CLE Board of Governors meeting.

8 Seattle: WSBA CLE Annual Business Meeting.

15 Deadline for November 1995 *Bar News* copy.

15-16 Seattle: 5th Annual Northwest Alternative Dispute Resolution Conference. *Sponsored by* WSBA/UW CLE.

22 Seattle: Business Succession Strategies. *Sponsored by* WSBA CLE.

October 1995

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.

January 1996

19 Seattle: Law Practice Management Institute and Expo. *Sponsored by* WSBA LPM Section/Puget Sound ALA. *For information:* Linda O'Brien, (206) 583-2260.

APPOINTMENTS

Committee Appointment Opportunities for WSBA Members

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

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

***Commission on Judicial Conduct*: One Seat**

Call for applicants-March; Board action-May)

The four-year term of G. Douglas Ferguson (Seattle) expires June 16, 1995. The four-year term of Margo T. Keller (Tacoma) expires June 16, 1996. The Commission is authorized under RCW Chapter 2.64 .Members are eligible for appointment to one additional term, for a total of eight years' service. For more information: David Akana, executive director, P.O. Box 1817, Olympia, Washington 98507, tel. (206) 753-4585.

***Judicial Information System Committee (JISC)*: One Seat**

(Call for applicants- April; Board action-June)

The three-year term of James S. Turner (Bellevue) and William F. Baron (Seattle), who hold one seat jointly, expires July 31, 1995. The Committee is authorized under the Supreme Court's Judicial Information System Committee (JISC) Rules and RCW Chapter 2.56. Appointments must be of persons who have demonstrated an interest in, and commitment to, judicial administration and the automation of judicial systems and functions. The WSBA Board makes nominations for appointment by the Chief Justice. The Committee meets every other month for three hours. For information contact Rick Coplen, Information Services, Office of the Administrator of the Courts, P.O. Box 41170, Olympia, Washington 98504, tel. (206) 753-3365.

***Statute Law Committee*: One Seat**

(Call for applicants-December; Board action-February)

The six-year term of Bernard J. Gallagher (Spokane) expires March 31, 1995. The six-year terms of Keith H. Campbell (Spokane) and James D. Hamilton (Vancouver) expire March 31, 1997. The six-year terms of Mary F. Gallagher Dilley (Seattle) and John G. Schultz (Pasco) expire March 31, 1999. The Commission is authorized under RCW Chapter 1.08. Five of its twelve members must be lawyers. It is the governing board of the Office of the Code Reviser, which serves as the bill-drafting arm of the legislature and as the codifier and publisher of the Revised Code of Washington. The Committee meets four to five times per year; a per diem of $50 and travel expenses is paid by the Committee. For information: Dennis W. Cooper, Code Reviser, (206) 753-1440.

Where Are You Going? Where Have You Been? The Dust Settles on the Tort Reform Act of 1986

by **Stewart A. Estes**

The law of torts is a creature of the common law, as modified by legislative pronouncement. During the last 20 years, tort law in the state of Washington has undergone significant alteration by a variety of statutes. The most substantial modification came in 1986, with far-reaching statutory reform. This reform most directly impacts tort lawsuits that involve multiple defendants. Washington's experiment may become part of the current national debate over tort reform, as recent federal proposals have included provisions for abolishing joint and several liability, and establishing caps on damages.

At common law, joint and concurrent (as opposed to successive) tortfeasors were jointly and severally liable for all indivisible damages caused by their negligence.[1] A plaintiff could sue such tortfeasors collectively or singly, and recover all his damages from a single defendant. Injured parties were, however, barred from recovery if they were found to be contributorily negligent for their injury.[2]

In 1973, the Washington Legislature abrogated contributory negligence in favor of "pure" comparative negligence. *Former*, RCW 4.22.010. However, joint and several liability remained, as did the common law rule that prohibited tortfeasors from seeking contribution from one another.[3] The combined effect of the abrogation of contributory negligence, the no-contribution rule, and the continued existence of joint and several liability created an inequitable situation for defendants. That problem was ameliorated, in part, by the Tort Reform Act of 1981 in which the Legislature created a right of contribution. RCW 4.22.040-060. This statutory right of contribution is premised on the existence of joint and several liability. However, the Legislature largely eliminated joint and several liability five years later through the Tort Reform Act of 1986. Laws 1986, Ch. 305; now largely codified at RCW 4.22.070 ("Act").

The substantive changes wrought by the Act have given rise to many questions. Some of the questions are fairly clearly answered by the Act itself or have been resolved by the courts. However, several open questions remain. This article (with apologies to Joyce Carol Oates) will summarize the known answers and suggest answers to some of these unresolved issues.

Proportionate Liability

The most fundamental question under the Act is, "When does joint and several liability arise?" This has been fairly clearly resolved. Joint and several liability is the exception, not the rule. It can arise either procedurally or through the establishment of certain facts. In some circumstances, common-law joint and several liability may continue to govern. Whether the legislative reform of tort law will have an impact on how the judiciary interprets the common law remains to be seen.

The general rule in Washington is proportionate liability. A plain reading of the Tort Reform Act of 1986 and three recent Washington Supreme Court decisions [4] confirms that the Act largely abolished joint and several liability in favor of a general rule of "several" (or "proportionate") liability.[5] The jury determines the percentage of the total fault which is attributable to every "entity" which caused the plaintiff's damages. RCW 4.22.070(1). "Entities" include the plaintiff, defendants, third-party defendants, other plaintiffs, released and dismissed parties, and even non-parties such as those who possess defenses or immunities (but not immune employers), and named parties who were never served.

The Act creates two exceptions to the rule of proportionate liability.

The first form of joint and several liability arises where a person acts as the "agent or servant" (employee) of a party, or where both were "acting in concert." RCW 4.22.070(1)(a). "Acting in concert" is said to require consciously acting together in an unlawful manner.[6]

The second form of joint and several liability arises where the claimant is free of fault, and judgment is entered against multiple defendants. RCW 4.22.070(1)(b). This type of joint and several liability is actually a modified version of the common-law rule: only those defendants against whom judgment is entered are liable, and then only for "the sum of their proportionate shares" of the plaintiff's total damages. They are not liable for the share of any at-fault entity which does not have judgment taken against them. At first blush, the Act may seem to have expanded common-law joint and several liability. Tortfeasors who would not have been jointly liable previously—viz., suc-

Can a party be jointly and severally liable for the acts of a non-party (as was the case under the common law)? The act provides for this possibility.

cessive tortfeasors—may be so now if a judgment is entered against them. However, the Act retains the common-law requirement that damages be "indivisible" for joint and several liability to exist. RCW 4.22.030. Thus, if the defendants can apportion the plaintiff's damages, they are liable only for those they actually caused.

The statute also wholly exempts three types of claims from the reformed liability scheme: hazardous waste, tortious interference with a contract, and fungible product claims. RCW 4.22.070(3)(a) through (c). These claims remain subject to common-law joint and several liability rules.

These two distinct types of joint and several liability created by the Act can logically be denominated "procedural" and "factual." *Factual joint and several* liability arises under the agent/employee, or acting-in-concert exception of subsection (1)(a). RCW 4.22.070 (1)(a). A plaintiff may establish joint and several liability factually—by introducing evidence of the employment or agency relationship, or of the conspiracy. This is in contrast to the second form of joint and several liability, where the fault-free plaintiff may (procedurally) establish joint and several liability under subsection (1)(b) through the entry of a judgment against multiple defendants. RCW 4.22.070(1)(b).

One of the questions that arises under the Act is whether a party can be jointly and severally liable for the acts of a non-party (as was the case under the common law). The act provides for this possibility. Subsection (1)(a) provides that:

> [A] *party* shall be responsible for the fault of another *person* or for payment of the proportionate share of another party where both were acting in concert or when a *person* was acting as an agent or servant of the *party*.

RCW 4.22.070(1)(a) (emphasis supplied.) Thus, even if a plaintiff is at fault, a defendant who is an employer or principal can be jointly and severally liable for the acts of a non-party employee or agent. (But a party employ*ee*/agent cannot be liable for the acts of a non-party employ*er*/principal). Similarly, even if the plaintiff is at fault, a defendant can be jointly and severally liable for another person's fault, if that person is a coconspirator. The rule would likewise apply if the employee/agent or coconspirator were a named defendant.

The next question that arises is who has the burden of apportioning fault to a non-party. The Act mandates that the trier of fact allocate fault to all parties and "entities" who caused the claimant's damages. RCW 4.22.070(1). Any party can assert that another person is at fault. However, this provision is not "self-executing." That is, one of the parties must present evidence of an entity's fault before the allocation procedure is invoked.[7] "Only the plaintiff, however, can assert that another person is liable to the plaintiff."[8] If the plaintiff does not do so, the burden is on the defendant to provide such proof.

A plaintiff may wish to apportion fault to a non-party who is jointly and severally liable with defendant, such as its employee. If someone other than the plaintiff establishes the fault on a non-defendant, "the person at fault is not liable to the plaintiff—the plaintiff has made no claim against him or her—but his or her fault nevertheless operates to reduce the 'proportionate share' or damages that the plaintiff can recover from those against whom the plaintiff has claimed."[9] Additionally, CR 12(i) now requires a defendant to assert entity fault as an affirmative defense. The rule also requires a defendant to identify the entity if known. Thus, the locus of the burden to plead and prove non-party fault depends upon the circumstances.

The question arises whether a fault-free plaintiff could settle with a defendant and retain *procedural* joint and several liability between the settling defendant and the remaining defendants. Possible procedures include a loan receipt agreement, the entry of a covenant not to enforce, or a covenant not to execute a judgment which would leave a settling defendant as a party. Judgment could later be entered against the settling defendant and the non-settling defendants, and *procedural* joint and several liability would arguably arise under subsection (1)(b).

Under a hybrid approach, the intentional tortfeasor would be held jointly and severally liable for all damages, but the negligent tortfeasor would be liable only for its proportionate share as the jury would be instructed to apportion fault to all entities.

A contrary argument can be made that the settling defendant has been "released" by the plaintiff, has an individual defense, or is immune from liability because the plaintiff cannot recover any money from that defendant. The Act provides that "judgment shall be entered against each defendant except those who have been released by the claimant or are immune from liability to the claimant," or who have prevailed on an individual defense. RCW 4.22.070(1). Thus, the Act does not permit a judgment to be entered against an immune or released defendant or one with a defense. Alternatively, it can be argued that a "judgment" with adverse consequences (as that term is used under RCW 4.22.070(1)) has not been entered against it, and joint and several liability does not exist. [10]

Intentional Torts

A complicated situation arises when a plaintiff is injured by the combined fault of a negligent tortfeasor and the act of an intentional tortfeasor. The Act fails to address this circumstance, stating only that the proportionate fault rules apply to "all actions involving fault of more than one entity[.]" RCW 4.22.070(1). But "fault" does not include intentional conduct. RCW 4.22.015.

Three distinct approaches to the dilemma are possible. First, the addition of the intentional tortfeasor to an action otherwise subject to the rules of proportionate liability completely removes the matter from the reach of the 1986 Act. That is, the jury would not apportion fault to any party, but instead render a verdict by which the tortfeasors would be jointly and severally liable for all of the plaintiff's damages. This is of course attractive to the plaintiff, but deprives a negligent tortfeasor of the benefits of proportionate liability based only on the fortuitous circumstance that his fellow tortfeasor acted intentionally instead of carelessly. A second approach would be to ignore the interjection of the intentional tortfeasor into the action and simply apportion fault to all involved, as would otherwise occur. This approach would benefit the defendants, especially the intentional tortfeasor, but appears to conflict with the policies of the common law which forbid extending the benefit of contributory negligence to an intentional tortfeasor, [11] and the intent of the 1981 legislature to exclude intentional torts from the definition of fault.

A third, and hybrid approach, is possible. It would accommodate the two important, but conflicting, principles discussed above. Under this model, the intentional tortfeasor would be held jointly and severally liable for all damages, but the negligent tortfeasor would be liable only for its proportionate share as the jury would be instructed to apportion fault to all entities. [12] (For this purpose alone, the intentional act would be treated as "fault.") This view also appears compelled by the language of the Act itself, in that apportionment is mandatory in all actions which involve the fault of more than one entity (which could include the plaintiff, the defendants and non-parties). RCW 4.22.070(1). The inclusion of an intentional tortfeasor into the equation does not remove the requirement that the jury apportion "fault" to those who have so acted.

Our courts have yet to address the issue. In *Schmidt v. Cornerstone Investments*, [13] the Supreme Court affirmed the trial court's reduction (offset) of a verdict by a previously determined reasonable settlement figure. The plaintiffs claimed that this offset was improper as the verdict was based on intentional conduct and, therefore, not subject to apportionment as "fault" under RCW 4.22.015. The court determined that the issue was more properly resolved under RCW 4.22.060(2), which requires the plaintiff's

"claim" to be offset, without regard to what was considered "fault." The court also affirmed on the basis that the defendants were jointly and severally liable. The court declined to address the plaintiffs' argument that the trial court erred by giving a contributory fault instruction on the claims involving intentional conduct.

Recall, also, that unless tortfeasors were jointly and severally liable at common law, they could not be joined in the same action. Joinder may be improper if some method exists to apportion the damages caused by their independent tortious acts.[14] Thus, an initial issue is whether intentional and negligent tortfeasors can even be named as codefendants. Another question is whether the tortfeasors's acts were indeed intentional, or whether merely reckless or negligent (and thus "fault"). A question of fact may exist for the jury's resolution.

Contribution

One of the largest remaining questions is when does contribution apply. The answer seems to be not often. The 1986 Act provides that *if* a defendant is jointly and severally liable under subsection (1)(a) or (1)(b), the defendant's right to contribution against another jointly and severally liable defendant—and the effect of one defendant's settlement—are determined under RCW 4.22.040, .050, and .060. *See*, RCW 4.22.070(2). Contribution plaintiffs must have extinguished the liability of the contribution defendant (with whom they are jointly and severally liable) and also establish that the amount they paid the plaintiff was reasonable at that time. RCW 4.22.040(2). The 1986 Legislature likely contemplated that the right to contribution created by the 1981 Tort Reform Act retained significance only when joint and several liability existed—supposedly rarely. Unfortunately, the 1986 Act did not clearly address this point.

Contribution is still applicable when defendants are jointly and severally liable. But our Supreme Court has ruled that under procedural joint and several liability, a settling defendant cannot be jointly and severally liable with a nonsettling defendant; a defendant with an affirmative defense is not subject to joint and several liability or a claim for contribution; and, a defendant who has been voluntarily dismissed has no joint and several liability either.[15] Thus, a right to contribution does not have any application in *procedural* joint and several liability cases.

An initial issue is whether intentional and negligent tortfeasors can even be named as codefendants. Another question is whether the tortfeasors's acts were indeed intentional, or whether merely reckless or negligent (and thus "fault").

Contribution may then have continuing vitality in only two situations. First, where *factual* joint and several liability exists under subsection (1)(a). And second, in those three situations where common law joint and several liability continue to exist. RCW 4.22.070(3). There might be other situations where the Tort Reform Act of 1986 does not apply, and common-law joint and several liability continues in effect. For example, with intentional torts which are not defined as "fault." *See*, RCW 4.22.005 and .015.

Factual joint and several liability may exist, of course, even without the entry of a judgment. This could arise where a defendant is jointly and severally liable with a party (or nonparty) employee/agent or coconspirator. Vicarious liability was created to assure full recovery for injured parties. However, primary liability rests with the employee/agent. A plaintiff is required to seek recovery first from the employee/agent and pursue the "additional security" of the employer/ principal only if those efforts fail.[16]

Third-Party Practice

The 1986 Act suggests that third-party practice under CR 14 is improper. A

condition precedent to the right of contribution is the existence of joint and several liability. RCW 4.22.040(1). And, a third party complaint may only name as a defendant a non-party "who is or may be liable" to the defendant/third-party plaintiff. CR 14(a).

The contribution statute was enacted in 1981 when joint and several liability was the rule, not the exception. The 1986 Act of course altered that situation and significantly undermined the underlying basis—and the need—for a right of contribution. If a defendant will generally never pay more than its proportionate share, it has no need to sue another defendant for having overpaid. Therefore, a third-party complaint for contribution does not appear to have a good-faith basis to be asserted, at least in procedural joint and several liability cases.[17]

The Act indicates that judgment is entered only against "each defendant," and the courts have held accordingly. RCW 4.22.070 (1)(b). The statute uses the term "third-party defendants" in the very sentence in which it states that judgment shall be entered only against defendants. Thus the Legislature apparently intended to exclude third-party defendants from this procedure. [18] Because a third-party defendant is not a "defendant" (unless the plaintiff amends the complaint and asserts a direct claim against the third-party defendant), the defendant/third-party plaintiff and the third-party defendant will not be "defendants against whom judgment is entered." Therefore, they cannot be jointly and severally liable.

The basic premise of the Tort Reform Act of 1986 is that (with exceptions) no tortfeasor will ever pay more than its proportionate share of a claimant's damages.

(Note that this would apply only to *procedural* joint and several liability cases under subsection (1)(b) and not *factual* joint and several cases under subsection (1)(a). *Factual* joint and several liability can arise whether or not a tortfeasor is even made party to the suit.)

Reasonableness Hearings

Another open question is whether the requirement of reasonableness hearings remains. The probable answer is that the requirement still exists only in those situations where contribution still exists, viz., *factual* joint and several liability or where an exception to proportionate liability exists. Our Supreme Court recently stated that a decision on the continuing necessity of such hearings "must wait another day." [19] Reasonableness hearings are a creature of the Tort Reform Act of 1981. They are, essentially, evidentiary hearings to determine whether, based upon various judicially determined factors, an amount paid in settlement was "reasonable."[20] They arise in multiple-defendant cases when there is a less-than-global

settlement of the lawsuit. The requirement that a defendant notify all other parties of an impending settlement and set a reasonableness hearing was enacted at a time when joint and several liability was the rule, not the exception. That changed five years later, but the provisions for reasonableness hearings were not accordingly revised in 1986.

There are two basic purposes for a reasonableness hearing:
(1) to establish the right to contribution of a settling jointly and severally liable defendant under RCW 4.22.040(2)(b); and (2) to establish a non-settling, jointly and severally liable defendant's right to obtain a credit for the amount paid by a settling defendant. RCW 4.22.060(2). [21]

The requirement for a reasonableness hearing is interrelated with the right of contribution. That is, both are founded upon the assumption that joint and several liability exists. In *Waite v. Morisette*,[22] Judge Jack P. Scholfield concluded that a non-settling defendant (who is not jointly and severally liable) is *not* entitled to a credit for amounts paid by settling defendants. At issue was the continuing effect of the offset provision and reasonableness hearing requirement of RCW 4.22.060 (of the 1981 Act) after the passage of the 1986 Act. By implication, *Waite* also deals with the right to contribution in RCW 4.22.060.

The court concluded that the 1986 Act "established proportionate liability" with the limited exceptions of where defendants act in concert, a person acts as an agent or servant of a party, or a claimant is not at fault. The court went on to say that it is plain that RCW 4.22.060 is applicable only to those few exceptions contained in RCW 4.22.070(1)(a) and (b). Neither an offset nor a reasonableness hearing is required unless joint and several liability exists. If each defendant pays only its proportionate share, there is no need for either; the jury apportions fault to settling defendants, and this process acts as the reasonableness hearing. Although the plaintiff shoulders the risk of settling "low," he also receives the benefit of settling "high." [23]

We know now that neither contribution nor an offset is available to a non-settling defendant under the *procedural* joint and several provisions of subsection (1)(b). Thus, it seems evident that under the 1986 Act contribution, reasonableness hearings and offsets apply only if *factual* joint and several liability exists. That is, in principal/agent, or acting in concert circumstances. Worthy of note is the fact that the 1986 Act permits the court to treat two persons "as a single person for purposes of contribution." RCW 4.22.040(1). At common law, the acts of those acting in concert were all attributable to each tortfeasor. Thus, contribution may not even be available between conspirators.

A primary purpose of a reasonableness hearing is to prohibit the manipulation of the value of a case by settling parties, to the detriment of the non-settling defendant. [24] However, in the absence of joint and several liability, a reasonableness hearing is unnecessary. The basic premise of the Tort Reform Act of 1986 is that (with exceptions) no tortfeasor will ever pay more than its proportionate share of a claimant's damages. Neither contribution nor an offset—and thus the requirement of a reasonableness hearing—is needed. The jury apportions fault to all at fault entities and fulfills the same purpose.

In conclusion, many of the significant questions which arose under the 1986 Tort Reform Act have been answered by the courts, or at least answers have been suggested. The Act is actually not as mystical as it might appear at first blush. If one reviews the provisions of the Act with its basic premise in mind—that defendants will pay only their proportionate share of fault—sound strategic decisions can be made as to litigating our cases. The author recognizes that there are as many theories about the above issues as there are attorneys who have studied them. An exception or countervailing point can always be made. This article is not intended to be a definitive work on the subject, but merely a starting point for debate and conversation. Many nuances still exist, and more questions will arise when the Legislature no doubt enacts other statutes which have an impact on tort law.

Endnotes

[1] *Snavely v. Goldendale*, 10 Wn.2d 453, 117 P.2d 221 (1941); *Rauscher v. Halstead*, 16 Wn.App. 599, 602, 557 P.2d 1324 (1976).

[2] *See, Hynek v. Seattle*, 7 Wn.2d 386, 395-98, 111 P.2d 247 (1941) (discussing common law doctrine of contributory negligence created by *Butterfield v. Forrester*, 103 Eng. Rep. 926 (K.B. 1809)).

[3] *Wenatchee Wenoaka Growers Assn.. v. Krack Corp.*, 89 Wn.2d 847, 849, 576 P.2d 388 (1978).

[4] *Washburn v. Beatt Equip. Co.*, 120 Wn.2d 246, 294, 840 P.2d 860 (1992); *Gerrard v. Craig*, 122 Wn.2d 288, 292, 857 P.2d 1033 (1993) and *Anderson v. Seattle*, 123 Wn.2d 847, 850, 873 P.2d 489 (1994).

[5] Some have correctly criticized the use of the term "several" on the basis that at common law "several" liability meant that any one of several defendants could be forced to pay for the entire harm; "joint" liability referred to the plaintiff's right to join all tortfeasors in a single action. Bryan Harnetiaux, *RCW 4.22.070, Joint and Several Liability, and the Indivisibility of Harm*, 27 Goz. L.R. 193, 198 n.19 (1991/92). "Proportionate liability" is the more accurate term.

[6] *Gilbert H. Moen v. Island Steel*, 75 Wn.App. 480, 487, 878 P.2d 1246 (1994). *See also, Martin v. Abbott Laboratories*, 102 Wn.2d 581, 596, 689 P.2d 368 (1984).

[7] *Adcox v. Children's Orthopedic Hospital*, 123 Wn.2d 15, 25, 864 P.2d 921 (1993).

[8] *Mailloux v. State Farm Insurance*, 74 Wn.App. 528, 532, 874 P.2d 209 (1994).

[9] *Mailloux v. State Farm Insurance, supra*, at 532.

[10] *See*, Gregory C. Sisk, *Interpretation of the Statutory Modification of Joint and Several Liability: Resisting the Deconstruction of Tort Reform*, 16 U. Puget Sound L.Rev. 1, 48-51 (1992).

[11] *Adkisson v. Seattle*, 42 Wn.2d 676, 682, 258 P.2d 461 (1953).

[12] *See*, Westerbeke & Robinson, *Survey of Kansas Tort Law*, 37 Univ. Kan.L.Rev. 1005, 1049 (1989); *Reichert v. Atler*, 875 P.2d 379, 381 (N.M. 1994), affirming 875 P.2d 384, 391 (Ct.App. N.M. 1992); and *Weidenfeller v. Star & Garter*, 2 Cal.Rptr.2d 14 (Ct.App. Cal. 1991) (adopting hybrid approach). *But see, Kansas State Bank v. Specialized Transp. Services*, 819 P.2d 587, 606 (Kan. 1991); and, *Loeb v. Rasmussen*, 822 P.2d 914, 918-19 (Ak. 1991) (rejecting hybrid approach).

[13] 115 Wn.2d 148, 161-63, 795 P.2d 1143 (1990).

[14] *Snavely v. Goldendale, supra*, at 458; *Benton City v. Adrian*, 50 Wn.App. 330, 342, 748 P.2d 679 (1988) (applying the rule of *Summers v. Tice*, 33 Cal.2d 80, 199 P.2d 1, 5 A.L.R.2d 91 (1948)). *Compare*, RCW 4.22.070 authorizing the trier of fact to apportion *fault*, as opposed to damages).

[15] *See*, note 4, .

[16] *See, e.g., Marshall v. Chapman's Estate*, 31 Wn.2d 137, 144, 145, 195 P.2d 656 (1948); *Glover v. Tacoma General Hospital*, 98 Wn.2d 708, 720, 658 P.2d 1230 (1983).

[17] Cf., *Orwick v. Fox*, 65 Wn.App. 71, 826 P.2d 12, review denied, 120 Wn.2d 1014 (1992) (joint and several tortfeasors are necessary, but not indispensable parties—but not discussing RCW 4.22.070).

[18] *See, Anderson v. Seattle, supra* at 852 ("a defendant against whom judgment is entered, as that term is used in RCW 4.22.070(1)(b), must be a *named defendant in the case when a court enters its final judgment"*) (emphasis supplied); *Gerrard v. Craig, supra* at 298-99; and *Washburn v. Beatt, supra* at 294.

[19] *Washburn v. Beatt Equip. Corp., supra* at 298.

[20] *See, e.g., Glover v. Tacoma General Hospital, supra* at 715-18.

[21] *See, e.g., Stout v. State*, 60 Wn.App. 527, 803 P.2d 1352, review denied, 116 Wn.2d 1029 (1991) (pre-1986 Tort Reform Act case reducing jury verdict against non-settling defendant by amounts paid by settling defendants).

[22] 68 Wn.App. 521, 843 P.2d 1121, review denied, 122 Wn.2d 1006 (1993).

[23] *Id.* at 527 (reasoning that "symmetry" requires that if the disadvantage of settlement is the plaintiff's, so ought the advantage be.) *See, also, Washburn v. Beatt Equip. Corp., supra.*

[24] *Adams v. Johnston*, 71 Wn.App. 599, 602, 860 P.2d 423 (1993), *review denied*, 124 Wn.2d 1020 (1994).

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The Legal Profession: Then and Now

by **Charles H. Sheldon**
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[Revision of a talk to the East King County Bar Association on March 17, 1994]

A profession, be it medicine, engineering, teaching or lawyering, is characterized by 1) a special body of learning, 2) a rite of passage in order to use that learning, 3) a formal linkage to other practitioners, and 4) independence. Thus, to trace the growth of the legal profession we would have to look at the history of 1) legal training, 2) admission standards, 3) bar associations, and 4) regulation. Let's try looking briefly at each.

Legal Training

Nowadays a law school degree or rarely, a clerking certificate constitutes the accumulation of the special training. But what was it like 100 or 200 years ago?

Prior to the Revolution, lawyers got their training in London at the Inns of Court. But little learning went on. Clerking with one of the Inns of Court was largely a means of moving up the social ladder of English society rather than learning any law. Following the Revolution, the main source for a legal education was the apprenticeship. Clerks paid heavily to work in an attorney's office, spending most of their time hand-copying legal instruments and memorizing legal forms. John Quincy Adams's apprenticeship experience was fortunate. He wrote:

> It is of great advantage of us to have Mr. Parsons in the office. He is himself a law library, and proficient in every useful branch of service; but his chief excellency is, that no student can be more fond of proposing questions than he is in solving them. I am persuaded that the advantage of having such an instructor is very great. [1]

But Thomas Jefferson was not so sure of the advantages when he wrote, "I was always of the opinion that the placing of a youth to study with an attorney was rather a prejudice than a help." And William Livingston, agreed: "'Tis a monstrous absurdity to suppose, that the law is to be learned by a perpetual copying of Precedents." [2]

With the appearance of influential treatises on law in the early Nineteenth Century such as Tucker's annotated *Blackstone* available in 1803, James Kent's Commentaries first published in 1826 and Story's *Bailments* (1832), and his *The Constitution of the United States* (1834), self-education, Lincoln style, vied with apprenticeship for the attention of law students.

Clerking had an advantage over self-education as it afforded additional funds and assistance to the tutoring attorney. Instruction and boarding, "exclusive of washing and candles" could be had with Leonard Henderson in North Carolina for $225. He advertised,

> "I shall not deliver formal lectures, but will give explanations whenever requested, examinations will be frequent, and conversations held on law topics at table after meals." [3]

As early as 1784, in a little village in Connecticut called Litchfield, the earliest and perhaps most influential law school was born. A student could complete the course of study, covering the complete 48 areas of the law in 14 months (which included two vacations of four weeks each). Approximately 1,000 students completed the Litchfield course of study over the 35 years of the school's existence. Among the graduates were two vice presidents, three U.S. Supreme Court justices, 34 state supreme court judges, six cabinet members, 101 congressmen, 28 senators, and 14 governors. [4]

An alternate route to providing the necessary training was the establishment of professors of law at leading colleges. For example, George Wythe at William & Mary, James Kent at Columbia, and James Wilson, then associate justice of the supreme court at the College of Philadelphia. However, Wilson's lectures were discontinued after a year because of the lack of student interest. Often, an aspiring lawyer would combine individual study of the legal classics with clerking and attending lectures at a college.

Appointing several lawyers to law professorships at a leading college led to the early version of the modern law school. Most notable, of course, was Harvard Law School with Christopher Columbus Langdell. According to Langdell, law was a science and should be studied like a science. The laboratory for such a science was the casebook. However, if law has anything to do with society, much was missing from Langdell's science. One critic noted that "[It] was [like] a

geology without rocks, an astronomy without stars." [5] Perhaps more devastating to apprenticeship than the modern law school was the invention and production of the typewriter in the late 1800s. No longer was the apprentice needed for copying, when typists and secretaries could do the job much more cheaply and effectively.

Today, high grades, a BA, a high LSAT score, and at least three letters of recommendation get you into law school. Not back then. At the turn of the century, only 18 of the 61 law schools had any entrance requirements. Only four of these 18 had requirements equal to what was needed to get into a liberal arts college. By 1931, the average lawyer had one year of college and 2 1/4 years of law study. As early as 1921, the ABA recommended two years college for entrance to law schooling. By 1936, over half of the 94 accredited law schools required two or three years pre-law college training. In 1947, seven schools experimented with the Law School Admissions Test. The next year, it became generally available until now it is required for entrance into all accredited law schools.

Admission Standards

Knowledge of the law did not assure the right to practice law. The second requirement of the profession—some selective certification to practice—meant standards of admission were imposed.

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The oral examination by one or several lawyers and the results sworn to before a judge constituted the early access to the practice. Chief Justice Salmon Portland Chase recalled his admission to the bar:

> Very seldom, I imagine, has any candidate for admission to the bar presented himself for examination with a slenderer stock of learning. I was examined in open court. The venerable and excellent Justice firstname?Cranch put the questions. I answered as well as I was able . . . Finally, the judge asked me how long I had studied. I replied ". . . I thought three years might be made up." The Judge smiled and said, "We think, Mr. Chase, that you must study another year and present yourself again for examination. "Please your honors," said I, ". . . I have made all my arrangements to go to the western country and practice law." The kind judge yielded to this appeal, and turning to the Clerk said, "Swear in Mr. Chase." [6]

Abraham Lincoln, a member of the Illinois Board of Examiners, conducted an examination of Jonathan Birch in his hotel room while taking a bath. Birch recalled:

> "How long have you been studying?" Lincoln inquired.
>
> "Almost two years," was the response.
>
> Lincoln laughed, saying "By this time, it seems to me, you ought to be able to determine whether you have the kind of stuff out of which a good lawyer can be made. What books have you read?"
>
> It was more than he had read.
>
> The note to the judge responsible for swearing in Birch read: My Dear Judge—The bearer of this is a young man who thinks he can be a lawyer. Examine him if you want. I have done so, and I am satisfied. He is a good deal smarter than he looks to be. [7]

The first account I have found of the admission process is in 1885, while Washington was still a territory, when Wingfield S. Ebey presented himself for examination. The process was quite simple. The judge would appoint an examining committee composed of three members of the bar. These three would quiz the applicant and, if satisfied, recommend admission to the judge who would forthwith administer the oath. The ceremony had to be repeated in each of the three territorial jurisdictions. Ebey's examining committee was composed of Elwood Evans, Victor Moore and Frank Clark, all known as more-than-moderate drinkers. According to Ebey, who then was working in the custom house in Port Townsend:

> The only examination I passed consisted of a single question by Mr. Clark, who asked me if I had any good brandy in the Custom House. The answer being in the affirmative,

Frank Clark moved [my] admission.[8]

Access to a legal education and practice for African Americans came late and not without considerable difficulty. John Mercer Langston seems to have been the first, having been admitted to the bar in Ohio in 1854 after studying theology at Oberlin and clerking with Philemon Bliss. In 1868, he became the first dean of Howard Law school. In 1890, 431 African Americans were licensed to practice in the United States. By 1900 their number was 728.[9] The first African-American to be admitted to the Washington bar in 1889 was Robert O. Lee, who had studied law at Columbia law school in South Carolina and Badden Institute in North Carolina. He was admitted to the bar in Illinois before coming to Seattle. In 1895, John Edward Hawkins was the first African-American admitted to the Washington bar without having been admitted in another state.[10]

For but a short time during the territorial period were women permitted to vote and to practice law.[11] Later, confronting them was the 1873 decision of the U.S. Supreme Court refusing admission of women to the profession. Justice Joseph P. Bradley, writing for the Brethren, reasoned,

> The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. . . . The paramount destiny and mission of women are to fulfill the noble and benign offices of wife and mother. This is the law of the creator. And the laws of civil society must be adapted to the general contribution of things, and cannot be based on exceptional cases.[12]

Special learning and admission standards were not enough to constitute a legal profession. Common interest had to bring lawyers together. . . . In January 1888, in anticipation of statehood for the territory, 35 lawyers assembled in Supreme Court chambers in Olympia to form the Washington Bar Association.

During the short period when women had the vote, Lelia J. Robinson and Mary Leonard were admitted to the Washington bar. Reah Whitehead was admitted in 1893 and in 1914 was elected to the Seattle Justice Court, serving until 1949—the first female judge in our state. The first class at the University of Washington School of Law, in 1889, included Othelia Carroll and Adele Parker.[13]

Bar Associations

Special learning and admission standards were not enough to constitute a

legal profession. Common interest had to bring lawyers together. In 1870, the New York City bar was established, followed by Cleveland (1873), Chicago and St. Louis (1874). In 1878, the ABA was formed, composed of 75 "gentlemen" out of 60,000 attorneys at that time. They got together to "advance the science of jurisprudence, promote the administration of justice and uniformity of legislation, . . . uphold the honor of the profession . . . and incourage cordial intercourse among the members of the American Bar." However, according to one observer, the ABA was "never much more than a gathering of dignified, well-to-do lawyers, enjoying the comfort and elegance" of their meeting place in Saratoga, NY. Initially, bar associations succeeded in bringing together a few of the "decent parts" of the profession in pleasant social settings. [14]

In territorial times, King County lawyers would gather together upon the death or retirement of a noted judge, passing memorials or resolutions of appreciation. However, in 1885, prompted by a Congressional Act expanding the jurisdiction of justices of the peace to cases involving $300, lawyers gathered to nominate and endorse two competent lawyers for the office in the November election. Before adjourning, the 31 lawyers passed the following resolution: "That a committee of five be appointed by the chair, whose duty it shall be to draw up articles for the bar association in this city, to be reported for the consideration of some future meeting." A year later, at a meeting of attorneys called to condemn two of their lot for encouraging anti-Chinese riots of February 1886, the report of the "committee of five" was approved, and the King County Bar was formed with a total membership of 24. [15] In January 1888, in anticipation of statehood for the territory, 35 lawyers assembled in Supreme Court chambers in Olympia to form the Washington Bar Association.

The courts provided the locals with much entertainment. What else was there when many were forced to report for jury duty, and the village was flooded with lawyers and judges?

Bar Discipline

Professions have a tradition of self-regulation. The Bar of the City of New York was first to establish a Committee on Grievances in 1870, but it was 14 years before a complaint was heard. A 1912 report for the Ohio Bar read: "This committee has never found it necessary to even have a meeting." Then-Bar President William Howard Taft added:

> Some man from Cincinnati has a grievance against a lawyer who has been dead for several years. I do not know what the grievance is, but it is here, and we will turn it over to the Committee. It may make interesting reading. [16]

However, Washington—then part of the Oregon Territory—lost no time in bringing its legal profession into line. In 1851, John Butler Chapman became the first lawyer admitted to practice North of the Columbia and also became the first to run into disciplinary problems. Upon admission in May 1851, Chapman, immediately after being sworn in, turned to the defense of several persons charged with misdemeanors. At the next term of the court, just five months later, Judge William Strong ordered Chapman to appear and show cause why his license should not to be suspended. The charge was "malfeasance in office and obstructing the sheriff in the performance of his duties." [17]

The problem was that the county commissioners had designated the Ford farm on the Chehalis River as the county seat, where the court was to hold its sessions. However, Strong held court at the Jackson place on the Cowlitz River, fifteen miles to the south, causing travel problems for jurors in northern Lewis County. Besides, these independent pioneers were not used to intimidating phrases such as "commanded to appear" and "fail not under penalty." Prompted by Chapman, the jurors threatened not to attend and impeachment was suggested as a proper response to Strong. This was apparently the cause of the charge of "malfeasance."

In addition, Chapman had prevented the sheriff from arresting one of his clients, one George Slaser, who was under indictment for assault. Thus, the charge of "obstructing the sheriff." Although the U.S. Attorney was available to prosecute Chapman, the historical record says only, "Chapman was said to have squared himself with Judge Strong." [18]

The connection between the law and lawyers, judges and the settlers was, of course, the jury system. Under territorial status, grand jury indictments were required for all serious crimes. Often, the lack of enough public-spirited white male residents made difficulties for the courts. For example, it was not uncommon that the petit jury lacked the necessary twelve, so those who had served moments before on the grand jury issuing the indictment would be called upon to serve on the trial jury. There exists one record of a grand juror being excused momentarily while he was indicted by his fellow grand jurors. [19]

The courts provided the locals with much entertainment. What else was there when many were forced to report for jury duty, and the village was flooded with lawyers and judges? In 1854, James Swan recorded this account:

> The grand jury, having been duly instructed, were marched into old McCarty's zinc house nearby, as that was the only unoccupied place in town. There were but two rooms in this house, one of which contained several hogsheads of salt salmon, and all a fishlike perfume. Although we were well acquainted with [such aroma], this was too much of a good thing. But there was no help for it, so we proceeded to business, . . . To further the ends of justice, a culprit must not know that there is a bill against him till it is popped in his face by the sheriff, but old Mac's zinc house was just as sonorous as a dru, and for all purposes of secrecy, we had better have held our deliberations on the logs of Chinook beach than where we were. The outsiders either crawled under the house or stood outside, where they could hear perfectly well what was going on. And if anyone was a little deaf all he had to do was to get a nail and a stone and punch some holes through the zinc, then clap his ear to the aperture and become perfectly cognizant of all the proceedings. [20]

Each of the district judges rode circuit. The lawyers, clerk and judge all traveled together, one lawyer serving as prosecutor and another as defense attorney and apparently on occasion switching roles. Traveling circuit up the Columbia was indeed an adventure. One trip, the "Okanogan" ran aground, and all passed the time fishing, playing cards, cooking over a campfire and exploring for three days until the steamer "George Wright" picked them up.

Judge Ethelbert Oliphant recorded his experiences while traveling up the Columbia to hold court:

> I was much impressed with the scenery along the Columbia River, and noted a portage of more than two miles from the Cascades to take the steamer "Idaho" for further ascent of the river again, this portage being over sand hills and requiring about three hours to make. It terminated at Des Chutes, where the steamer "Tenino" was boarded for Walla Walla.... Aboard the Tenino, I occupied a stateroom with Judge Strong and Judge Lander. There was approximately three hundred passengers, seventy head of horses and mules and one hundred and seventy tons of freight, exclusive of passengers and baggage. This was the time of the gold excitement [in Idaho], and though the voyage terminated at Walla Walla, the steamer continued up the river to Lewiston . . . the anticipated depot of all the mining region, but it was only what might be called "a very paper city." [21]

Much more remains to be told of "the good old days," but the point is that your profession with its special training, often-strict admission standards, bar rules and professional codes has a rich history. Your problems are not new, and your solutions to these problems never completely satisfying. Nonetheless, the history of Washington would be far different and considerably less exciting without the legal profession. I thank you for your history.

Endnotes:

[1] R. Stevens, *Law School: Legal Education in America from the 1850s to the 1980s*, 10 (1983).

[2] *Ibid.*, 11.

[3] L. Friedman, *The History of American Law*, 319 (1985).

[4] Stevens, *supra* note 1 at 11.

[5] Friedman, *supra* note 3 at 617.

[6] J.W. Hurst, *The Growth of American Law: The Lawmakers*, 281 (1950), *Ibid*, 281.

[7] *Ibid.*, 282.

8 Arthur S. Beardsley, *The Bench and Bar of Washington: The First Fifty Years* (unpublished manuscript in State Archives, Olympia) Hereafter, "Beardsley Manuscript."

[9] Stevens, *supra* note 1 at 81-82.

[10] M. Lampson, *From Profanity Hill*, 38 (1993)

[11] In 1884, the Territorial Supreme Court interpreted the law to permit women suffrage in *Rosencrantz v. Territory* (2 WT 267,1884). However, the Court took it away in 1887 in *Harland v. Territory* (3 WT 131,1887). *See* . Meaney, *History of the State of Washington*, 271. (1909).

[12] *Bradwell v. Illinois*, 83 U.S. 130, 131 (1873)

[13] Lampson, *supra*, note 11 at 39.

[14] *Ibid*, 26.

[15] Beardsley Manuscript.

[16] R. Abel, *American Lawyers*, 143 (1989).

[17] Beardsley Manuscript.

[18] *Ibid.*

[19] *Ibid.*

[20] *Ibid.*

[21] *Ibid.*

Professor ***Charles Sheldon****, who wrote "Fifty Years Ago: The Beginnings of Law Clerking with the Washington Supreme Court" for the* Bar News *in October 1987, and is editor of Arthur S. Beardsley's* The Bench and Bar of Washington: The First Fifty Years *(1993), teaches at Washington State University.*

Asking for Help

by **Mary Truselo**, *LAP Staff*

Who are the clients of the Lawyers' Assistance Program? People much like you and me. It is a difficult thing to ask for help, and I have the impression that this is magnified in the legal profession. Our model of how life is supposed to work is based on the American success model: work hard, be independent, know everything and, if that fails, work harder. The problem with this model is that life does not work that way. It unfolds in a circular fashion of coming together and then falling apart. If we keep trying to hold it together in times of falling apart, we are going to get into serious trouble because, at a deep level, we are in conflict with our own integrity.

Whether people come to LAP because they realize they are unable to cope with an addiction, are overwhelmed with depression, are feeling burnt out and dissatisfied with life, have a problem managing their anger or being around someone else's, they are not different from you and me. Their "problem" is not an inherent defect, but the shared pain of being a person in these times of alienation, confusion, shrinking job market and redefinition of values both in the culture as a whole and in the profession of law itself. Some individuals feel that something is "off" in life; they feel out of control.

As a matter of fact, we have very little control over anything; the true denial is insisting that we do. The wise response to feelings of inner dissatisfaction is to look inward and to do deep soul-searching. Seeking counseling or therapy at these times is an appropriate action.

When life begins to fall apart because of a personal crisis—a death, divorce, illness, loss of job—or just a persistent feeling of angst, we habitually see only two choices: we blame ourselves or blame the world. This depends on how we learned to cope with our feelings of helplessness and neediness that were part of our birthright as totally dependent human infants. When the good will of our adult caretakers, usually our parents, seems threatened—whether that is the actual fact or the perception—the instinct for survival takes over, and we form ways of behaving that do indeed save us. It has worked; we have survived.

Thus is born a deeply ingrained way of being in the world. It is patterned in our unconscious, so change is difficult. Any significant alteration of our perception of how the world operates brings up our fear of death. Yet significant and long-lasting change requires confrontation of this deep fear. Life often presents us with evidence that our perception of how the world works is off, but only a crisis usually gives us the impetus to do something about it. More often than not, we sense a loss of control and an accompanying judgment that says we are not OK. One of the primary values of therapy is being in relationship with another human being who says we are still OK even though we are in pain.

The Lawyer's Assistance Program offers a initial place to help people deal with the inevitable pain of life. Our program offers a totally confidential, supportive place to take that courageous first step—admitting the need for help.

WASHINGTON'S TWO NEW LAWYER-CONGRESSMEN LIKE THE JOB SO FAR

by **Lindsay Thompson**
Editor, Bar News

Washington's two new lawyer-congressmen say they're enjoying their new jobs, but think employment in The Other Washington is at best a lateral career move.

Told, in separate interviews, that we're always pleased to see *Bar News* readers turn out well, both laughed and replied, "Well, I'm not sure most people would see this job as a step up."

Both 5th Congressional District Representative George Nethercutt, 50, of Spokane and 2nd District Representative Rick White, 41, of Seattle were swept into office in last November's Republican landslide. White ousted first-term incumbent Democrat Maria Cantwell, while Nethercutt gained national notoriety by toppling another Washington lawyer, U.S. House Speaker Tom Foley.

The state has two other WSBA members in its congressional delegation, incumbent Democratic congressman Norm Dicks and Republican Senator Slade Gorton.

"I do notice I seem to have a higher name recognition around here than the average freshman member," Nethercutt told the *Bar News*. "I've tried to play that down. The other new members of the Washington delegation all worked as hard as I did running against other incumbents. I don't want to take away from their accomplishments. My opponent is a nice man, and we ran a respectable campaign on both sides. We didn't get into the kicking, fighting and spitting that broke out in a lot of races around the country. Besides," he added, "we'll all be judged by what we accomplish here, not how we got here."

For White, who was a partner at Seattle-based Perkins Coie, the Pacific Northwest's largest law firm, the House of Representatives wasn't as big an organizational change as he expected. "It's a lot like being in a large law firm," he commented in his Capitol Hill office as snow fell outside. "You have a lot of partners with their own practice interests and constituents taking the place of clients. You have to work through things with them and sort out the differing views.

"I was mainly worried about not getting enough exercise, about sitting in hearings and at my desk all day," White continued. "But it's fully a third of a mile from my office to the House floor, and we must vote fifteen times a day. I get in five miles a day fast walking, easy, because when the bells go off we only have a few minutes to get over there and vote." White is even philosophical about having to fly home nearly every weekend: "I get to see my family, and I really get through a lot of paperwork on the flight."

Although Nethercutt had four years' experience as an assistant to Alaska Senator Ted Stevens to draw on for a sense of the legislative process, he still found the demands of being a congressman surprising. "I always thought I was a hard worker as a lawyer," he said. "But here the hours are longer, and there's a steep learning curve." He feels his legal training has made settling in easier, though: "I find I draw on every skill a lawyer is trained to have or acquires in practice: examining witnesses and written materials, drafting, negotiating, persuasion and discussion, even a form of open and closing arguments."

Nethercutt said he found it harder to wind up practicing law than he expected. "I came back to Spokane from my Senate job 17 years ago, to take over my father's practice when he died. He'd been practicing law in Spokane for 36 years, so I had a long-standing practice to get out of last November and December. I have mixed feelings: I love this job, and the opportunities it offers, but I loved practicing law, too. It's not like I hated it and was looking for something else to do." Nethercutt's wife, Mary Anne, is also a lawyer and has taken over the practice on a part-time basis since he joined the Congress.

Though they are part of a Republican congressional majority with aggressively different ideas about the nature and role of government, both agreed the November Revolution didn't bring any changes in the allocation of House office space. They are shoehorned into offices in the pre-world War II Cannon and Longworth House Office Buildings, but both profess to like what they got. "I was eighth in the freshman lottery," White said. "There were 77 more members behind me." He thinks recent Congressional action to apply federal employment laws to Congress may have an effect on the long-standing practice of cramming members' staffs into tiny office suites. "I don't think a lot of the office arrangements will satisfy OSHA (Occupational Safety and Health Act) requirements. Lawyers know about that sort of thing, but a lot of people in Congress haven't figured out the practical impacts the accountability legislation will have. Maybe we'll get an extra room," he concluded, looking hopeful.

Though only 45 days into the 100-day march of the Contract With America, both members saw changes coming for the legal profession. "Tort reform, product liability changes, limitation of punitive damages awards, the adoption of the 'English Rule' to shift liability for the winner's legal fees to the loser in some types of litigation—these are all under serious consideration," Nethercutt observed. "I don't know how the English Rule will fare. The public seems to have embraced it for the moment, but when they understand the effects it can have, I expect they'll be wanting us to take a hard look at whether it's a good idea or not."

For his part, White favors the rule's adoption. "We just finished subcommittee markup of the securities reform legislation, and it calls for the English rule to apply. I've always favored its adoption in this country. We need a different set of incentives in litigation." However, he added that he expects President Clinton, who enjoyed support from a variety of lawyers' groups opposed to fee-shifting, will veto any legislation containing it. "I'm not sure there are enough votes in the House to override such a veto, so it may be a long debate on that issue," White concluded.

For our part, we figured there's one question every reader wants to hear answered: "Congressman, do you miss filling out time sheets?"

"I was always pretty good about keeping up with that," White responded. "But I have to admit, it feels like a great weight has been lifted from my shoulders."

Nethercutt didn't hesitate a moment. "Not a bit. I always hated billing. I don't miss the administrative side of practicing law a bit."

NEWS FROM HOME

Former Okanogan County prosecuting attorney **Barnett N. Kalikow** has announced the opening of his law offices at 910 Lakeridge Way S.W., Olympia, WA 98502, with a focus on serving local government clients especially in the areas of land use, growth management, resource management, environmental issues, intergovernmental relations, appellate litigation, and board and agency negotiation and appeals.

Michael J. Lambo, **Joseph T. Schlosser** and **Sarah J. Bierce** have announced the opening of their firm in Bellevue. Lambo, Schlosser & Bierce limit their practice to criminal and DUI defense.

Richard Hill, a partner at Foster Pepper & Shefelman, has been elected president of the Pacific Real Estate Institute, an organization providing for the education and interaction of professionals practicing in the real estate industry in the Pacific Northwest. **Charles W. Dent** has joined the firm's personal planning and tax practice groups as an associate working out of its Bellevue office.

Susan C. Hacker and **Thomas F. Peterson** have been elected directors (principals) of the Seattle law firm of Betts, Patterson & Mines, P.S.

Claudia Burke has become a partner in the Hood River, Oregon, firm of Jaques, Sharp, Sherrerd & Burke. She is licensed in Oregon, Washington and California.

Kerry G. Robinson has been named a partner at Davis Wright Tremaine in Seattle. She concentrates her practice in employment law litigation. **Janine V. Roberts** has joined the firm as Of Counsel. She will concentrate her practice in the areas of commercial real estate law. Roberts was previously a general business attorney at Immunex Corporation, a real estate attorney with Perkins Coie and a real estate lawyer with a New York City firm. **Garry G. Fujita** has been named a partner at the firm as well. Fujita concentrates his practice in the area of state and local tax law.

Timothy K. Ford has been named managing director of MacDonald Hoague & Bayless. He assumed the position February 1.

Louise D. Bush has joined Lane Powell Spears Lubersky as an associate, and will concentrate her practice in insurance defense litigation and toxic torts. **Stephen P. McGrath** has joined the firm as an associate in the commercial litigation area.

Neil P. Cox has joined Henderson & Grow in Clarkston, Idaho. Cox is a graduate of the University of Idaho College of Law.

Heller Ehrman White & McAuliffe has added **Scott D. Benner** as an associate in its corporate department. Benner was previously associated with Bogle & Gates in Seattle. Two lawyers have also been named partners of the firm: **Brendan T. Mangan** is resident in the Seattle office and has a litigation practice emphasizing complex commercial matters, including environmental insurance coverage and securities law; **Marcia Newlands** works in the firm's Tacoma office and practices environmental law, covering a broad spectrum of areas including water rights, hazardous waste management, superfund negotiations and state regulatory matters.

Steven W. Hale has joined Perkins Coie as a litigation partner, focusing on environmental and insurance coverage litigation. He was previously associated with Barrett, Hale & Gilman.

John A. Manix and **Christopher J. Hogstad** have become partners with the Spokane law firm of Paine, Hamblen, Coffin, Brooke & Miller. Manix practices in the firm's litigation department, and Hogstad works in the firm's commercial law department.

L.R. "Rusty" McGuire became a principal at the law firm of Underwood, Campbell, Brock & Cerutti on January 1. He practices out of the Spokane, Davenport, Ritzville and St. John offices, concentrating his practice in agriculture, family and estate planning and elder law.

EAST KING COUNTY REPORT

by **MARIJEAN E. MOSCHETTO**

Yes, April is tax month again, which is enough reason to be in a grouchy mood for all of us. It is not enough reason, however, to neglect to get ready to renew your memberships in our local Eastside organizations.

The benefits of membership in the East King County Bar Association include receipt of a monthly newsletter where you'll find the musings of our president, **Randy Gordon**, notification of various social events, and the opportunity to schmooze with the best and brightest of the Eastside bar at our monthly luncheons, held on the third Thursday at the Bellevue Inn. We have a heavy social calendar starting in the late spring, including the annual ELAP luncheon in May, the June cruise around Lake Washington, the Suburban King County Bar Associations' Golf Challenge starting in July, and the EKCBA Golf Tournament in August. There are also local section meetings in business law, family law, criminal law, and trust and probate where you can trade

ideas and stories and, as in my case, maybe learn a thing or two.

Eastside Legal Assistance Program started as an idea: providing no-cost or low-cost legal services to needy Eastside citizens. In the five years of its existence, it has achieved a level of success that has earned it deserved kudos from many. Like other social-service organizations, however, its budget comes increasingly from its own efforts. At its annual May luncheon, renewal of membership will be encouraged as well as acceptance of generous donations from various law firms on the Eastside. Mark May 18 on your calendar and plan to attend.

In other Eastside news: **Jennifer Rydberg** has moved her offices to Bellevue (eat your heart out, South King!). **Judy Graves** has retired from the daily practice and is taking a well-deserved rest, although those of us who know her do not plan to let her rest in peace. Williams, Kaster & Gibbs is celebrating the tenth anniversary of their Eastside office. EKCBA also looks forward to welcoming prospective new members, having received calls by press time from **Josh Green** of Bellevue, **Phyllis Miller** of Renton, and **Jaye Lynn Schneider** of Bellevue. For further information, call ECKBA at (206) 637-3097 or membership chair **Kristin Olson** at (206) 454-4800.

LAW FUND REPORT

by **LAUREN MOORE**

Thank you to the volunteers of the Equal Justice Coalition for your effort to maintain state and federal funding for civil legal services. The Equal Justice Coalition was formed in January of this year in order to respond to threatened loss of federal and state funding for civil legal services to the poor in Washington state. The Coalition is working to educate and inform the Washington state congressional delegation about the civil legal needs of the poor and of the continuing need for federal funding. If you are interested in volunteering for the Coalition or adding your organization as a member, please contact the LAW Fund office at (206) 623-5261.

One hundred and seventy-five law firms from across the state participated in the 1994 Annual LAW Fund Firm Campaign. The 1995 campaign is underway now, with information mailed to every firm in the state. Firms are encouraged to participate on a per capita basis. Please mail in your firm's pledge or contribution now. Your early support is important in our fundraising efforts.

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

LEGAL SUPPORT PROFESSIONALS OF WASHINGTON REPORT

by **CINDY MANSON**

More than 90 members attended the WALS Board of Governors Meeting and Educational Conference hosted by the Kitsap County Legal Secretaries Association January 19-21 in Silverdale, 43 at the member networking workshop on Sunday morning. During the business meeting, the Board of Governors voted to change the state association's name to Washington Association of Legal Support Professionals. This change has resulted from the continued growth and diversity of our membership. The association's commitments remain the same—education, networking, leadership, and personal development.

There were several February committee meetings, including the WALS Executive Committee budget planning meeting and a WSBA/WALS Joint Education Committee meeting in Seattle in preparation for its presentation to the WSBA Board of Governors in LaConner.

National Director **Arline Joyce** attended the Mid-Year Business Meeting and Educational Conference in Tulsa, Oklahoma, February 24-25. National directors from every state attended this meeting. **Donna K. Dendy**, from Midland, Texas, is the 1995-1996 president-elect, and the directors ruled on standing rule amendments regarding the professional certification programs and 1995-1996 budget.

Our 3rd Annual Leadership Workshops were held in Toppenish and Tacoma. Topics included: Communications, Dealing with Difficult People, Right and Wrong Way to Conduct a Chapter Meeting, Decision-Making, Delegating, and Goal-setting.

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On April 22 we will be holding a one-day seminar for new legal secretaries. For more information please contact Diana Osborne at (206) 259-5106.

Chelan-Douglas County Legal Secretaries Association will host our Annual Meeting and Educational Conference in Wenatchee May 19-21. Three concurrent seminars being offered Friday afternoon are "Domestic Pattern Forms," "CD Rom in The Law Office" and "PLS Topic—Communications." Two concurrent seminar sessions are offered Saturday morning: "Personal Injury—Torts and Damages" or "Juvenile Justice—Prosecution," "Personal Injury—Discovery" or "Juvenile Justice—Defense" are the topics for the second session. For more information, please contact **Marge Moeller** at (509) 664-6450 or **Cindy Manson** at (206) 775-4626.

Roxanne Forrest, **Julie Sherwood** and **Janice Thompson** were recently certified by the National Association of Legal Secretaries as Accredited Legal Secretaries (ALS). Forrest, a member of the Washington Association of Legal Support Professionals (formerly Washington Association of Legal Secretaries), is employed by **Douglas Cowan** of Cowan, Hayne & Fox of Bellevue; Sherwood by the City of Bellevue Prosecuting Attorney's Office; and Thompson by Beresford, Booth & Demaray of Seattle.

The Accredited Legal Secretary exam is given to individuals just entering the legal field as legal support staff and consists of the following parts: Written Communication Comprehension and Applications; Office Administration, Legal Terminology, and Accounting; and Ethics Human Relations, and Applied Office Procedures.

For further information regarding the examinations for the Accredited Legal Secretary and Professional Legal Secretary (for individuals with three or more years of experience or education) certifications, please contact the certification chair for the Washington Association of Legal Support Professionals, **Marcia Heying**, at (206) 528-0800

PIERCE COUNTY REPORT
by **GEORGE S. KELLEY**

The TPCBA recently hosted the 87th edition of its annual Lincoln Day dinner. There was a near-record turnout at the Tacoma Club, which overlooks the scenic Puyallup River tideflats and the Tacoma Dome, temporary home of the Tacoma Sonics. On a clear day one can see all the way to Mt. Tacoma. Featured speaker was Washington Supreme Court Justice **Robert F. Utter**, who managed to include thoughts on Lincoln and the emerging court system in the former Soviet Union in the same speech, all by 9 p.m.

Also speaking was **Darrell L. Cochran** of the law firm of Gordon, Thomas, et al., who outlined his first year in the practice of law. Traditionally, newly admitted lawyers have been invited to address the banquet audience so that everyone in town can learn who they were. Darrell mentioned that as part of his firm's litigation team, he took part in a case which resulted in a $7 million settlement, but that his wages were comparable to those of a night janitor in the Yelm school district. Utter mentioned that Cochran's speech was a tough act to follow.

This particular banquet will be remembered for those who left early. Sometime before Utter's speech, 11 guests got stuck in the Tacoma Club elevator. They included Court Clerk **Ted Rutt, Mike Sterbick** and **Susan Keers.** Rutt and Sterbick were probably trying to get home in time for "Seinfeld" on TV. Keers had the only legitimate excuse as she was trying to catch the last ferry home to Vashon Island. These folks were stuck for almost an hour because everyone else was listening to Utter or doing the dinner dishes.

New TPCBA officers were recognized. They include **Joseph Quinn,** president; **Christopher Keay,** vice president/president-elect; **Donald Powell,** secretary-treasurer; and **Greg Abel**, **Scott Candoo** and **Dennis Greenlee**, new trustees. None of these officers is claiming responsibility for the unfortunate elevator incident.

As a postscript to the Christmas holiday, it should be noted that the aforementioned Joe Quinn, disguised as Santa Claus, made the rounds of law offices collecting food for the needy. His only problem occurred at the courthouse entrance when Santa and his 500 pounds of canned goods were forced to go through the security gates.

District Court Commissioner **Elizabeth Verhey** has been selected by the Tacoma City Council to the Tacoma Municipal Court bench to replace **Sergio Armijo**, who was recently appointed to take Pierce County Superior Court Judge **J. Kelley Arnold**'s place, who took over the Federal Magistrate job from **Frank Burgess**, who was appointed to replace the retiring Federal District Court Judge **Jack Tanner.** There is a rumor that the best way to get a judge job is to start out as a judge.

WASHINGTON DEFENSE TRIAL LAWYERS REPORT
by **NORA C. TABLER**

The Washington Defense Trial Lawyers started the new year with a membership dinner meeting at the Tacoma Sheraton Hotel where Tacoma WDTL Trustee **Beth Jensen** introduced Attorney General **Christine Gregoire** as the after-dinner speaker. Gregoire gave an excellent speech on the status of the juvenile justice system in Washington.

With the onset of the cold winter months, WDTL members marked their calendars for the annual "Sunbreak" seminar in Phoenix on March 10 and 11. This year's program was a great success with featured speaker **Howard Varinsky**, a nationally recognized trial consultant, discussing "how to maximize witness credibility," followed by a focus group with a mock jury trial. The program schedule also allowed plenty of time for leisure activities and sightseeing.

On March 21, WDTL members and colleagues of recently retired Judge **Jack Scholfield** gathered at the Washington Athletic Club where WDTL President **Mary Spillane** presented the judge with the "Jack P. Scholfield" award for his role as founding president of the WDTL in 1962 and his exceptional service to the organization. This award will be given in coming years to other individuals who give exceptional service and support to WDTL.

With the month of March designated "Professionalism Month," WDTL and WSTLA again joined forces to cosponsor their second professionalism seminar at the Washington Convention Center on March 23. This year's slate of speakers included Supreme Court Justice **Gerry Alexander**, Judge **Evan Sperline**, Attorney General Gregoire, WSBA President **Ronald M. Gould** and a host of experienced attorneys. The organizations offered low tuition fees for new lawyers to encourage them to attend.

On Saturday, April 15, WDTL is sponsoring a New Defense Lawyer Workshop at the Washington Athletic Club. This program, the brainchild of WDTL Trustee **Andrew H. Cooley** and **Deborah Brookings**, is designed to teach new lawyers some of the basics of a defense-oriented practice.

WASHINGTON LAWYERS' CAMPAIGN FOR HUNGER RELIEF REPORT

by **CHERYL COTTRELL**

The Board members for the Washington Lawyers' Campaign for Hunger Relief wish to thank those attorneys and their families who have made donations this year. The Campaign raised $21,588 in 1994 and $5,198 this year to date. Selected recipients of this year's funds are the Emergency Feeding Program, Food Lifeline, Senior Services' Meals on Wheels and Women, Infants and Children. CARE will also receive $1,000 for aid to victims of the Kobe earthquake.

The Campaign recently joined other local charities in expressing support for the World Summit for Children Implementation Act of 1995, which was introduced in the U.S. House by Representatives Jim Walsh (R-NY) and Tony Hall (D-OH) in January. The bill gives priority within the foreign assistance budget to programs such as vaccination clinics, Vitamin A and micronutrient distribution and basic primary education.

IN MEMORIAM

David C. Dobson

Renton attorney David C. Dobson, 76, died January 6, 1995. A native of Renton, Dobson was active in sports at the high school and collegiate levels. After graduating from the University of Washington, he played minor league baseball for a time before joining the Navy Air Corps in September 1941. He rose to the rank of commander and led a squadron of bombers.

After the war, Dobson took his law degree from the UW and worked for several years as a deputy prosecutor. In 1952 he joined his brother's law firm in Renton and practiced there until his retirement in 1987. Dobson continued to practice part-time until a few days before his death.

Dobson was a former president of the South King County Bar Association and a longtime member of the Washington Horse Breeders' Association and the Horsemen's Benevolent Protection Association. Survivors include his brother, wife, three children and four grandchildren.

Gordon M. Callow

Gordon M. Callow, 73, died February 21, 1995. Son of Russell S. Callow, coach of the University of Washington Crew from 1922 to 1927, Callow was a graduate of the University of Washington and its School of Law. Callow and his father held the distinction of being the only father and son to each serve as president of the Associated Students of the University.

Callow received a masters degree in law from Georgetown University and retired in 1983 as chief regional administrative law judge for the U.S. Social Security Administration. Survivors include his brother, wife, two children and six stepchildren.

Stephen M. Ringhoffer

(The following Memorial Resolution was filed with the Walla Walla County Clerk January 27, 1995, by the Walla Walla County Bar Association in keeping with its long-standing practice.)

Stephen M. Ringhoffer, of 1813 Home Street, died January 20, 1995, at the age of 68. Surviving are his wife, Rose, at home; three daughters, Myra Jean Hoane of Seattle, Washington; Margaret Ringhoffer of Bellevue, Washington; and Mary Ellen Haltiner of Seattle, Washington; and three stepchildren, Sylvia Hershberger of Seattle, Washington; Larry Carlson of Seattle; and Michael Carlson of Vancouver, Washington.

Mr. Ringhoffer was born in Walla Walla and attended Walla Walla schools. He completed one year at Whitman College before enlisting in the United States Navy where he served in the South Pacific Theater. He returned to Whitman College after his service and graduated from Whitman College in 1948. He earned his law degree from Harvard Law School in 1951, and returned to Walla Walla to associate with his father as Ringhoffer & Ringhoffer.

In 1953 he married Winnifred Collier and they raised three daughters. They dissolved their marriage in 1975. On July 22, 1982, he married Rose Carlson.

Mr. Ringhoffer was active in fraternal organizations throughout his life. He was a 32d Degree Knight Commander Court of Honor Mason and Past Master of the Blue Mountain Lodge, Number 13, Free & Accepted Masons. As a member of Scottish Rite bodies, he founded the Junior Achievement Awards in Walla Walla which are given annually to high school juniors with outstanding leadership and academic records. He also helped establish a Washington State and local branch of the Scottish Rite Foundation which gives scholarships to college students focusing on political science and government. He was a past wise master of the Rose Croix. He was also a member of El Katif Temple, the Blue Mountain Shrine Club Cycle Patrol, the First Congregational Church, Order of the Eastern Star, Royal Order of Scotland, Walla Walla Kiwanis Club, Narcissa Rebekah Lodge as a musician and a past noble grand of the International Order of Odd Fellows Enterprise Lodge. His life and career are an inspiration to all.

THEREFORE, BE IT RESOLVED by the Walla Walla County Bar Association, that we express in this Resolution our respect and appreciation of Stephen M. Ringhoffer, both as a citizen and as a member of the Bar; that a copy of this Resolution be filed with the Superior Court for Walla Walla County for entry upon its permanent record, and that an additional copy be delivered to the family of Stephen M. Ringhoffer as an expression of both our sympathy and our esteem.

DATED at Walla Walla, Washington, this 27th day of January, 1995.

Gary M. Schrag, President, Walla Walla County Bar Association.

Raymond Tanksley, Jr.

Spokane County District Court Judge Raymond Tanksley, Jr. died January 14, 1995. A graduate of Gonzaga University School of Law, Judge Tanksley practiced law in Spokane from 1955 to his appointment to the bench in 1985. He was a member of the Washington district and Municipal Court Judges' Association, American Judges Association, Spokane County and Washington State Bar Associations, and the Association of Trial Lawyers of America.

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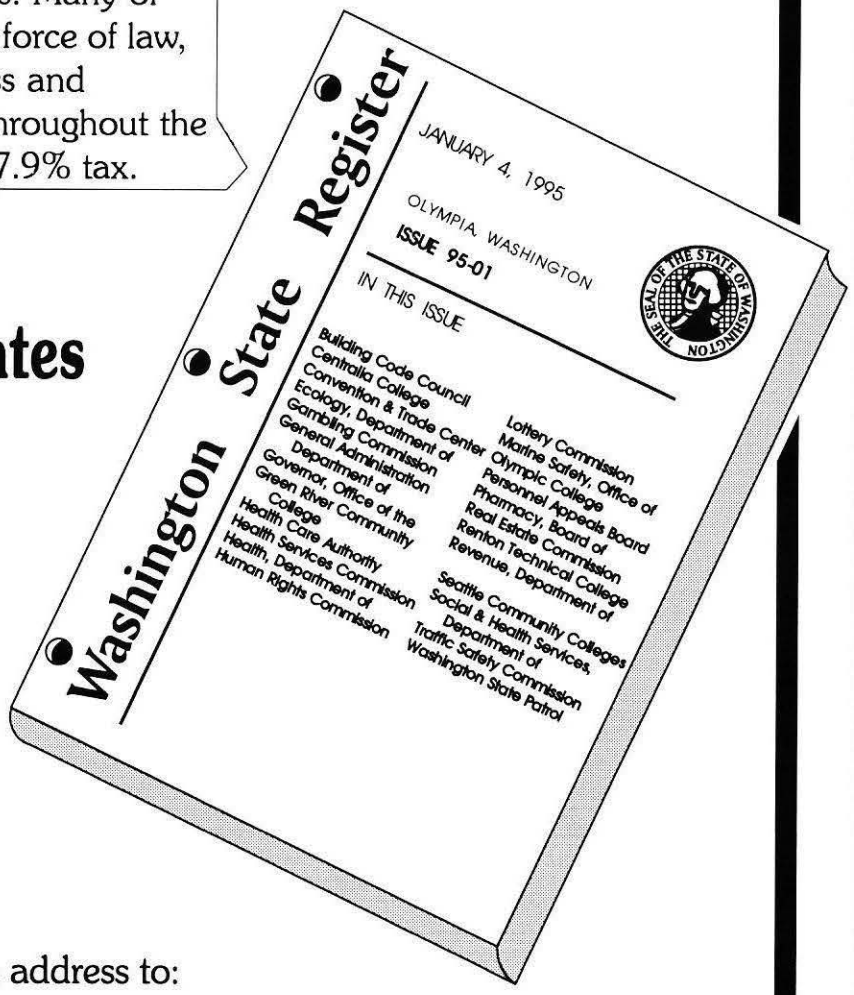

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