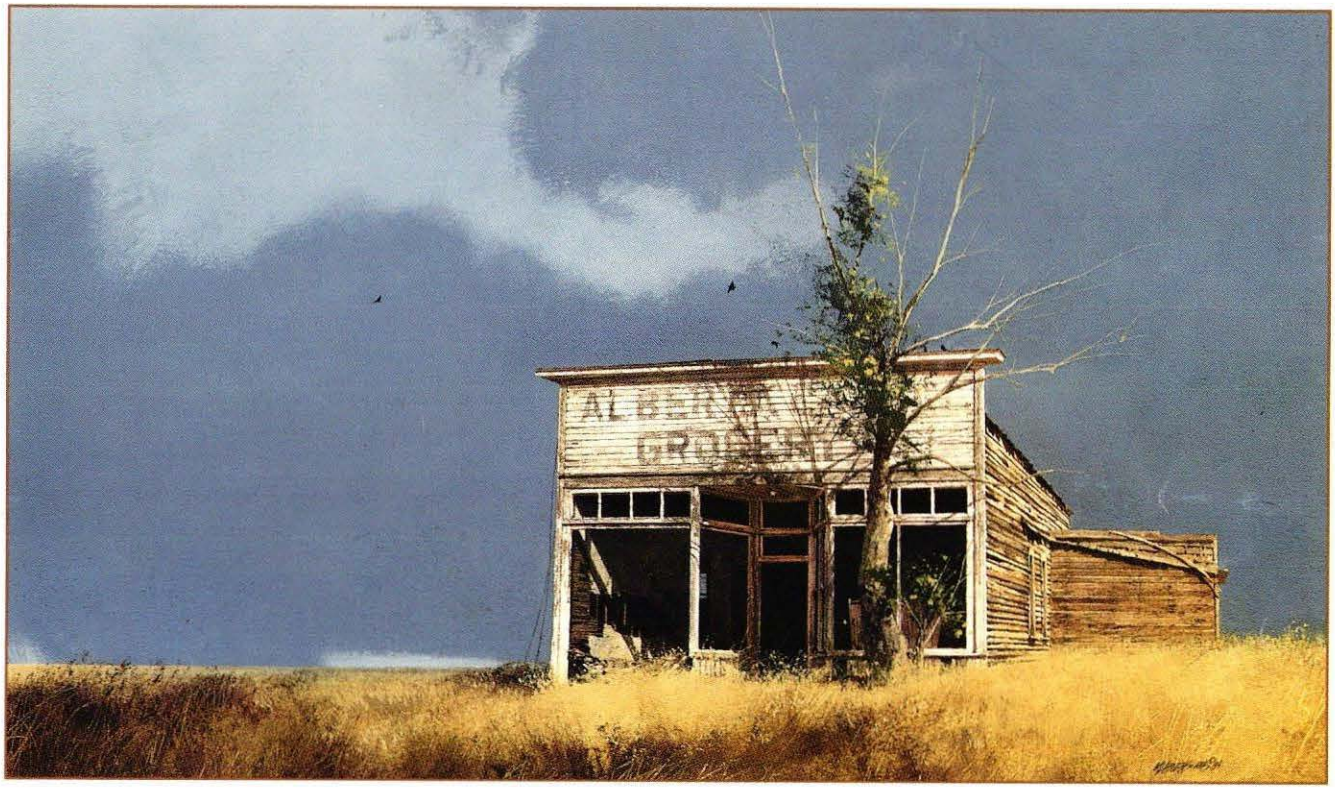
Washington State Bar News

Vol. 49, No. 6, June 1995

The official publication of the Washington State Bar



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Washington State Bar News
Vol. 49 No. 6, June 1995
The official publication of the Washington State Bar

ANNUAL FINANCIAL ISSUE

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ART CREDIT

The Law of Supply and Demand, painted by the late Bothell, Washington, artist **M. L. Burns**. Watercolor on paper / 14" x 24," 1984.

The painting, Burns said, "is a comment on economic law . . . When many small farmers populated this area, there was a demand for goods which was met by many small country stores. As larger conglomerate farms took over and improved highways and transportation led people to larger metropolitan areas to do their shopping, the demand for goods at small country stores decreased. When the demand decreased, there was no longer a need for the supply, and many stores were forced out of business. In this painting the people have left and a prairie town has passed into history."

West Art and the Law. Photo courtesy of West Publishing Corporation, Eagan, Minnesota.

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DENNIS P. HARWICK
Executive Director

MARY ELIZABETH ST. CLAIR
Director of Communications

BAR NEWS
LINDSAY THOMPSON, *Editor (206) 625-9211*
JENNIFER KLAMM, *Managing Editor (206) 727-8215*
JACK YOUNG, *Advertising Director (206) 727-8260*
DOREE ARMSTRONG, *Editorial Assistant [professionals] (206) 727-8214*
BETH GREENHILL, *Classified Coordinator (206) 727-8213*

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

There You Go Again, Ed—

Editor:

Some of your readers may have recently received a fax from Ed Hiskes, an attorney in Richland, titled "RE: 100% Increase in WSBA Annual Dues Is Proposed." You should be alerted that Mr. Hiskes's fax is false and misleading. The Washington State Bar and the Board of Governors have not increased your dues.

1. The Supreme Court approved a rule (APR 15) which imposes a mandatory annual fee to support the Client Security Fund. The Board of Governors did recommend adoption of that rule with a $10 fee, but it was submitted to the membership for comment by the Supreme Court.

2. With regard to the Discipline Task Force report, Mr. Hiskes's statement is totally false. First of all, the Task Force "report" is only that. The Board of Governors has taken no action and does not intend to do so until the entire membership has had an opportunity to review, comment, suggest and recommend action. The entire matter has been referred to the membership to get just that input. Second, the recommendations for funding discipline—and there are several different ones in the report—do not recommend any fees earmarked for discipline "over and above the current mandatory dues." For example, there is one recommendation in the report that the Supreme Court take over the administration and funding of the discipline system. That proposal suggests the Supreme Court impose fees on the membership earmarked for discipline up to $115 per year. This is *not* in addition to your current WSBA licensing fee. Already about $93 of your licensing fee goes to discipline. That proposal—if adopted at all—would increase the amount of current licensing fees allocated to discipline by a grand total of $22.

Another proposal from the Task Force calculates that if all the recommendations in the report were adopted, they would approximately double the cost of discipline to $185 per year total. Again, this sum is not in addition to your current licensing fee. Rather, it means that if all the proposals considered were adopted, it would take $185 of the current WSBA licensing fee to pay for them. All of this presumes the Task Force report would be adopted wholesale without the consent of WSBA members. That's not happening!

Mr. Hiskes's memorandum is false and designed to mislead the membership on the eve of another referendum. Such behavior should be shown for just what it is—misleading, false scare tactics.

Your Board of Governors and Executive Director Dennis Harwick have not attempted to avoid the results of the dues roll-back referendum. Quite to the contrary, Dennis Harwick should be hailed for putting the Bar Association on a sound financial footing despite the dues roll-

back. It is through his management and the efforts of his staff—particularly Diane deRyss and the CLE department—that we have slashed costs, eliminated programs, surveyed the membership and addressed their wishes and commands, and stayed well within budget.

Contrary to Mr. Hiskes's charges of eroding membership control, your Board, at least during my tenure of the last three years, has conducted a survey of the membership and followed the results. Recently, we voted to submit any questions of changes in governance to the membership as a whole for a vote. Programs have been dramatically cut or eliminated, the Bar Convention abolished, sections required to help pay their own way, committees opened up to the entire membership, and so forth.

Not everyone's definition of "nonessential purposes" for the spending of funds is the same. Your Board and the Supreme Court consider a Client Security Fund essential. Historically, it was underfunded and in a budget crunch; money was often not available. It was deemed wise by the Court to adopt a rule where the Court collected the money and set it aside specifically for that purpose and no other, rather than have it budgeted as part of the general fund subject to the vagaries of economics and emergencies. It was a commitment to the public.

I would like to know what nonessential spending Mr. Hiskes would like us to stop. Maybe your favorite program, like the LAP, CLE, deskbook publishing, or the *Bar News*. On the other hand, if Mr. Hiskes is so bent out of shape about economic policies, why doesn't he run again for the Board that makes those budgetary decisions?

Get your facts straight, Ed, and be honest. Nobody is proposing a 100 percent increase in your annual dues.

JAN ERIC PETERSON
Seattle

(Mr. Peterson represents the Seventh Congressional District on the WSBA Board of Governors)

. . . and a Reply

Editor:

Paul Stritmatter [*Bar News*, May 1995, p. 29] and Jan Peterson make several points which deserve a response. Both gentlemen attack me for suggesting that a 100 percent increase in annual licensing fees has been proposed. Unlike Paul, Jan at least admits that the Task Force report discusses a mandatory fee assessment of $90, in addition to the $10 for Client Security.

However, Task Force minutes for October 7, 1994, show that Governor Donald Curran, chair of the Task Force subcommittee dealing with finance, advocated a much higher number:

> Mr. Curran said that his subcommittee advocates for a cap in the order which would include an educated guess as to what the funding needs will be over the next three to five years. He explained that the total responsibility for annual funding would be with the Board of Governors. The cap of $350 will guard against the Supreme Court having to crunch numbers . . .

A $350 assessment on top of current dues would be a 179 percent increase. If the current discipline expenditure of $95/year is subtracted, the figure is 130 percent. Of course, the amount could be lower, since a cap is not the same thing as a floor. However, Curran relates the magnitude of the cap to expected funding needs. Moreover, none of the foregoing figures take into account possible increase in the Client Security assessment, which the ABA report suggests should be in the $25-$50 range. During the course of the Task Force deliberations, the proposed cap rose from $115 to $350 and was then discarded altogether. This is not a good trend.

Jan says that the Task Force's output is "only" a report, as if to say that the approving signatures of Chief Justice Andersen, WSBA President Paul Stritmatter and Governor Curran carry no weight with him. Such disrespect!

Jan talks about getting membership input, but he never proposes that mandatory fees be submitted to a membership referendum. Membership comment is OK, but control is not. Paul and Jan would take away a right which WSBA members have enjoyed since 1933, i.e., the right to control their own association by means of democratic referendum.

Paul Stritmatter states:

> "The study of our discipline system has absolutely nothing to do with any attempt by the Board of Governors to circumvent the dues rollback."

However, the ABA report says the WSBA requested a "consultation" because of financial concerns. This was done at a time when Alva Long was already publishing ads calling for a mandatory referendum concerning any proposed dues increase (see *Bar News*, August 1992, p.

81). Moreover, the central point of both the ABA and Task Force reports is that mandatory assessments against WSBA members not be subject to membership referendum.

Jan and Paul think that WSBA members cannot be trusted to manage their own associations by means of democratic referendum. I think WSBA members can be trusted.

EDWARD B. HISKES
Pasco

There You Go Again, Joe—

Editor:

The article by attorney Joe Scalone, "It's time to open the legal profession," left out an important point regarding his employer, the Estate Guarantee Association, and mischaracterized the role of the Attorney General's office in pursuing living trust companies. First, nowhere in the article is mention made that the Attorney General's office - Consumer Protection Division - is currently suing the Estate Guarantee Association, alleging numerous violations of RCW 19.86, the Consumer Protection Act. One cause of action focuses on the activity of the non-lawyer sales persons, alleging that their activity is the unauthorized practice of law. This is not the first litigation between our office and the Estate Guarantee Association's owner, Daniel Vargus. Also, the Estate Guarantee Association has sued the State in a lawsuit alleging various forms of tortious conduct.

Second, Mr. Scalone is not correct when he states that we do not have jurisdiction over law-related services. In fact, we have jurisdiction over the entrepreneurial aspects of the law. Also, the unauthorized practice of law has been found by the Washington Supreme Court to be a Consumer Protection Act violation.

Finally, the Attorney General's office will continue to sue any company engaged in violations of the Consumer Protection Act. Companies involved in the sale of living trusts frequently generate complaints with our office for practice which involve high-pressure sales, deceptive claims and the unauthorized practice of law, any one of which could be proved to be a violation of the Act. After all, our first mission is to protect consumers from unfair and deceptive conduct.

SALLY R. GUSTAFSON
Senior Assistant Attorney General
Chief, Consumer Protection Division
Seattle

Training 21st-century Lawyers: a Differing View

Editor:

Robert Cumbow's piece in the March *Bar News* on "Educating the 21st-century Lawyer" was alarming both in its underlying assumptions and its ultimate conclusions.

Mr. Cumbow laments the perversion of "Constitutional provisions designed to protect religion from government" and neglects to mention the more important agenda of protecting government from religion. Many of this nation's founders came to this country to escape a religious hierarchy that had the imprimatur of the state. When government weighs in on the side of religion (any religion), irreverence and blasphemy (read: freedom of speech) become actions against the state. There is no better contemporary example than Pakistan, where the government now trembles before the "faithful" and blasphemy is punishable by death.

Mr. Cumbow believes that we need a "value system" to guide our actions as lawyers and I am not so sure I disagree with him. I do question his suggestion that law school is the place to obtain a value system, especially if the process focuses on "reading and discussing ancient Judeo-Christian, Islamic and other thought systems" or taking courses in "treating clients like human beings."

Instead, perhaps law schools could alter their admission policies to insure that new law students arrive with an intact value system. This could be accomplished by raising the minimum age for enrollment to 27, thus ensuring that the incoming student had abandoned, at least for a time, the discussion of the theory of life and had entered into the joyous (and frustrating and devastating) business of life itself. Although I would be among the last to irrefutably link chronological age with maturity, there does seem to be some correlation.

I share his concern that the public holds us in universal ill regard. We are seen not as cunning like a fox but as sly like a weasel. We are often the greedy representing the greedier; if there is any unfairness in this view, it is only that we are the most visible representatives of a society obsessed with what Virgil called "the noisy strife of the hell of greed." What we have now is a value system based on the dollar.

The underlying premise of Mr. Cumbow's article is that law adopted (or should adopt) its value system from religion. It seems more logical to assume that religion is an attempt at the codification of law. It would be nonsensical to suggest, for instance, that murder or thievery were freely endorsed before they were proscribed by the ten commandments. A value system is nothing more than a device for choosing the best course of action from a range of possibilities. A student who had some real-world experience would forge a belief system that would work in any venue. Religion may provide the heat for this forging process; I believe justice would be better served if law provides the light.

STEVE BURTCHAELL
Yokohama, Japan

Don't Diss the Jury System

Editor:

Judge David Nichols of Whatcom County appears to have little use for hung juries since he suggests that we should trade the unanimous jury verdict requirement for a majority rule in reaching jury verdicts ("It is time to get rid of peremptory . . ." *Bar News*, April). No doubt an entirely different view of hung juries was held by the man whose life was saved by a hung jury in a witchcraft trial in Fairfield, Connecticut, in 1693. The Founding Fathers left us a heritage of unanimous jury verdicts required for conviction because history has so often proved lone dissenters, or "outlaw jurors" as Judge Nichols calls them, to be right.

There is another reason that unanimous verdicts are required for conviction, besides the quest for factual certainty, that goes even deeper to the true purpose of the jury system. The jury is a palladium of liberty that stands between the citizen and the government and the jury's duty is to protect freedom and the Constitution.

There is no more libertarian institution in all of society than the jury. In every other forum the rights of the individual are at the mercy of mob rule. But on the jury—with the unanimous verdict requirement —one man or woman can say "no" and stop the juggernaut of the State.

In a randomly chosen jury of 12 that is a fair cross-section of the community, each juror will represent about 8% of the people. This means that before the blunt and brutal instrument of any criminal law can be successfully applied by the government with any regularity, that law must enjoy the support of more than 92% of the people. The people in general, and minorities in particular, are able to defend their rights and liberties through a jury system as the unanimous verdict requirement.

The Founders intended that no one should be stripped of life or liberty by laws that did not enjoy universal consensus. The society they envisioned was to be based on freedom, not millions of laws dictated by hoards of politicians and bureaucrats.

But freedom depends upon the jury knowing about and following its primary and paramount duty. And that duty is to judge the law and to hold all laws invalid that are in the jury's opinion unjust or oppressive. The jury vote is the only time a citizen has the opportunity to vote on the application of a law in real life. All other votes are for hypotheticals. And jury veto power over laws is the only practical way to uphold liberty and the Constitution. As Jefferson put it, "I consider trial by jury as the only anchor yet imagined by man by which a government can be held to the principles of its constitution" (Letter to Thomas Paine, 1789).

Judge Nichols's proposed instruction telling the jury to consider nothing but those facts which the judge has allowed into evidence leaves out the most important element in the entire deliberation process—the juror's conscience. A far better instruction would be the words of John Adams, second president of the United States and signer of the Declaration of Independence: "It is not only his [the juror's] right, but his duty . . . to find the verdict according to his own best understanding, judgment, and conscience, though in direct opposition to the direction of the court" (1771).

As to abolishing peremptory challenges, this change of Judge Nichols's, standing alone, would severely cripple the defense and leave the prosecution free to continue stacking the jury. Prosecutors, in collusion with judges, routinely— and unconstitutionally—strike off for cause any juror who expresses dissent about the law at issue, thus stacking the jury with government partisans. Without peremptory challenges the defense has no way to even attempt to correct this.

Striking off dissenters is unconstitutional since a jury of one's peers must include a fair cross section of dissenters to the law in the community. The fact that dissenters to the law are routinely struck off by lawyers and judges betrays a misconception in the legal community of the true purpose of the jury system.

Every school child and every judge should be made to memorize the opening lines of the classic work "Trial by Jury" by the abolitionist lawyer Lysander Spooner, in 1852: "For more than 600 years—that is, since the Magna Carta in 1215—there has been no clearer principle of English or American constitutional law than that, in criminal cases, it is not only the right and duty of juries to judge what are the facts, what is the law, and what was the moral intent of the accused; but that it is also their right, and their primary and paramount duty, to judge the justice of the law, and to hold all laws invalid, that are, in their opinion, unjust or oppressive, and all persons guiltless in violating, or resisting the execution of, such laws."

Lysander Spooner understood that it is not politicians, judges or laws that are sovereign. It is the people who are sovereign. And there is no higher authority than the people acting through their juries to judge the law. Our state's Constitution bears him witness: "All political power is inherent in the people . . ." (Article I, Section 1, Washington State Constitution).

TOM STAHL
Ellensburg

Editor:

I read Judge David Nichols's article and came to the immediate conclusion that he is either an ex-prosecutor, an ex-insurance defense attorney or like a tomato that has spoiled on the bench. He overlooks the conviction of innocent persons by unanimous juries and would make it easier to convict the innocent. Has his thinking process been corrupted by years on the bench? While the struck method may be a better way to pick a jury and it incidentally may speed up the system, I do not agree that it should be used as a way to bootstrap lowering the standard to convict persons of crimes. This is especially true since we appear to be living in an age prone to witch hunts and scapegoats.

EDWARD L. DUNKERLY
Vancouver, WA

Editor:

I enjoyed Judge David Nichols's article on doing away with peremptory challenges and treating jurors with dignity. He make a lot of good points.

His "simplified" final jury instructions, however, fall far short of simple. His instruction on page 21 is 302 words of largely passive (and thus hard-to-understand) sentences. On the Flesch readability scale, it scores at 41.7—somewhat harder to comprehend than the *Wall Street Journal* and the *Harvard Business Review*. Surely, these college level instructions would leave many of the state's jurors floundering in confusion. I'd suggest that Judge Nichols (and most other lawyers in the state) read Rudolph Flesch's book, *How to Write Plain English*. It can really help communication between those of us schooled in gobbledy gook and the rest of the world.

Below is a rewrite of Judge Nichols's instructions in half the words and at an eighth-grade level—about the same as an article in *Sports Illustrated*. Don't *you* find them easier to understand, too?

> You've heard the witnesses and seen the evidence. The judge has explained the issues you must decide. He has also explained the law, which you must accept.
>
> Your duty is to look at all the evidence before you make up your minds. You must decide on the relevance, believability and weight of the evidence in light of the main issues of the case.
>
> I suggest that you first select a chairperson. Then review each item of evidence and try to agree on what actually happened.
>
> Get the opinion of all jurors—

even those who may be shy about speaking out. Don't allow pushy jurors to take over the discussions. Listen carefully to everyone. Don't be afraid to change your opinion.

Be sure to look at the evidence considering all the possibilities. Then base your verdict only on the evidence, not sympathy, prejudice or anger.

ERIC L. HUTCHINSON
Perspectives Idea Development
4975 N. E. Avalon
Bainbridge Island 98110

Some Further Thoughts on Tort Reform

Editor:

As the author of several law review articles on tort reform and comparative fault in Washington, I write to commend Stewart A. Estes's article on the Tort Reform Act of 1986 in the April *Bar News*.

In a few short pages, Mr. Estes concisely and cogently explains the modification of joint and several liability in RCW 4.22.070; summarizes the current state of the case law on this subject; describes the areas of continuing controversy; and provides the reader with citations to many of the leading cases and commentaries on this important statute. (Needless to say, I appreciated the citation to my own comprehensive study of the statute in the *University of Puget Sound Law Review*.)

I would encourage any practitioner confronted with a question of comparative fault under Washington law to begin with Mr. Estes's excellent primer on the subject. And, as I have emphasized in my own writings, Mr. Estes concludes by reminding us to "review the provisions of the act with its basic premise in mind—that defendants will pay only their proportionate shares of fault."

I write to suggest one substantive correction. On the question of contribution among tortfeasors after the Tort Reform Act, Mr. Estes's discussion is well presented and largely correct. Because RCW 4.22.070 establishes a general rule of "several only" or proportionate liability (that is, that each defendant is only liable for its individual proportionate share of the fault), contribution is of declining importance. Mr. Estes correctly states that contribution has continuing vitality only in the increasingly narrow category of cases involving joint and several liability, such as cases involving tortfeasors acting in concert or in an agency context (what Mr. Estes describes as "factual joint and several liability") and when the statute allows common law joint and several liability (primarily the statutory exceptions for cases involving hazardous waste, specified business torts, and certain generic products).

However, RCW 4.22.070(1)(b) also preserves a species of joint and several liability among defendants when the plaintiff is without fault. In the case of an innocent plaintiff, the defendants against whom the judgment is entered are jointly and severally liable for the sum of their proportionate shares of fault (Mr. Estes describes this as "procedural joint and several liability"). This is a limited form of joint and several liability because it is shared only among those defendants against whom judgment is entered and only for the shares of fault allocated to those defendants. Under the statute, the jury must also allocate fault to "every entity" that contributed to the plaintiff's harm, including a tortfeasor who is not joined to the lawsuit, is immune from liability, possesses an individual defense, or is released from the suit.

Thus, for example, if one of multiple defendants reaches a settlement with a plaintiff and is released from the lawsuit, the remaining defendants are not jointly and severally liable with the released defendant. The Washington Supreme Court has held that the share of fault allocated to the settling defendant must be borne by the plaintiff. Under no circumstances will the remaining defendants be obliged to pay for the share of the fault allocated to an absent entity, so there is no need for, or right to, contribution from an enjoined or dismissed tortfeasor.

Nevertheless, Mr. Estes makes an overstatement in saying that "a right to contribution does not have any application in *procedural* joint and several liability cases." Contribution remains fully available among the defendants who are retained in the case and thus subject to joint and several liability if the plaintiff is found to be without fault. Thus, while it is certainly true that the defendants who remain in the suit for the entry of final judgment are not liable for any share of fault attrib-

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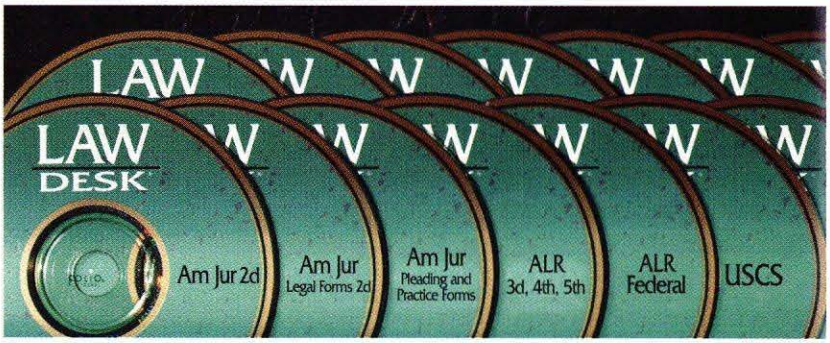

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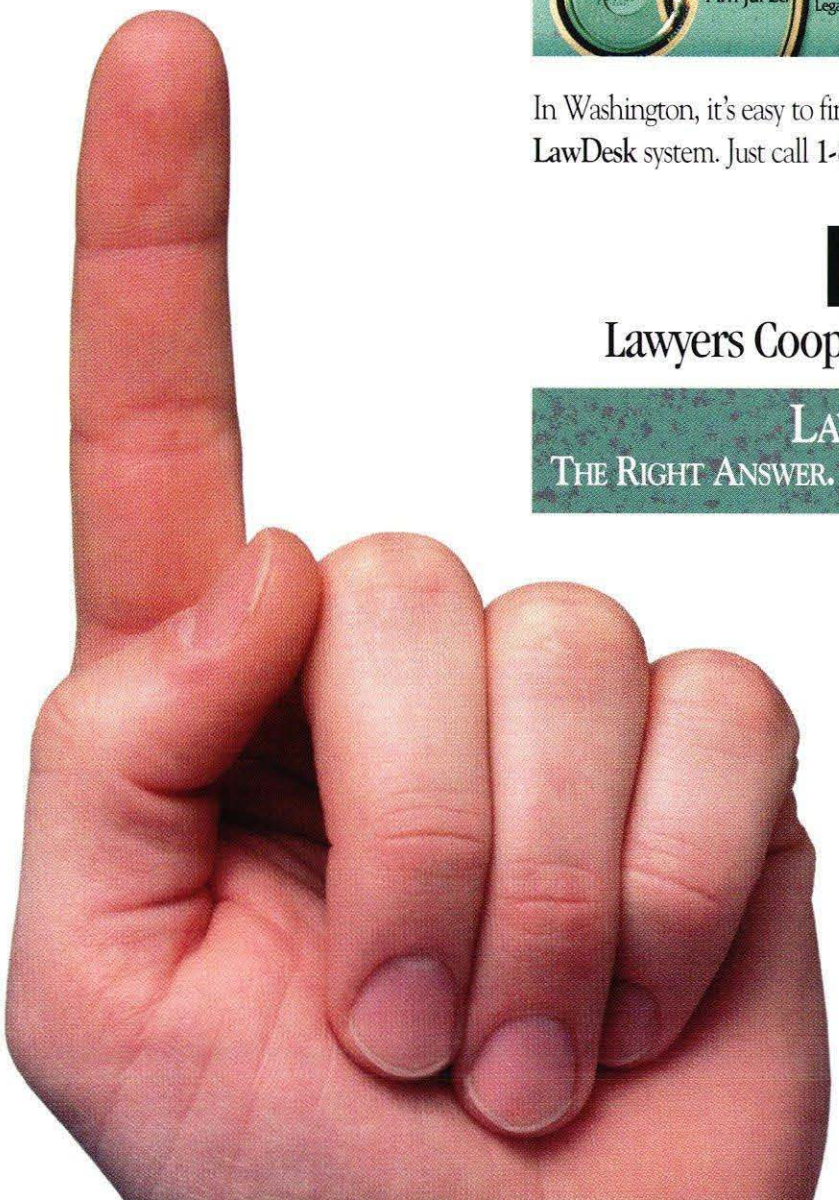

utable to absent tortfeasors not joined to or retained in the suit, each defendant is truly jointly and severally liable for "the sum of their proportionate shares" of the plaintiff's damages. RCW 4.22.070(1)(b). As such, the plaintiff may collect any or all of the judgment from any single defendant. Any defendant who is forced to pay more than its proportionate share of the judgment retains a proper contribution claim against every other defendant against whom judgment was also entered.

A partial error in this particular, important though it may be in certain cases, cannot detract from the validity of Mr. Estes's overall point that contribution has limited application today. Mr. Estes's article thoughtfully introduces the reader to the new world of comparative fault, among all parties and entities, created by the Tort Reform Act of 1986.

GREGORY C. SISK
Associate Professor of Law
Drake University
Des Moines, IA

Draconian Times Call for Draconian Solutions

Editor:

I have founded Washington Lawyers In Favor of Truth, Justice and the American Way. We provide free soap boxes for lawyers with too much time on their hands who don't feel the real world is giving them the admiration they deserve.

Anyone who opposes the Bar Association exacting mandatory tribute from all its members to subsidize me and my pet project is *against* Truth, Justice and the American Way, and has no place in our profession. No lawyer can be against Truth, Justice and the American Way, so, therefore, I am entitled to money for nothing from the government.

Everyone who does not agree with the Bar Association giving me money so I can promote Truth, Justice and the American Way should be disbarred and have their names turned over to the FBI and the House Un-American Activities Committee.

E. KENNETH SNYDER
Seattle

P.S. By the way, does the LAP have a program for crackpots?

Ronald M. Gould

My Colleagues Speak Out

One of my important functions as WSBA president is to act as spokesperson for the Bar. This month, I am offering my column space to some of the bar leaders whose organizations oppose the referendum. Their eloquent letters to me appear below.

The members of the Elder Law Section responding to our survey overwhelmingly oppose the referendum which would limit the use of WSBA dues. A survey mailed to the members of the Elder Law Section received 38 responses; only one supported the referendum. The number of responses received represents approximately ten percent of the members.

On April 14, 1995, the Executive Committee of the Elder Law Section met and voted to oppose the Referendum.

The Elder Law Section stands opposed to the Referendum.

Thank you for the work you have put into educating the members about this issue and encouraging groups to become informed and take a stand. We will be happy when this is behind us so we can get on with the work which is our mission. Perhaps there was some value in this referendum in that the self-analysis it generated led to a keener realization that the WSBA provides valuable support and service.

JANINE LAWLESS, Chair
Elder Law Section, WSBA

The Whitman County Bar Association has voted to oppose the referendum to limit the activities of the WSBA. The consensus among our membership is that the Washington State Bar Association is an outstanding organization that nurtures and maintains the integrity of our profession.

We have a duty to the public to do more than simply regulate ourselves. The WSBA's efforts toward providing professional development opportunities, insuring access to justice, and improving Washington's laws and legal system benefit not only members of the bar but the general public as well. The WSBA provides the leadership we need to advance understanding of our legal system and improve the delivery of legal services to the citizens of Washington. Individual Bar sections provide important opportunities to network and improve our individual skills—this is particularly true for those of us who practice in relatively isolated areas of the state.

We consider it our duty to our profession and to the public to defeat the referendum.

DAWN REYNOLDS
President, WCBA

The Executive Committee of the Consumer Protection, Antitrust & Unfair Business Practices Section recently voted to oppose the upcoming referendum to limit the WSBA's activities. There was substantial discussion of the issue at the Executive Committee meeting of April 12. It was the view of the Committee that there are many negatives inherent in the proposal but no advantages.

AL VAN KAMPEN
Chair, Consumer Protection,
Antitrust & Unfair Business
Practices Section

This is to confirm that the Minority Attorney Bar Association of Tacoma is opposing the referendum limiting the use of Washington State Bar dues to admissions, discipline and regulation. We believe that the Bar Association has made progress in promoting diversity and an increase in minority attorneys in the law. We would like to see the efforts continue.

If you should have any questions, please feel free to contact me.

JAMES C. BUCKLEY, President
Minority Attorney Bar Association

On Monday, April 10, the Executive Committee of the General Practice Section met by phone to conduct a special meeting to discuss the pending *Referendum*. Although no formal poll of our section membership has been conducted, the members of the Executive Committee have considered the issue and, of course, discussed the issue with some of the members.

The members of the Executive Committee voted 6 to 1 in favor of adopting a resolution opposing the *Referendum*. Although it is recognized that there are members of the Bar, and of course members of the General Practice Section, who favor the *Referendum*, the overwhelming majority of our Executive Board believe there is great benefit derived from the Bar programs as presently constituted. As general practitioners, many of whom practice in small firms or as solos, we find great support in the work of the sections; not only ours, but other sections as well. We

appreciate the CLEs, and the efforts the bar has made to foster greater professionalism among the members of the Bar. Bar publications, like the various desk books, are of great assistance to us.

So, we have voted, as indicated, to oppose the *Referendum*. . .

RICKEY C. KIMBROUGH, Chair
General Practice Section

On April 12, 1995, the Executive Committee of the Taxation Section of the Washington State Bar, by telephone conference, unanimously voted to recommend that the members of the Section vote "no" on the Bar referendum to limit WSBA dues to admissions, discipline, and regulatory monitoring of CLE or trust accounts.

In the view of the Executive Committee, passage of the referendum would be detrimental to the Washington State Bar Association Taxation Section and the Bar Association as a whole. We intend to communicate this position to our Section members.

We believe the Bar Association provides a number of valuable services to the Tax Section which, but for the availability of those services, would cause the Section to incur substantial additional expenses.

GARY C. RANDALL, Professor of Law
Chair, Taxation Section

You should already have my fax regarding the Resolution that the Chelan-Douglas County lawyers passed at our noon meeting on April 1, 1995. There were 40 plus lawyers at the bar meeting and the vote was unanimous in support of the Resolution. I realize that the Resolution does not carry a lot of weight, but you can use it however it may help. I think that you are going to get a lot of support from the Chelan-Douglas County attorneys in support of the State Bar Association as it now exists.

If I can be of further help, do not hesitate to contact me.

DAVID M. BOHR, President, Chelan-Douglas County Bar Association

This is to let you know that the Spokane County Bar Association Board of Trustees took a position on Thursday, April 20, 1995, to oppose the referendum to restrict Washington State Bar Association activities.

The Washington State Bar Association is free to use the name of the Spokane County Bar Association in materials listing organizations opposed to the referendum.

PATRICK E. CONNELLY, President,
Spokane County Bar Association

The King County Bar Association Young Lawyers Division has voted to take a position opposing the referendum limiting the use of Washington State Bar dues to admissions, discipline and regulation. We are especially opposed to this referendum because it would eliminate the Washington Young Lawyers Division. Please feel free to use our name as a group opposed to the referendum. I plan to publish an article in June explaining our opposition to the referendum.

If you need any further support on this issue or have any questions please feel free to call me at 464-7352.

SUSAN M. EDISON, Chair
King County Bar Association
Young Lawyers Division

This is to let you know that the King County Bar Association took a position on April 5 to oppose the referendum to restrict Washington State Bar Association activities. Therefore, the WSBA can feel free to use the name of the King County Bar Association in materials listing organizations opposed to the referendum.

MARY H. WECHSLER, President
King County Bar Association

At our regular meeting today, the Yakima County Bar Association voted to oppose the referendum to restrict Washington State Bar Association activities. I have enclosed a copy of the resolution we adopted. You will note that the resolution also directs the President and the Executive Board to actively advocate and communicate our opposition to the referendum. Therefore, I will be publishing our position in our newsletter and sending a copy of our resolution to the county bar leaders and to the members of our bar. There are approximately 300 members of the Yakima County Bar Association.

Please let me know if I can be of further assistance.

TERESA C. KULIK, President
Yakima County Bar Association

We want to express our gratitude to the Washington State Bar Association for its continued support of the Asian Bar Association of Washington and the Asian and Asian-American communities of this state. The WSBA has given us an avenue to voice our concerns for the profession as it affects the promotion of attorneys of color and our communities. We appreciate the opportunity to collectively address issues of gender and race bias. With the help of the WSBA, the quality of our profession continues to improve.

Understandably, we oppose the recent referendum to reduce the State Bar to a regulatory agency. If the referendum passes, organizations like the ABAW will lose a vital partner in the promotion of attorneys of color and the elimination of race and gender bias issues. No other bar association influences the direction of this profession in this state more than the WSBA. No other organization can make the social changes we need better than the WSBA.

It is time for us to work together again. Together we can defeat this referendum. We will continue to inform our members of the need to oppose this referendum.

RUSSELL M. AOKI, President
Asian Bar Association of Washington

I also want to direct your attention to the Washington State Lawyers Campaign for Hunger Relief. Hungry and undernourished children start out life with disadvantages that many never overcome. Such need demands our attention as lawyers working within a legal system that promotes social justice and equal opportunity. Read the Campaign's insert in this issue. This nonprofit organization, staffed mainly by volunteers, has two objectives: improving the plight of needy children and the elderly chiefly in Washington, and improving the image of lawyers in our communities.

Please help. Aon

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Regionalization of Some Bar Activities: A Good Idea or Another Trilateral Commission Plot?

Dennis P. Harwick

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

Last October, WSBA member George Riemer (currently general counsel to the Oregon State Bar) wrote a thoughtful article in *Bar News* about "The Cascadia Law Practice Agency: A Proposal to Improve Lawyer Regulation by the Year 2000." Mr. Riemer's article was, in the tradition of Jonathan Swift, "a modest proposal" to regionalize the practice of law and the regulation of the legal profession.

The idea advanced a notch early this year when the President of the Oregon State Bar wrote to the leaders of the other state bars in the region (Washington, Idaho and Alaska) to suggest a luncheon at the Western States Bar Conference. As it happens, the WSBA did not have any official representatives at that conference because of a scheduling conflict with the February Board of Governors' meeting. However, the idea continued to flicker (with Utah joining in), and that group proposed a meeting this summer in—of all places—Seattle. So guess who got to organize it!

Consequently, on June 19, 1995, a group of bar leaders and executive staff will be sitting down at a conference room in the Westin Building (where the WSBA is housed) to discuss both the concept and the logistics of: a) regionalization of the practice of law, and b) consolidation of the regulation of the practice of law.

I'd like to hear from WSBA members what they think about this concept. Is it a good idea because it will recognize the reality of multi-state practice for those who live on the border? Could it simplify logistical complexities, such as getting CLE programs approved for credit across state lines? Or is it an unnecessary expansion of regulatory authority?

As many of you know, I grew up in Idaho, am a member of the Idaho State Bar, and practiced law in both Pocatello and Boise. Believe me, Pocatello lawyers are suspicious of Boise regulators, just the way Spokane, Walla Walla, Wenatchee, and Bellingham lawyers are suspicious of Seattle regulators. Is the concept of a regulator from another state so far fetched that it isn't worth pursuing? Or are there some economies of scale that would serve everyone—urban and rural?

Since I have the unique experience of being the only person who has actually been the executive director of more than one state bar in the Pacific Northwest (Idaho and Washington), it might seem as if I would think this was a "no-brainer," but I don't. My initial thoughts are that there are some functions that might be a good test, accreditation of CLE programs being number one on my list. On the other hand, a unified bar association must have credibility with its members. Would regionalization of activities detract from that?

I know that I'm raising more questions than I'm answering—so let me hear from you. You can also contact Vicki Toyohara at the Washington State Minority and Justice Commission (PO Box 41170, Olympia, WA 98504-1170), who is serving as the representative of the WSBA Board of Governors at this meeting on June 19.

What do you think? Reinventing government or a one-world plot?

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

Spokane, May 12-13, 1995

Present: The President, President-elect, and Board of Governors. *Also present:* Hon. Ted Armbruster (Administrative Law Judges' Association); Rebecca Baker (Legal Foundation of Washington); Thomas Campbell (Washington Association of Criminal Defense Attorneys/ South King County Bar Association; South King County Bar members take note, he was at the April meeting in LaConner, too); Susan Edison (King County Young Lawyers Division); Evelyn Fielding (Government Lawyers Bar Association); Christine Gregoire (Attorney General of Washington); Dennis P. Harwick (WSBA Executive Director); Jim Kaufman (Washington Association of Prosecuting Attorneys); Nancy Krier (Washington Women Lawyers); J. Richard Manning (King County Bar Association); Scott Miller (Washington ABA Delegation); Michael Mitchell (WSBA General Practice Section); Hon. Kathleen O'Connor (Superior Court Judges' Association); Kit Querna (WSBA Business Law Section); Hon. John Schultheis (Court of Appeals); Bradford Steiner (WSBA Young Lawyers Division); Lindsay Thompson (*Bar News* editor); and Robert Welden (WSBA General Counsel).

Referendum News: After the Board approved the minutes of the last meeting, the president gave his report to the Board. He told the Board his time has been principally occupied by matters connected with the referendum to restrict the use of WSBA licensing fees. He noted that every bar association group that had considered the referendum had voted against it, and passed out an updated list:

Groups Opposing the Referendum: Asian Bar Association; County Bar Associations of Adams, Benton-Franklin, Chelan-Douglas, Clallam, East King, Ferry, King, Lincoln, Spokane, Tacoma-Pierce, Thurston, Yakima, Whatcom and Whitman Counties; Federal Bar Association for the Western District of Washington; Filipino-American Legal Association of Washington; Hispanic Bar Association; King County Young Lawyers Division; Minority Bar Association of Tacoma; Washington Defense Trial Lawyers; WSBA Administrative Law, Business Law, Consumer Protection, Antitrust & Unfair Business Practices, Corporate Law, Elder Law, Family Law, General Practice, Litigation, Real Property, Probate & Trust, and Taxation sections; Washington State Bar Association Committees on Court Rules and Procedures, and Public Relations; WSBA Task Force on Governance; WSBA Young Lawyers' Division; Washington State Trial Lawyers Association; and Washington Women Lawyers.

Groups Supporting the Referendum: None reported.

Governor Ron Perey told the Board he had been asked by a number of people what the Board's position is on the referendum. While board members have been active individually, the Board as a whole has not taken a position, and Perey felt this needed to be remedied by a resolution he offered. After some discussion, the Board voted unanimously to oppose the referendum. The text of the resolution follows this report.

The president said he felt efforts by opponents of the referendum were paying off, but urged opponents not to stop running short of the tape. "There is great momentum against the resolution, but we cannot stop yet," he added. Ballots were mailed May 15 and are due back June 9.

It's Official! The Emily Litella Trophy Has Been Retired: Emily, you'll recall, was the inspired creation of the comedienne Gilda Radner on "Saturday Night Live." Appearing on "Weekend Update," the show's news segment, she'd wax eloquent about a slightly misunderstood public issue ("*What's* all this fuss about detaining Russian *jewelry*?"). Corrected by the anchor ("Ah, Emily, it's Russian Jewry"), she'd smile sweetly at the camera and utter her catch-phrase: "*Never mind.*"

The Board—indeed the entire Bar Association—faced a Genuine Emily Litella Moment when Dennis Harwick read a letter sent to him by Ed Hiskes, one of the cosponsors of the referendum and a longtime critic of WSBA policies and programs. Harwick told the board Hiskes, author of the May *Bar News* article "The Reichstag Fire Revisited"—which accused WSBA leaders of emulating the German Nazi Party and inventing a fraudulent financial crisis in order to impose a referendum-proof dues increase by way of a Supreme Court ordered assessment to cover increased costs of attorney discipline programs—phoned him earlier in the week. After reading a reply in the May issue called "My Life As A Nazi Press Flack, And Other Tales," he experienced an epiphany of sorts. His letter, the text of which follows this report, apologizes for the charges he made in his article. "People who have criticized this article are right: the analogy was *unfair* and *inappropriate*. I am sure that everyone who has worked on these projects [the Client Security Program fund and lawyer discipline system] is sincerely interested in promoting the good of both profession and public. They deserve our gratitude and my apology . . . Executive Director Dennis Harwick and the Board of Governors deserve great credit for improving the quality and efficiency of WSBA management," he said in the letter. "Things are better than they used to be."

Board members expressed gratitude at Hiskes' gesture. It is worth noting that at the same time the board was hearing Hiskes's "Never Mind" letter nearly 20,000 ballots were sitting in a locked room at the Bar office to be sent out two days later. All of the information cited in the letter was available long before the referendum was filed. It would have been nice if some folks had been paying attention. But here we all are; ballots have been mailed. Vote yea or nay, but vote. Let's get this perpetual guerrilla warfare settled one way or the other.

Wrap-up in Spokane: In other action, the Board acted on a suggestion by Yakima lawyer Blaine Gibson and voted to raise the WSBA mileage reimbursement rate to 30 cents, the current IRS-recognized rate. They voted to look into whether CLE regulations need revision in light of a spate of complaints about accreditation and what critics call the CLE Board's generally stroppy attitude. They took note of the passage of the February bar exam by 407 more people. The overall pass rate was 81.6 percent. In the law school sweeps it was Gonzaga win with 82.5 percent, Seattle University place with 79.4 percent and UW show with 69.2 percent.

The Board reappointed Doug Ferguson of Everett to a second four-year term on the Commission on Judicial Conduct, and Access to Justice Board members Susan Agid, Nancy Isserlis and Mary Alice Theiler (who drew short terms) to full, three-year assignments. They approved a motion to create an "emeritus" category of WSBA membership for lawyers who are semiretired but want to do public-service pro bono work.

Attorney General Christine Gregoire talked with the Board about legislation and court rule revisions needing to be undertaken to overhaul the juvenile-justice system, as well as a spate of court challenges to things like the attorney-client privilege her office is defending. General Gregoire always has more interesting things to say than there is room for here, and her assumption of a leadership role—both as the state's top elected lawyer and in bringing government lawyers more into the WSBA fold—deserves great praise.

WSBA legislative liaison John Fattorini reported by phone from Olympia on the legislative session to date. Members of the Access to Justice Board and Equal Justice Coalition—Paul Stritmatter, John McKay, Lauren Moore of LAW Fund and Jim Bamberger of Spokane Legal Services—gave harrowing reports on the vendetta-driven may-

hem being worked on legal-service programs at the state and federal legislatures. Governor Dan Hannula gave an update on the volunteer efforts to get lawyers involved in stopping youth violence, a priority of President Ron Gould's.

Noting, "This is the one time in the year when I get to sit at the big table with you guys," WSBA Young Lawyers Division President Brad Steiner, aided by YLD board members, gave a report on the work of their division. In a word, it's all fantastic.

Spokane lawyer Scott Miller told the Board the ABA is reorganizing itself such that Washington will be pulled out of its Northwest region and thrown in with a bunch of foreign states back east, and it will likely lose a seat in the House of Delegates as well. If several hundred lawyers join the ABA the seat may be saved.

The 1995 Bar Derby and Bottom Fish Rodeo sails from Westport August 4. Breakfast at 4:30 am., fishing at 6, dinner at 4 at the VFW Club. It's as much fun as you can have and still be green-faced and throw up a lot. Call Curtis Janhunen in Aberdeen for the particulars.

RESOLUTION OF THE WSBA BOARD OF GOVERNORS AGAINST THE REFERENDUM TO LIMIT USE OF BAR DUES

WHEREAS, the Board of Governors of the WSBA has received a petition for a referendum signed by the required number of active members of the WSBA, the objective of which is to limit the use of bar dues for anything other than licensing and disciplinary functions; and

WHEREAS, the Board of Governors of the WSBA has submitted a ballot to the active members of the WSBA for the purpose of voting on that referendum; and

WHEREAS, the Board of Governors of the WSBA, as the duly elected representatives of the 20,000 members of the WSBA has a duty to review the referendum, discuss its merits, and advise the membership of its collective opinion on the wisdom of the referendum; and

WHEREAS, each member of the Board of Governors, and the President of the WSBA, has read the statements in support of, and in opposition to, the referendum, and has discussed the referendum with each other and with lawyers throughout the state; and

WHEREAS, the Board of Governors of the WSBA is aware of no organization of lawyers who have expressed support for the referendum or its objective; and

WHEREAS, the Board of Governors of the WSBA has received countless letters and resolutions opposing the referendum from substantially all organizations of lawyers in the State of Washington, and

WHEREAS, the Board of Governors of the WSBA, including its President, believes that the referendum is unwise and, if passed, would be adverse to the interests of lawyers and other citizens of the State of Washington;

NOW THEREFORE, the Board of Governors of the WSBA unanimously urges all WSBA members to vote "NO" on the referendum ballot.

Dated this 12th day of May, 1995.

/s/ Ronald M. Gould, President

Peter Ehrlichman	Daniel L. Hannula
Vickie K. Norris	Jan Eric Peterson
Mary E. Fairhurst	Steven G. Toole
West H. Campbell	James V. Handmacher
Patricia C. Williams	Linda Dunn

Ron Perey

LISH WHITSON
Washington State Bar Association
Board of Governors
7th District

The law firm of HELSELL, FETTERMAN, MARTIN, TODD & HOKANSON is proud to announce that our partner LISH WHITSON has been nominated for the 7th District seat on the Washington State Bar Association Board of Governors.

This is a critical time for the bar. Our profession is under attack from without and within, and many fine attorneys are leaving the practice because it is no longer satisfying or the rewards are no longer obvious. We need dedicated and proven leaders such as Lish on the Board of Governors to help reverse this trend.

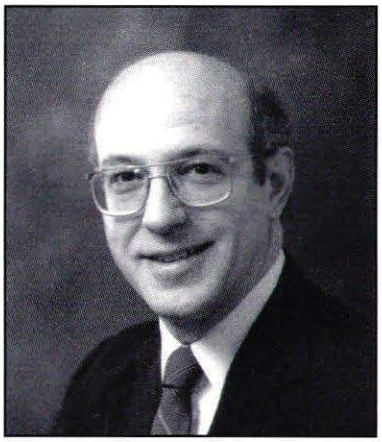
Since 1976, Lish has litigated a wide range of civil cases for plaintiffs and defendants in federal and state courts. In 1993 Lish received the **King County Bar Association's Pro Bono Service Award** for his work on behalf of women with breast cancer.

Lish has a long history of community involvement and currently serves on the boards of the Downtown Emergency Service Center, serving Seattle's homeless, and the Seattle Youth Symphony Orchestra, and is president of Allied Arts of Seattle. He has served on the board of the Public Defender Association and was a Peace Corps volunteer in Afghanistan before attending law school.

Lish is equally committed to his profession. A Fellow of the American Bar Foundation, he has served on the ABA and King County Young Lawyer Division Boards and on the boards of the American Judicature Society and the Seattle King County Bar. He has lectured on all aspects of civil litigation for the WSBA, KCBA and WSTLA.

Please join the distinguished attorneys listed below who have provided written endorsements for Lish:

"He is a person of great integrity, compassion and ability." — "MAC" SHELTON



"Lish's commitment to professionalism and excellence in the practice of law, as well as his tireless work in important areas of social change, such as the right of women with breast cancer to receive effective treatment, make him an excellent choice for leadership." — CAROLYN CAIRNS

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Patricia E. Anderson
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Patricia E. Olson
Kristen Pugsley Onsager
Robert E. Ordal
Douglas N. Owens
Margaret Pageler
Joel R. Paisner
Walter G. Palmer
Laura Pasik

Michael A. Patterson
David W. Pavlick
Alan J. Peizer
Louis D. Peterson
Scott A. Peterson
Susan Peterson
John Phillips
John T. Piper
John Q. Powers
Ragan L. Powers
Erik D. Price
Llewelyn G. Pritchard
Constance L. Proctor
Peter G. Ramels
Erik H. Rasmussen
Charles A. Reed
Walter J. Reseburg, Jr.
Allen Ressler
Hon. George H. Revelle
Kerry A. Richards
Roberta N. Riley
Rebecca Ringer
Solie M. Ringold
Mark F. Rising
Richard Robinson
Donald Roistacher
Rhea J. Rolfe
Katherine Riffle Roper
Michael H. Rorick
Michael H. Rosen
Linda M. Roubik
John R. Ruhl
Michael H. Runyan
Steven T. Russell
Jerret E. Sale
Steven J. Samario

Aldo A. Samboni
Mike T. Sanders
Terence Savery
Bradley P. Scarp
Reed P. Schifferman
Jackson Schmidt
Serena Schourup
Michael P. Scruggs
Paul F. Seligmann
Deborah Senn
Cashton L. Sessler
Larry Setchell
Bradley S. Shannon
J. Peter Shapiro
Sean Sheehan
David "Mac" Shelton
Craig Shrontz
Dolores Sibonga
Ray Siderius
Paul Sikora
Lawrence D. Silvernale
Richard M. Slagle
Pauline V. Smetka
Charles L. Smith
Dennis Smith
E. Kenneth Snyder
Sidney R. Snyder, Jr.
David Soderland
Shannon Sperry
Richard E. Spoonemore
Lynn B. Squires
Bob C. Sterbank
Kevin L. Stock
James L. Strichartz
Jack G. Strother
David Strout

Donald D. Stuart
Robert M. Sulkin
William H. Taylor
Jerry E. Thonn
Britt L. Tinglum
Christopher Tompkins
Russell F. Tousley
Gary A. Trabolsi
James A. Tupper, Jr.
Howard Tuttle
Karen J. Vanderlaan
John C. Versnel III
Jane J. Voget
Patricia H. Wagner
Scott C. Wakefield
Burton C. Waldo
Michael C. Walter
Linda D. Walton
Martha Walton
Dexter A. Washburn
Karen Southworth Weaver
Bert H. Weinrich
Christopher B. Wells
Livingston Wernecke
John K. Wheeler
Cynthia B. Whitaker
David Paul Williams
Scott M. Williamson
Bruce Winchell
James H. Wishaar
Benson D. Wong
Joel Wright
Sung Yang
Richard C. Yarmuth
Finley Young
John R. Zeldenrust

RE: APOLOGY CONCERNING "REICHSTAG FIRE" ARTICLE

In an article I wrote for the May *Bar News* I drew an analogy between the Reichstag Fire incident and proposed mandatory assessments for the WSBA Client Security Fund and lawyer discipline system. People who have criticized this article are right: the analogy was *unfair* and *inappropriate*. I am sure that everyone who has worked on these projects is sincerely interested in promoting the good of both profession and public. They deserve our gratitude and my apology.

Although it was not apparent, my rhetoric was inflamed not by a perception that the WSBA is bad, but rather by a conviction that the WSBA has made progress that we should strive to preserve. In recent years, the WSBA has responded to membership wishes by curtailing expensive conventions; opening financial records; and applying the Open Public Meetings and Public Records Acts to itself. Moreover, Executive Director Harwick and the Board of Governors deserve great credit for improving the quality and efficiency of WSBA management. Things are better than they used to be.

My concern is that the membership referendum, which has played a role in motivating recent reforms, is endangered by the concept of mandatory fees imposed by court rule or court order. However, rhetorical excess presents dangers as well: dangers which I shall henceforth endeavor to *minimize*.

My writings concerning the "Joint Task Force Report on Discipline" have been criticized, sometimes fairly, in various forums. With the feedback I have received from WSBA officials and others, I can now sum things up with improved precision: Everyone agrees that the Task Force has proposed a mandatory assessment for discipline. The Task Force report will be considered by the Board of Governors at a later time. Task Force minutes discuss various "caps" that could be placed on the mandatory fee. Two numbers mentioned are $115 and $350 annually. The final report omits any number, but states that there should be a "predetermined" cap, to be determined, by the Supreme Court (a point which I definitely missed). Dennis Harwick submitted an estimate for an expanded discipline system at $187 per member per year, although it could be less if all suggested expansions are not implemented. The amount of the mandatory fee depends upon the "cap" eventually arrived at, the per member budget, and the extent to which annual dues money, as opposed to mandatory fee revenue, is allocated to discipline. Currently, about $95 per year per member is allocated to discipline from annual dues. Everyone agrees that the Task Force report proposes a mandatory discipline fee that will not be subject to membership referendum. Personally, I assumed that the Task Force report, signed by the Chief Justice and the WSBA President, would get a rubber stamp from the Board. However, Governor Jan Peterson assures me that this will not be so.

The APR 15 Client Security assessment, as distinguished from the discipline assessment, has been endorsed by the Board for this fiscal year and forwarded to the Supreme Court for approval. Having been endorsed by the Board, I assumed that this assessment would also be a matter of course. However, WSBA General Counsel requests that I point out that approval has not yet happened. I hereby do so. WSBA President Ronald Gould, in a special letter to all WSBA members, rightly points out that the WSBA Board of Governors has not proposed any increase in bar dues. Thus, to the extent my writings have inappropriately and unfairly failed to distinguish between the concepts of mandatory fees versus annual dues, I must also apologize for that.

My thanks go out to WSBA officials and others who have provided more precise information concerning mandatory fees. I hope that the foregoing clarifications will remove any misunderstandings resulting from my earlier discussions of this subject.

Sincerely,
Edward V. Hiskes

CONSUMER PRICE INDEXES - PACIFIC CITIES AND U. S. CITY AVERAGE 1994

ALL ITEMS INDEXES (1982-84=100 unless otherwise noted)
MARCH 1995

MONTHLY DATA	ALL URBAN CONSUMERS						URBAN WAGE EARNERS AND CLERICAL WORKERS					
	INDEXES			PERCENT CHANGE Year ending		1 Month ending	INDEXES			PERCENT CHANGE Year ending		1Month ending
	MAR 1994	FEB 1995	MAR. 1995	FEB 1995	MAR. 1995	MAR. 1995	MAR 1994	FEB 1995	MAR 1995	FEB 1995	MAR 1995	MAR 1995
U. S. City Average	147.2	150.9	151.4	2.9	2.9	0.3	144.4	148.3	148.7	3.0	3.0	0.3
(1967=100)	441.1	452.0	453.5	-	-		430.2	441.7	443.0	-	-	-
Los Angeles-Anaheim-Riverside	152.5	154.5	154.6	1.5	1.4	0.1	147.0	149.2	149.3	1.6	1.6	0.1
(1967=100)	450.5	456.5	456.9	-	-	-	434.4	440.9	441.3	-	-	-
San Francisco-Oakland-San Jose	148.2	150.5	151.1	2.1	2.0	0.4	145.6	148.3	149.9	2.3	2.3	0.4
(1967=100)	455.5	462.7	464.4	-	-	-	443.4	451.6	453.5	-	-	-
West	149.0	152.4	152.8	2.8	2.6	0.3	145.9	149.4	149.8	2.8	2.7	0.3
(Dec. 1977 = 100)	240.8	246.3	247.0	-	-	-	234.8	240.4	241.1	-	-	-
West - A	150.5	153.1	153.6	2.1	2.1	0.3	145.9	148.7	149.1	2.3	2.2	0.3
(Dec. 1977 = 100)	245.5	249.7	250.4	-	-	-	236.2	240.7	241.4	-	-	-
West - C	148.7	155.1	155.2	4.6	4.4	0.1	146.3	152.2	152.2	4.2	4.0	0.0
(Dec. 1977 = 100)	230.6	240.5	240.7	-	-	-	225.6	234.7	234.7	-	-	-

Size classes: A = 1,250,000 and over, B = Not available for West, C = 50,000 to 330,000, D = Not available for West.
Release date April 12, 1995. For more information, call (415) 744-6600. CPI 24-hour hotline numbers for the Pacific cities are as follows:

Anchorage	(907) 271-2770	Lost Angeles	(213) 252-7528	San Diego	(619) 557-6538	San Jose	(408) 291-7012
Honolulu	(808) 541-2808	Portland	(503) 231-2045	San Francisco	(415) 744-6605	Seattle	(206) 553-0645

To speak personally to a Bureau of Labor Statistics representative, call the San Francisco office at (415) 744-6600.

Notices of Interest to Bar Members

WSBA Disciplinary Notices

Reprimanded: Seattle lawyer **Mickey Magness** (WSBA #19542, admitted 1990) was ordered reprimanded pursuant to a stipulation to discipline approved by the Disciplinary Board of March 17, 1995. Magness shared attorney fees with a nonlawyer in violation of Rule of Professional Conduct (RPC) 5.4(a), assisted the nonlawyer in the unauthorized practice of law in violation of RPC 5.5(b), and practiced law with a corporation owned by a nonlawyer, in violation of RPC 5.4(d)(1).

From July 1990 until March 1992, Magness worked with a law office owned and operated by a person who was not an attorney. Magness handled personal-injury cases for the office. For each case that settled, Magness gave the office 70 percent of her attorney fees. When she first started working with the law office, Magness believed these payments were in exchange for office space and secretarial services, but she later realized the arrangement involved the improper sharing of fees.

Magness's name was on the office stationery and on the door to the office. The nonlawyer owner's name was not. When a new client came to the office, the nonlawyer would meet with the client and prepare a letter of representation with Magness's name. Magness did not always meet the client in person. The nonlawyer negotiated settlements for clients, drafted legal documents, and in other ways engaged in the practice of law without supervision by Magness or another attorney.

Magness believed the nonlawyer owner was an attorney until 1991, when she overheard the owner tell a client that she was not an attorney. Magness continued to work at the office for over a year after learning that the owner was not an attorney. Magness denies knowing that the owner was engaged in the practice of law until shortly before Magness stopped working at the office. By lending her name to the owner's business and working for the owner, Magness assisted the owner in the unauthorized practice of law.

In June 1992, Magness reported the conduct summarized above to the Bar Association because of blackmail threats.

Commission on Judicial Conduct Notice

Stipulation and Order of Closure: By stipulation and order filed April 7, 1995, the Commission on Judicial Conduct and Hon. **Carmel C. Mackin**, Mason County District Court Commissioner, stipulated that at all relevant times she was serving as Mason County District Court Commissioner or pro tem District Court judge. She now serves in neither capacity.

On January 23, 1994, Commissioner Mackin was arrested for driving under the influence of intoxicating liquor. On February 1, 1995, she was found guilty of the charge of driving while intoxicated, and has given notice of intent to appeal that conviction.

On March 31, 1994, Mackin was arrested a second time for driving while intoxicated and pled not guilty. Trial of that matter is pending in Thurston County District Court.

A hearing before the Commission was scheduled for February 24, 1995. Mackin stipulated that the conduct she is accused of violates Canons I and II(A) of the Code of Judicial Conduct. She stipulates that the Commission could find violations of Canons I and II(A) and impose disciplinary sanctions upon her.

Mackin agreed to neither seek nor serve in any judicial office in Washington unless and until she has completed an alcohol evaluation and has received the prior approval of the Commission on Judicial Conduct. In exchange for this agreement and stipulation, the Commission agreed to accept the agreement and stipulation and close the investigation and proceeding without a hearing.

The Commission was represented by Brown Lewis Janhunen & Spencer, and Curtis M. Janhunen. Mackin was represented by McCluskey, Sells, Ryan, Uptegraft & Decker, and James K. Sells. *In Re the Matter of Hon. Carmel C. Mackin, Commissioner, Mason County District Court, Cause No. 94-1677.*

Public Notices

Attorney General's Opinions:

I. Salary-Compensation-Colleges and Universities-State Budget-Whether Increased Vacation Leave Amounts To Increased Salary: A college may increase the vacation leave of its employees without increasing their "salaries" for purposes of interpreting salary increase limits contained in the 1993-95 state operating budget. Maureen Hart, Senior Assistant Attorney General, is author of the opinion, Cite as AGO 1995 No. 2, February 24, 1995.

II. Schools-Districts-Students-Religion-Use of School Districts' Facilities By Student Groups for Religious Purposes: The state constitution does not prohibit schools from adopting a "limited open forum" policy for student organizations making use of school districts' facilities, even where federal law requires that equal access be granted to student groups for religious purposes, so long as it is clear that the school district maintains a neutral position on religious matters.

A school district may recognize student groups engaged in religious activity and grant such groups access to school time and space on the same basis offered to other student organizations, so long as the district grants equal access to all points of view and neither endorses nor opposes the activities of any particular group. James K. Pharris, Senior Assistant Attorney General, is author of the opinion. Cite as AGO 1995 No. 3, March 23, 1995.

III. Municipal Judges-Cities-Elections-Offices and Officers-Statutory Interpretation-Effective Date of Amendment Making Certain Municipal Court Judgeships Elective: RCW 3.50.055, enacted in 1993 but effective January 1, 1995, requires certain municipal court judgeships to be filled by election as vacancies occur after January 1, 1995: that is, and new judgeships created or vacancies occurring in existing positions (if they are covered by RCW 3.50.055) must be filled by election for the remainder of the current term, while duly appointed judges serving terms scheduled to end on January 1,1998 may complete their current terms, but their successors

will be chosen by election.

RCW 3.50.055 was not intended to change the term for which municipal court judges service; pursuant to RCW 3.50.040 and 3.50.050, all municipal court judges serve four-years terms beginning on January 1, 1986, and every four years thereafter. James K. Pharris, Senior Assistant Attorney General, is author of the opinion. Cite as AGO 1995 No. 4, March 31, 1995.

IV. Taxation-Property-Valuation-Constitutional Requirements On Imposition of Ad Valorem Property Tax: Article & of the Washington State Constitution does not require that property subject to ad valorem property tax be assesses at 100 percent of true and fair value.

The State Constitution imposes three requirements on the assessment of property subject to ad valorem property tax: (1) any tax must be uniform as to any class of property within the territorial limits of the authority levying the tax; (2) the valuation system must be administered in a systematic, nondiscriminatory manner; and (3) the aggregate of all taxes levied upon real and personal property by the state and all taxing districts must not, in any year, exceed one percent of true and fair value of each property. William B. Collins, Senior Assistant Attorney General, is author of the opinion. Cite as AGO 1995 No. 5, April 11, 1995.

Felony Judgment and Sentencing Form Available on Disk:

Bradley J. Hillis, legal analyst in the Office of the Administrator for the Courts, has advised that the felony judgment and sentencing form has become available on computer disc in a variety of word processing formats. Created in WordPerfect 6.0, the form works best in that version of that software. It has been translated into WordPerfect 5.1 and 6.0, which have the ability to include tables, as well as WordPerfect 5.0 and 4.2, which do not. The translation across software is not perfect, and office staffs will likely have to do some cleanup of hidden codes embedded in the document and controlling paragraph indents, margins, line spacing and the like.

"Individual counties may develop special macros to increase efficiency in completing the forms, for example, by merging the defendant's name and identification date into the form," Hillis reports. "I would certainly like to receive a copy of any such programs so that I can make them available to other offices. I would also appreciate receiving comments on improvements to formatting the form to make it work better on personal computers."

An Apple Macintosh version of the form on diskette is also available on request. Hillis may be contacted at The Office of the Administrator for the Courts, P.O. Box 41770, Olympia, Washington 98504-1170, (360) 357-2128. The OAC forms line is at (360) 705-5328. Individual criminal defense attorneys may obtain a copy of the form from their local public defender organization, prosecutor's office, or the forms line. There is no charge.

George Mason Independent Law Review Article Solicitation:

The George Mason Independent Law Review accepts articles throughout the year, and invites any interested authors to submit manuscripts. It publishes high-quality, scholarly articles written by judges, attorneys and law professors, as well as the most outstanding articles written by its student members. The Review is published twice a year plus occasional additional symposium issues devoted to specific legal topics. It is available on both Lexis and Westlaw. Hard-copy circulation includes many courts, including the US Supreme Court, all US Courts of Appeal, U.S. District Courts in the Third, Fourth, Sixth and D.C. Circuits and the courts of appeal and supreme courts of Virginia, West Virginia, Maryland and Delaware.

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 May 1995 is 6.12 percent. ***The maximum allowable interest rate permissible for June 1995 is therefore 12 percent.***

Compilations of the average coupon equivalent yields from past auctions of 26-week treasury bills and a past maximum interest rates of the past ten years appear on page 72 of this issue.

June 1995

1-2 Seattle: High-stakes Negotiations. *Sponsored by* UW CLE.

2-4 Stevenson: Real Property, Probate & Trust Midyear. *Sponsored by* WSBA CLE/WSBA Real Property, Probate & Trust Section.

3-4 Bellevue Litigation and Testimony. *Sponsored by* WA Sex Offense Specialists & the Seattle Forensic Institute. *Contact:* Sandra Gibbs, (206) 565-8022.

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 52, May 95 Bar News.*

9 Seattle: How to Draft & Defend Employee Handbooks. *Sponsored by* WSBA CLE.

9 Seattle: Tom Chambers Legal Update for the General Practitioner. Also presented **June 12 in Vancouver**, **June 14 in Port Angeles** and **June 21 in Spokane**. *Sponsored by* WSTLA.

9 Criminal Law Update. *Sponsored by* SCBA.

9 Spokane: SCBA Annual Meeting

15 Deadline for August 1995 *Bar News* copy.

16 Seattle: Current Issues Facing Local Governments. *Sponsored by* WSBA Administrative Law Section/ WSBA CLE.

16 Seattle: WWL 25th Anniversary Leadership Development Conference. *For information:* Tiffanie Kilmer, (206) 622-5585.

16 Spokane: Annual SCBA Golf Tournament and Volunteer Lawyers Fund-raiser.

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.

23 Spokane: Federal Bar Association, Eastern district of Washington District Conference. *For information*: Lisa Corigliano, (509) 838-6131.

23-24 Chelan Litigation Midyear. *Sponsored by* WSBA CLE/WSBA Litigation Section.

23-25 Spokane: Family Law Midyear. *Sponsored by* WSBA CLE/WSBA Family Law Section.

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.

12 Seattle: Trial as Theatre (video). *Sponsored by* WSTLA

14 Seattle: Auto Cases (video). *Sponsored by* WSTLA.

15 Deadline for September 1995 *Bar News* copy.

20 Seattle: Trial as Theatre (video). *Sponsored by* WSTLA.

26 Seattle: Auto Cases (video). *Sponsored by* WSTLA.

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

26 Seattle: Effective Law Firm Leadership for the '90s. *Sponsored by* UW CLE.

27 Seattle: Employment Law (video). *Sponsored by* WSTLA.

27-28 Seattle: More for Less: Legal Computing & Communications. *Sponsored by* UW CLE.

28-29 Winthrop: WSBA Board of Governors meeting.

29 Seattle: Employment Law (video). *Sponsored by* WSTLA.

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.

14-18 DUI Practice Certificate Program. *Sponsored by* UW CLE.

15 Deadline for October 1995 *Bar News* copy.

17 SeaTac: Product Liability. *Sponsored by* WSTLA.

25 SCBA Annual Golf Tournament.

29-31 Seattle: Taking and Defending Depositions. *Sponsored by* NITA.

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.

8 Family Law Skills Certificate Program (first of 12 sessions). *Sponsored by* UW CLE.

8 Seattle: Technology and the P.I. Practice. *Sponsored by* WSTLA.

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.

22-24 Mediation Skills Certificate Program. *Sponsored by* UW CLE.

22-24 SCBA Bar Convention.

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.

TRADE SECRETS AND NONCOMPETITION AGREEMENTS: A WASHINGTON LAW PRIMER

by **Fredrick D. Huebner** *and* **Yana D. Koubourlis**

Both trade secret statutes and noncompetition agreements seek to protect a business's economic position against new or existing competitors. Trade secret and breach of noncompetition agreement claims are often litigated in the same lawsuit and revolve around the basic fact pattern of an employee who departs to start his or her own business or to join an existing competitor. In this article, we will generally discuss the statutes, case law and strategic considerations in the context of the departing-employee problem.

Trade Secrets

Definition of a trade secret

The Uniform Trade Secrets Act ("UTSA"), RCW 19.108.010 et. seq., governs trade secrets in Washington. A party seeking to establish a trade secret claim under the UTSA must prove that the information alleged to have been misappropriated was in fact a legally protectable secret. *Boeing Co. v. Sierracin Corp.*, 108 Wn.2d 38, 49 (1987). The UTSA defines a trade secret as information, including a formula, pattern, compilation, program, device, method, technique, or process that: (a) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and (b) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy. RCW 19.108.010(4). Thus, a legally protectable secret exists if two primary criteria are met. These criteria are 1) inaccessibility to other persons who can obtain value from the information and 2) reasonable efforts to maintain the secrecy of the information.

Statutory requirements

1. Information That Derives Independent Economic Value From Not Being Generally Ascertainable By Proper Means

To be a trade secret, the information in question must not be readily ascertainable from another, legitimate source. RCW 19.108.010(4)(a); *Boeing* at 50; *Machen Inc. v. Aircraft Design, Inc.*, 65 Wn.App. 319, 326, *review denied*, 120 Wn.2d 1007 (1992). If the information is a compilation, it is a trade secret as long as some elements of the compilation are not readily ascertainable from a legitimate source. *Boeing*, *id.*; *Machen* at 327. This does not mean the information must be "patentably nonobvious or novel" in order to have trade secret status. *Imi-Tech Corp. v. Gagliani*, 691 F.Supp. 214, 231 (S.D.Cal. 1986). Rather, "all that is required is that, except by use of improper means, there would be difficulty in acquiring the information." *Id. See also Robert S. Weiss & Assoc. v. Wiederlight*, 546 A.2d 216, 225 (Conn. 1988).

Legitimate information sources are those sources available to the public, in contrast to information sources available only to the owner of the putative trade secret. *Century Personnel, Inc. v. Brummett*, 499 N.E.2d 1160, 1164 (Ind.App. 1986); *Steenhoven v. College Life Ins. Co. of America*, 458 N.E.2d 661, 666 (Ind.App. 1984), *reh'g denied*, 460 N.E.2d 973 (Ind.App. 1984). Legitimate sources include trade journals, reference books, or published materials. UTSA § 1, comment, 14 U.L.A. 439 (1990). Another legitimate source of information is the product or creation itself. For example, if the product or creation is "susceptible to reverse engineering," i.e., "starting with the known product and working backward to divine the process which aided in its manufacture [or creation]," then it is not a trade secret. *SI Handling Systems, Inc. v. Heisley*, 753 F.2d 1244 (3d Cir. 1985). *See, also, Boeing* at 326.

Even if the information is available from other, legitimate sources, however, the information still is a trade secret if it is not *readily* available from those other sources. *Imi-Tech* at 231. If the discovery process is lengthy and expensive, for example, the information is not readily available and therefore is a legally protectable secret. *Id. See also* UTSA § 1, comment, 14 *U.L.A.* 439 (1990); *See also Gillis Associated Industries v. Cari-All*, 564 N.E.2d 881, 885 (Ill.App. 1990), *appeal denied*, 137 Ill.2d 664, 571 N.E.2d 147 (1991); *Surgidev Corp. v. Eye Technology, Inc.*, 648 F.Supp. 661, 682 (D.Minn. 1986), *aff'd*, 828 F.2d 452 (8th Cir. 1987).

In addition to ready ascertainability,

An employer's mere intention to keep the information secret does not satisfy [the "reasonable efforts"] requirement . . . the employer must "show that it had manifested that intention by making some effort to keep the information secret."

the UTSA dictates the owner of an alleged trade secret must derive independent economic value from its secret status. Otherwise, the information is not entitled to trade secret protection. *See, e.g., Machen* at 326. *See, also, Optic Graphics v. Agee*, 591 A.2d 578 (Md.App. 1991), *cert. denied*, 324 Md. 658, 598 A.2d 465 (1991). Information has independent economic value if "an outsider would obtain a valuable share of the market" by gaining that information. *Surgidev* at 688.

2. Is the Subject of Reasonable Efforts to Maintain Secrecy?

The second element of trade secret status requires the information in question to be "the subject of efforts that are reasonable under the circumstances to maintain its secrecy." RCW 19.108.010(4)(b). *See, also, Gordon Equipment, Inc. v. Jewell*, 356 N.W.2d 738, 741 (Minn.App. 1984); *Colorado Supply Co. Inc. v. Stewart*, 797 P.2d 1303, 1306 (Colo.App. 1990), *reh. denied*, (1991), *cert. denied*, (1991). An employer's mere intention to keep the information secret does not satisfy this requirement. Rather, the employer must "show that it had manifested that intention by making some effort to keep the information secret." *Electro-Craft Corp. v. Controlled Motion Inc.*, 332 N.W.2d 890, 901 (Minn. 1983), *appeal after remand*, 370 N.W.2d 465 (Minn.App. 1985). The employer's efforts to maintain secrecy need not be extreme or unduly expensive. *Machen* at 327; *Colorado Supply* at 1306. Only reasonable efforts are required. *See, also, Surgidev at* 455 (8th Cir. 1987).

Generally, reasonable efforts to keep information secret include "advising employees of the existence of a trade secret, limiting access to a trade secret on a "need to know basis," and "controlling plant access." *Machen* at 327; *Colorado Supply* at 1306. *See, also, Surgidev* at 455. Thus, "secrecy must be maintained within the [employer's] business as well as without." *Rockwell Graphic System v. Dev Industries*, 730 F.Supp. 171, 177 (N.D.Ill. 1990), *rev'd on other grounds*, 925 F.2d 174, (7th Cir. 1991). This standard is not satisfied by normal business precautions against intruders. *Colorado Supply* at 1306; *Rockwell* at 179. Rather, to be sufficient, "security must be [specifically] directed at protecting company secrets." *Rockwell, Id.*

Particular examples of sufficient efforts to keep information secret include placing the trade secret in a safe in a room with limited access, *Davis v. Eagle Products*, 501 N.E.2d 1099, 1103 (Ind.App. 1986), *reh'g denied*, (1987), *transfer denied*, (1987), putting "employees on notice by requiring [them] to sign nondisclosure agreements . . . restrict[ing] visitor access to [sensitive areas of the workplace] . . . [keeping] . . . information . . . in locked files . . . and . . . distribut[ing] . . . information only on a need to know basis." *Surgidev* at 455.

Particular examples of insufficient efforts to keep the information in question a secret include keeping the information in an unlocked file, *Gordon Equipment, supra*, failing to control the proliferation of copies of the information, *Rockwell, supra; see, also, Gillis* at 885-886, and disclosing information to a third party without conveying to the third party that the information was confidential. *Machen, supra.*

Case patterns

1. Customer Lists

A customer list is entitled to trade secret protection as long as the list fulfills the two UTSA criteria for trade secret status. *Jewett-Gorrie Ins. v. Visser*, 12 Wn.App. 707, 716 (1975); *Nat. School Studios v. Sup. Etc.*, 40 Wn.2d 263, 272-73 (1952); *Network Telecommunications v. Boor-Crepeau*, 790 P.2d 901, 902 (Colo.App. 1990). Thus, "as long as a customer list is not generally known or readily accessible to others and is protected by efforts that are 'reasonable under the circumstances,'" it is a trade secret. Mark A. Rothstein et al., *Cases and Materials on Employment Law*, at 835 (2d ed. 1991). In contrast,

> where the customers are readily ascertainable outside the employer's business as prospective users or consumers of the employer's services or products, [or where the list's secrecy is not protected by efforts that are reasonable under the circumstances], trade secret protection will not attach and courts will not enjoin an employee from soliciting his employer's customers.

Consolidated Brands Inc. v. Mondi, 638 F.Supp. 152, 156 (E.D.N.Y. 1986), *quoting Leo Silfen Inc. v. Cream*, 29 N.Y.2d 387, 328 N.Y.S.2d 423, 278 N.E.2d 636 (1972).

The following cases illustrate these principles.

First, consider cases in which a customer list was found to be a trade secret. There are no Washington cases on this subject. Courts in other jurisdictions, however, have found customer lists to be trade secrets under the UTSA. For example, in *Koach v. Cra-Mar Video Center, Inc.*, 478 N.E.2d 110 (Ind.App. 1985), *reh. denied*, (1985), *transfer denied*, (1985). CRA-MAR Video Center sought to preliminarily enjoin Koach's, a competitor, from using CRA-MAR's customer list. CRA-MAR's list consisted solely of names of persons who had purchased video hardware or video rental club memberships from CRA-MAR. It was stored in a CRA-MAR computer file. Koach's had illegitimately acquired the customer list through unknown means, although not through a former employee of the video center. Koach's argued the customer list was not a trade secret. The

Indiana Court of Appeals, upholding the trial court, disagreed. First, the customer list was not readily accessible to the public, because it "could not have been created by any means other than through CRA-MAR's business operations." 478 N.E.2d at 113. Moreover, CRA-MAR took reasonable efforts to maintain the secrecy of the customer list through strict instructions to the computer programmers and operators, as well as locking up the disks containing the customer list. *Id.* Therefore, the list was a trade secret, and CRA-MAR was entitled to a preliminary injunction. *See, also, Merrill Lynch, Pierce, Fenner & Smith v. Hagerty*, 808 F. Supp. 1555, 1558 (S.D.Fla. 1992) (customer list is a trade secret where former employer took measures to ensure the list's confidentiality), *aff'd*, 2 F.3d 405 (11th Cir. 1993); *Surgidev* (customer list that is not generally known or readily accessible to others, is protected by efforts that are reasonable under the circumstances, and is valuable to competitors constitutes a trade secret).

Now consider cases in which a customer list was found not to be a trade secret because it did not satisfy the two criteria of trade secret status codified in the UTSA. In *Colorado Supply*, the court denied trade secret status for a customer list where the names on the list could be obtained

> . . . by reading through the business section of the telephone directory and by asking prospective customers from whom they purchase[d] certain products.

797 P.2d at 1306. Since the names were readily accessible through other, legitimate means, the list did not qualify for trade secret protection. *See, also, Xpert Automation Sys. v. Vibromatic Co.*, 569 N.E.2d 351 (Ind.App. 1991); *Robert S. Weiss & Assoc. v. Wiederlight* at 216; *Consol. Brands Inc. v. Mondi*, at 157-58; *Jewett-Gorrie Ins. v. Visser* (predating Washington's enactment of the UTSA) and *Nat. School Studios* (predating Washington's enactment of the UTSA).

In *Gillis Associated Industries v. Cari-All*, the court denied trade secret status to a customer list because the plaintiff did not use reasonable efforts to keep the list secret. The plaintiff asserted he had used reasonable efforts to keep the list secret, including keeping the list "under lock and key, making it available only on a single computer and giving only three key employees access to this computer, and informing employees via an employee manual that all information they learned at work was confidential. 564 N.E.2d at 885. The court disagreed. Because

> no restrictions existed upon the hard copies the computer generated [and] the copies were neither kept under lock and key, nor marked 'confidential' or 'do not copy,'

the plaintiff's access restrictions were inadequate. *Id.* In addition, the court held, the employee manual did not protect the secrecy of the customer list, because although it generally declared that information was confidential, it did not specify "what 'information' plaintiff deemed confidential." 564 N.E.2d at 885-86. Finally, there was no secrecy because the plaintiff issued sales reports to sales representatives which contained the customer information, without instructing the sales representatives that the information was to be kept confidential. 564 N.E.2d at 886.

a. Information "In the Employee's Head"

Even when a customer list satisfies the two criteria of trade secret status, a former employee still may be able to utilize the customer list if he had personal contact with the customers. *But see American Credit Indemnity Company v. Sacks*, 262 Cal.App.3d 622, 636 (1989) (customer list constitutes trade secret even where former employee had personally serviced all customers she solicited), review denied, (1989). There are three reasons for this "personal contact" exception. First, an employee who obtains customer information from personal contact does not obtain the customer information through "improper means," such as stealing a customer list from an employer. *Moss, Adams & Co. v. Shilling*, 179 Cal.App.3d 124, 128-29 (1986), *reh'g denied*, (1986), *review denied*, (1986). Second, information that may be obtained from personal contact with customers is "readily available from another source," namely, the customers themselves. *Steenhoven v. College Life Ins. Co. of America*, 458 N.E.2d 661, 666-67 (Ind.App. 1984). Finally, information the employee obtains from personal contact was not subject to "reasonable efforts" to maintain its secrecy, since, after all, the information was not kept secret from the employee. *Colson Co. v. Wittel*, 569 N.E.2d 1082 (Ill.App. 1991), *appeal denied*, 141 Ill.2d 537, 580 N.E.2d 110 (Ill. 1991).

Three reasons for the "personal contact" exception to obtaining customer information: personal contact is not "improper means; the information is readily available from another source;" and the information is not subject to "reasonable efforts to maintain secrecy."

In *Moss, Adams & Co. v. Shilling*, at 128-29, an accounting firm sued Shilling and Kenyon, two accountants who left Moss Adams to form their own firm, for using names and addresses from the firm's Rolodex to contact Moss Adam's clients. The Rolodex contained the names of clients with whom Shilling and Kenyon had personal contact and to whom they had charged time during their tenure at Moss Adams. 179 Cal. App. 3d at 127. The CaliforniaCourt of Appeals affirmed summary judgment dismissing the Moss Adams claim, holding that "one may do business with a former employer's customers with whom one became personally acquainted and developed a business relationship while formerly employed." 179 Cal.App.3d at 129. Since Shilling and Kenyon knew the clients through personal contact and provision of ac-

counting services, the customer information did not constitute a trade secret. *Id.* Thus, pursuant to Moss, Adams it is often said that a former employee cannot be "compelled to wipe clean the slate of [his] memories." *Id.*

Similarly, *Steenhoven v. College Life Ins. Co. of America*, at 666-67, relied on the "personal contact" exception to hold that a court could not prevent a former employee from using customer information he had gleaned from personal contact with customers during his employment with the plaintiff. Since the customer information could be obtained directly from the customers, and was not solely available via former employer, it was "readily available from another source" and therefore did not qualify for trade secret protection.

Finally, in *Colson Co. v. Wittel*, the Colson Company sued Wittel, a former employee, for soliciting Colson customers with whom Wittel had become acquainted while working at Colson. Colson alleged the customer information at issue was a trade secret. Wittel argued it was not, since the information had been either 1) given to him freely by Colson, or 2) developed by Wittel from his working a client. 569 N.E.2d at 1088. The trial court granted Colson a preliminary injunction restraining Wittel from communicating with any of Colson's customers. 569 N.E.2d at 1084. The Illinois Court of Appeals reversed. Although Colson had taken reasonable efforts to keep the information generally secret, the court held, it had not taken reasonable efforts to keep the information secret from Wittel himself. 569 N.E.2d at 1087-88. Therefore, trade secret protection was inapplicable.

The "personal contact" exception does not render a plaintiff-employer defenseless against former employees who dealt directly with the plaintiff's customers while in the plaintiff's employ. Rather, an employer may protect himself from the "personal contact" exception by requiring employees to sign restrictive covenants as part of their employment contracts. *Colson, supra.* Moreover, Washington cases predating the enactment of the UTSA in Washington suggest the "personal contact" exception may not obtain in this state. For example, *Davis & Co. v. Miller*, 104 Wash. 44 (1918), holds that a former employee who purports to carry customer information in his head can be enjoined from utilizing this information. The defendant in Davis was a former employee of a real estate agency. During his tenure at the agency, he came "in personal contact with many, if not all, of the principal customers of the business." 104 Wash. at 445. After leaving the real estate agency, the defendant formed his own company, which was also a real estate agency, and thus was a competitor of the plaintiff's agency. The defendant's agency then began "a systematic solicitation" of the customers of the plaintiff's agency. *Id.* The court granted the plaintiff an injunction, holding that "whether the information was carried away, first having been reduced to writing, or carried away in the memory, can make no difference." 104 Wash. 449. See also *Cooper & Co. v. Anchor Securities Co.*, 9 Wn.2d 45, 64 (1941).

An employer may protect himself from the "personal contact" exception by requiring employees to sign restrictive covenants as part of their employment contracts.

b. The Employee's Right to Announce New Employment

Although an employee may be prohibited from utilizing information obtained from a customer list that constitutes a trade secret, an employee is not prohibited from merely announcing to customers of his former employer that he has become associated with a new company. This "mere announcement" rule exempts a former employee from liability even if he sends announcements to customers whose names he obtained from a list that constitutes a trade secret. *American Credit Indemnity Company at* 636 (1989) (overruling Moss, Adams, *infra*, to the extent it held otherwise).

For example, in *Theodore v. Williams*, 185 P. 1014 (Cal.App. 1919), Anaheim Laundry sued Adkins, a former employee, when he drove a wagon labeled "Model Laundry, J.L. Adkins," along the laundry route which he had served for Anaheim, and announced his new employment in newspapers by declaring "I am agent for the Model Laundry, J.L. Adkins, [telephone number]." 185 P. at 1015. Anaheim argued Adkins was soliciting its customers, in violation of an injunction prohibiting Adkins from soliciting any laundry work from any Anaheim customers. The court disagreed, holding that advertising one's new employment does not constitute solicitation of a former employer's customers. To hold otherwise, the court declared, "would deprive [the employee] of the right to pursue a lawful calling as a means for obtaining a livelihood." *Id.*

The employee's latitude in this area is somewhat limited, however. In announcing his new employment, an employee must tread a fine line between mere announcement, which is permissible, and solicitation, which is not. As long as the former employee simply states who his new employer is, he is not guilty of solicitation. If, however, the putative announcement goes beyond merely stating the name of the new employer, and instead represents an endeavor to obtain the recipient's business, the sender has committed solicitation and may be guilty of trade secret misappropriation if the names of the customers contacted constitute trade secrets under the UTSA.

Moss, Adams provides a good example of an announcement that did not cross the solicitation threshold. Shilling and Kenyon, the departing accountants, wrote to Moss Adams clients, announcing they had formed their own firm. The announcement read: "John D. Shilling and Cynthia L. Kenyon, formerly with Moss Adams, are pleased to announce the formation of a new partnership: Shilling, Kenyon & Co. . . . [address, telephone number]." The court held this announcement did not constitute solicitation.

American Credit Indemnity Company provides an example of a letter to a former employer's customers that went beyond an announcement and amounted to an impermissible solicitation. The defen-

dant-employee wrote to her former employer's clients:

> After almost fifteen years . . . I have left [the plaintiff] and am very pleased to announce the formation of an independent insurance agency. I shall continue to specialize in Credit Insurance but will now primarily be representing [F & D], who [sic] is offering companies a very interesting alternative to the types of policies being written by . . . [the plaintiff]. If you would like to learn more about the [F & D] policy, I will be happy to discuss it in detail with you when you are ready to review your ongoing credit insurance needs at renewal time.

213 Cal.App.3d at 637. The court found this an impermissible solicitation. As the former employee "inform[ed] [the plaintiff's] customers of the interesting competitive alternative F & D offers as compared to [the plaintiff's] policies, invite[d] their inquiry about the F & D policy and indicate[d] she would be happy to discuss it with them," she was clearly "endeavoring to obtain their business," rather than merely announcing her new employment. *Id.* Such conduct constituted a misappropriation of trade secrets under the UTSA.

Formulas and Processes

Like customer lists, a product design may constitute a trade secret entitled to protection under the UTSA. The same criteria applied to determine whether a customer list is a trade secret are also applied to determine whether a design or formula constitutes a trade secret. For example, consider *Boeing Co. v. Sierracin Corp.*, wherein the Washington Supreme Court held that design information constituted a trade secret because it was not readily accessible to the public. Boeing was an action brought by Boeing Company alleging Sierracin Corporation had misappropriated its design for cockpit windows. Sierracin acquired the design through a contract with Boeing. Pursuant to the contract, Sierracin was to construct cockpit windows for Boeing. Boeing supplied Sierracin with drawings depicting how to construct the cockpit windows. Sierracin signed an agreement that it would not employ the knowledge it acquired from the drawings to construct cockpit windows for entities other than Boeing. After Boeing decided not to renew its contract with Sierracin, Sierracin attempted to obtain FAA approval to construct and market cockpit windows, the design of which Boeing alleged to be based on the Boeing drawings. Boeing sued, seeking damages. Sierracin argued the Boeing drawings were not trade secrets because the window design was "readily ascertainable from another source" namely, the product itself, in that the window design was susceptible to reverse engineering. The Washington Supreme Court, upholding the trial court, disagreed. Although the window design could be to some extent ascertained via reverse engineering, this did not mean the design was in the public domain. Rather, the court held, as long as the entire compilation was not susceptible to reverse engineering, the fact that some of its elements are susceptible to reverse engineering is irrelevant. Since Sierracin could not prove it could "reverse engineer" the windows in their entirety, the window design was a trade secret, and Boeing was entitled to damages. *See, also, SI Handling Systems Inc. v. Heisley*, 753 F.2d 1244 (3d Cir. 1985).

The same criteria applied to determine whether a customer list is a trade secret are also applied to determine whether a design or formula constitutes a trade secret.

Conversely, in *Eaton Corp. v. Appliance Valves*, 634 F.Supp. 974 (N.D.Ind. 1984), *aff'd*, 790 F.2d 874 (Fed.Cir. 1986), *aff'd*, 790 F.2d 874 (Fed. Cir. 1986), the court found that design information was not a trade secret because it was readily accessible to the public. Eaton was a suit by a dishwasher valve manufacturer, Eaton Corporation, against two former employees who had left Eaton to form a competing valve manufacturing company, AVC. Eaton alleged the defendants copied Eaton valves in creating valves for AVC. The court disagreed. The only information the defendants took from Eaton was "clean copies of patents, i.e., patent information readily available to the public." 634 F.Supp. at 984. Moreover, the similarities between the Eaton valves and the AVC valves were not attributable to illegal copying, since all valves in the industry were similar to each other. 634 F.Supp. at 985-86. Therefore, Eaton's valve design was not entitled to trade secret protection.

Noncompetition Agreements

As demonstrated above, a customer list does not always qualify for trade secret protection. Moreover, it is not easy for a former employer to prove his former employee solicited or diverted his clients. *Perry v. Moran*, 109 Wn.2d 691, 696 (1987), *modified on other grounds*, 111 Wn.2d 885 (1989), *cert. denied*, 492 U.S. 911, 109 S.Ct. 3228, 106 L.Ed.2d 577 (1989). An employer therefore may wish to protect himself by including a noncompetition covenant in his employment contracts. *Id.* A noncompetition covenant essentially is a device to prohibit a former employee from taking his former employer's customers with him when the employment relationship terminates. *Perry*, at 697-98. Such a covenant, if valid, obviates the need for proving the existence of a trade secret or solicitation of the former employer's customers. *Perry*, at 696, quoting *Racine v. Bender*, 141 Wash. 606, 610-11 (1927).

Requisites of Valid Agreements

A covenant prohibiting a former employee from competing with his former employer is valid if it is reasonable. *Knight, Vale and Gregory v. McDaniel*, 37 Wn.App. 366, 369 (1984), *review denied*, 101 Wn.2d 1025 (1984). *See, also, Perry, at* 698 (1987), quoting *Racine at* 610-11.

Whether a covenant is reasonable involves a consideration of three factors: (1) whether restraint is necessary for the

protection of the business or goodwill of the employer, (2) whether it imposes upon the employee any greater restraint than is reasonably necessary to secure the employer's business or goodwill, and (3) whether the degree of injury to the public is such loss of the service and skill of the employee as to warrant nonenforcement of the covenant. *Id. See, also, Sheppard v. Blackstock Lumber Company Inc.*, 85 Wn.2d 929, 932-33 (1975); *Perry*, quoting *Knight, supra*; *Wood v. May*, 73 Wn.2d 307, 309-10 (1968); *Racine v. Bender, supra*; *Alexander & Alexander Inc. v. Wohlman*, 19 Wn.App. 670, 686 (1978), *review denied*, 91 Wn.2d 1006 (1978). Whether a particular covenant satisfies these three factors is a matter of law to be determined by the court. *Alexander & Alexander*, at 684. *See, also, Perry v. Moran*, at 698-99, quoting *Alexander & Alexander, supra*; *Knight, Vale and Gregory v. McDaniel*, at 368 (1984). The following cases illustrate the application of the tripartite reasonableness test.

1. Whether or not the Restraint is Necessary to Protect the Employer's Business Interests

The first reasonableness factor requires that a noncompetition covenant be necessary to protect the employer's interests. In *Perry v. Moran*, the Washington Supreme Court held that a noncompetition covenant is an inherently legitimate way for an employer to protect himself against defecting employees. In *Perry*, an accountant, Moran, left the plaintiff accounting firm, PWT, to form her own firm. Moran's firm did not solicit the business of former PWT clients. 109 Wn.2d at 695. However, the new firm received $78,000 worth of business from former PWT clients in its first 17 months of operation. A noncompetition covenant prohibited Moran from servicing any PWT clients for five years. 109 Wn.2d at 693. Moran argued PWT's noncompetition covenant was invalid because, *inter alia*, it was not reasonably necessary to protect PWT's client base. Rather, Moran asserted, PWT adequately could "protect its client base by merely prohibiting a former employee from soliciting or diverting those clients from the employer." 109 Wn.2d at 701. Since Moran had not solicited any former PWT clients, such a prohibition would not apply to her. The Washington Supreme Court disagreed. Moran's suggested covenant would *not* adequately safeguard the employer's interest, it held, because it would place

> upon the employer the burden of proving (1) that the former employee performed some act or acts which had the potential of enticing clients away from the employer, and (2) that those acts were the cause of the client's decision to leave the employer.

To invalidate a noncompetition agreement, an employee must argue that the particular agreement at issue is not necessary to protect his employer's interests, but this argument is not likely to meet with much success.

Id. Proving these two things would be difficult and expensive, would involve litigation, would damage the goodwill existing between those clients and the former employer, and would damage the reputation of the employer with potential clients. *Id.* Therefore, the court determined, "it is reasonable for [an] employer to preclude [an] employee from servicing those who were clients of the employer . . . for a period after the cessation of employment." *Id.*

As a result of the *Perry* decision, the inherent acceptability of a noncompetition covenant is not subject to challenge. Rather, to invalidate a noncompetition agreement, an employee must argue that the particular agreement at issue is not necessary to protect his employer's interests. This argument is not likely to meet with much success, however. First, an employer always has a legitimate interest in protecting his client base. Second, employees worthy of a noncompetition covenant usually develop close relationships with the employer's clients, making them formidable competitors should they choose to go into business for themselves. For example, *Knight, Vale and Gregory* was an action between an accounting firm, KVG, and two former KVG accountants, McDaniel and Hallstrom. These two accountants left KVG to form their own accounting firm. "Soon thereafter, [McDaniel and Hallstrom] began providing services to three known former clients of KVG." 37 Wn.App. at 367. KVG promptly sued, asserting that McDaniel and Hallstrom had violated a noncompetition agreement

> contained in their employment contracts. The accountants defended, arguing the covenant was unreasonable. The court disagreed. In holding the first reasonableness factor was satisfied, the court stated that KVG had a "legitimate business interest in maintaining the large and profitable clientele [it had] acquired over the years." 37 Wn.App. at 370. In the accounting business, "employees . . . gain extensive, valuable knowledge of the clients' business and internal operations and develop a close, familiar working relationship with the client." *Id.* This knowledge "enables them to be exceptionally competitive with the firm should they choose to leave and offer the same services on their own." *Id.* Thus, preventing former employees from utilizing such knowledge could not be considered unreasonable.

The only case where a noncompetition covenant may not satisfy the first reasonableness requirement is where the former employee did not have extensive contact with or acquire valuable personal information about the former employer's clients. *Wood v. May*, at 310. This is because such an employee does not have as great a competitive advantage over his former employer as does a former employee who had extensive client contact. The competitive advantage derives from customer confidence in the employee and customer inertia. Where the customer has a history with a particular employee, he is reluctant to have a different person assist him. Customers want the same person to do, say, their accounting, not because "he is the only person who has the ability [to do the job], but because they know him well, and he knows all about their business." *Racine*, at 613. *See, also, Wood v. May*, at 310. On the other hand, customer confi-

dence and customer inertia do not play a role where there is only a superficial relationship between the customer and the employee.

For example, where the former employee did not provide *services* to the former employer's customers, but rather merely sold a *commodity* to them, the former employee does not necessarily have a competitive advantage over his former employer. *Racine v. Bender*, at 613-614. This is because there is not a history between the customer and the salesperson that makes the customer reluctant to change salespeople. *Racine*, at 614. Thus, a noncompetition covenant as applied to a person who did not have extensive customer contact or acquire personal information about the former employer's customers, such as a person selling a commodity rather than a service, may not satisfy the first reasonableness requirement.

2. Whether or not the Restraint is Greater than is Reasonably Necessary to Protect the Employer's Business Interests

The second reasonableness factor requires that a noncompetition covenant not be more restrictive than necessary to protect the employer's interests. Former employees challenge noncompetition covenants most frequently on the basis of this second factor. Thus, there exist several cases illustrating its application. In *Perry*, for example, Moran, the former employee, argued PWT's noncompetition covenant was overbroad, and therefore was unreasonable. The covenant prohibited Moran from servicing any PWT clients for the first five years after cessation of her employment. 109 Wn.2d at 693. Alternatively, in the event Moran did provide service to former PWT clients, the covenant permitted PWT to elect to receive 50 percent of the fees Moran billed to former PWT clients for a three-year period. *Id.* Moran argued the five-year period was too long to satisfy the reasonableness rule. 109 Wn.2d at 703. The court agreed that covenants of excessive duration may be unreasonable. It did not, however, determine whether a covenant of five years was unreasonable. Since PWT did not seek to enforce the covenant for the full five-year period, but rather only for the year and a half between Moran's termination and the time of trial, "the length of the period, even if excessive, [was] immaterial." 109 Wn.2d at 704. Moreover, the court stated, the portion of PWT's covenant providing the payment alternative was manifestly reasonable. Requiring

> the former employee . . . to pay for the clients "taken" . . . [protects] the legitimate interest of the employer . . . without imposing undue hardship on the employee or being overly injurious to the public.

Covenants prohibiting a former employee from servicing the geographical area served by the employer would not be favored. Such a restriction places an undue burden on the employee.

109 Wn.2d at 702. In addition, the Court gratuitously suggested that covenants prohibiting a former employee from servicing the geographical area served by the employer would not be favored. Such a restriction places an undue burden on the employee, the court stated, as it would require the former employee to either establish a practice outside the geographical region with which he had become familiar during his employment, or to forgo practicing [the particular trade] entirely for the period of time covered by the covenant. 109 Wn.2d at 701. Thus, time restrictions of limited duration or requiring the employee to pay for the customers taken are reasonable, while geographical restrictions may not be reasonable. *See, e.g., Racine v. Bender*, at 615 (three year time restriction on servicing former employer's customers valid); *Central Credit Collection Control Corp. v. Grayson*, 7 Wn.App. 56, 60-61 (1972) (former employee violated reasonable time restriction when he opened his competing business within one month of the termination of his employment, and violated reasonable area restriction when he located his competing business within 73 yards of Plaintiff's business); *Sheppard v. Blackstock Lumber Co. Inc., at* 930 (forfeiture provision was overbroad because it was unlimited in duration or geographic scope); *Schneller v. Hayes*, 176 Wash. 115, 121 (1934) (covenant unlimited as to time is unreasonable); *Alexander & Alexander v. Wohlman*, at 677-78 (covenant restricting former employees from working within 100 miles of former employer unreasonable).

Knight, Vale and Gregory v. McDaniel, at 366 rests on similar principles. The covenant at issue in Knight prevented the former employees from servicing KVG clients whom the defendants had met while at KVG for three years after leaving KVG. 37 Wn.App. at 370. KVG was not seeking an injunction, however, but instead was interested only in damages. The court held the covenant satisfied the second reasonableness requirement. First, it contained no geographical restriction. Moreover, since KVG sought only money damages, it contained no time restriction. Since the "defendants had the option of continuing to service [former KVG] clients,—if they were willing to do so at a loss—" the covenant was not unreasonable. 37 Wn.App. at 371.

There is a limit to the amount of loss a former employee must sustain as a result of breaching a noncompetition agreement, however. The restrictive covenant must not impose an excessive hardship upon the former employee. *Racine* at 611. *See, also, Wood v. May, supra*, 73 Wn.2d at 316 (Rosellini, J., dissenting). As long as the restriction in the noncompetition covenant does not adversely affect the former employee's ability to sustain his livelihood, it does not impose an excessive hardship. *Racine, id.* For example, in *Racine v. Bender*, the Washington Supreme Court upheld a noncompetition agreement where the former employee, an accountant who had left an accounting firm to start his own firm, "had . . . secured a large number of clients, and . . . at least three-fourths of them did not come to him from his former connections." 141 Wash. at 615. Similarly, in *Alexander & Alexander Inc. v. Wohlman*,

Does the noncompetition covenant injure the public by eliminating choice?

at 687 the court held that a covenant precluding a former employee from servicing his former employer's customers is not unreasonable, whereas a covenant entirely precluding a former employee from engaging in his profession imposes an undue burden on the employee and therefore is unreasonable.

Just because the noncompetition agreement is unreasonable, however, does not mean the employee is free of its restrictions. Rather, if a noncompetition agreement is determined to be overbroad, a court will enforce it to the extent it is reasonable. *Perry* at 703; *Sheppard* at 934. *Wood v. May* is the case that established this rule in Washington. In *Wood*, the noncompetition covenant at issue was between Wood, a master horseshoer, and his apprentice, May. Pursuant to the covenant, May agreed he would not practice horseshoeing within a radius of 100 miles from Wood's shop, for five years after the time he ceased working for Wood. May breached this covenant by setting up his own horseshoeing business five miles away, immediately after he quit working for Wood. The Washington Supreme Court found the area restriction unreasonable, "since it [was] . . . unduly harsh to [Defendant] in curtailing his legitimate efforts to earn a livelihood." 73 Wn.2d at 311. The court also noted that the time restriction was "probably unreasonable" *Id.* The court did not invalidate the entire noncompetition covenant, however. Rather, it remanded to the lower court to enforce the contract, by injunction, "to the extent necessary to accomplish the basic purpose of the [covenant] insofar as such [covenant] is reasonable." 73 Wn.2d at 314.

Similarly, in *Alexander & Alexander v. Wohlman*, at 686-88, a noncompetition covenant restricting the defendants from setting up an insurance brokerage firm in competition with their former employer within 100 miles of the former employer's Seattle office, for a five-year period, was held unreasonable. The court did not permit the employees freely to compete with their former employer, however. Rather, relying on *Wood*, the court modified the original covenant to apply only to the greater Seattle area, only to the plaintiff's customers, and only for a two-year period. 19 Wn.App. at 687-88. *See, also, Central Credit Collection Control Corp. v. Grayson*, at 60 (whether covenant prohibiting former employee from competing with former employer for two years anywhere in Pierce County is unreasonable is irrelevant where former employee established competing business 73 yards from former employer's office, within one month of terminating his employment).

3. Whether or not the Degree of Injury to the Public from the Loss of the

Does the noncompetition convenant injure the public by denying services?

Employee's Services Warrants Nonenforcement of the Covenant

The third reasonableness factor requires that a noncompetition covenant not injure the public to such a degree through the loss of the employee's service and skill as to warrant nonenforcement of the covenant. In other words, a noncompetition covenant does not satisfy the third factor if it prevents the former employee from servicing a community that does not offer its residents a choice of service providers in the employee's line of business. Two cases illustrate the application of this factor.

First, consider *Knight, Vale and Gregory*, in which the noncompetition agreement at issue satisfied the third reasonableness requirement. As mentioned above, *Knight* involved a noncompetition agreement contained in an employment contract between an accounting firm and two of its former accountants. KVG's covenant, as written, restricted the accountants from servicing former KVG clients. The court held this covenant would not unduly injure those clients. Since the defendant's services were "neither unique nor incomparable," and there were other accounting firms available to service KVG's former clients, the covenant satisfied the third reasonableness requirement. 37 Wn.App. at 370-371. *See, also, Racine*, at 613 (simply because some of the employer's former clients wanted the former employee to service them is not enough to warrant a finding that the interests of the public are so opposed to the covenant that it should not be upheld, where the former employee is not the only person who has the ability to perform the services for the former clients).

Now consider *Alexander & Alexander*, at 687, in which the noncompetition covenant at issue, as written, did not satisfy the third reasonableness requirement. The noncompetition covenant prohibited the defendants from conducting business within 100 miles of the plaintiff's Seattle office for a five-year period. The covenant thus entirely prohibited the defendants from working in the insurance business in most of Western Washington. Such a restriction, the court held, caused such loss of the service and skill of the defendants as to warrant nonenforcement of the covenant. Since "members of the public should be entitled to select whatever insurance broker they desire," the covenant was invalid under the third reasonableness requirement. 19 Wn.App. at 687. *But see Wood v. May*, (services of former apprentice farrier who went into business for himself in violation of a noncompetition agreement prohibiting him from working within 100 miles of Plaintiff are not indispensable, and therefore enforcing the covenant will not cause undue injury to the public where there are

Generally, a covenant is supported by sufficient consideration if the employee must sign it as a condition of employment. The offer of employment is the consideration for the noncompetition agreement.

eight competent farriers in the area).

Defenses to Noncompetition Agreements

In addition to arguing that a noncompetition agreement is unreasonable, a former employee has all of the standard defenses to contractual liability at his disposal to challenge the validity of a noncompetition agreement. Particularly, if the employee can persuade the court that the covenant is not supported by sufficient consideration, he will be entirely free of the covenant's restrictions.

Generally, a covenant is supported by sufficient consideration if the employee must sign it as a condition of employment. The offer of employment is the consideration for the noncompetition agreement. For example, in *Wood v. May*, at 310-11, the court found a noncompetition agreement between a master farrier and an apprentice supported by sufficient consideration where the apprentice signed the noncompetition agreement in return for the master's promise to teach him the skill of horseshoeing.

If, however, the employee signs the noncompetition covenant after he is already employed, there may not be sufficient consideration supporting the covenant. In order for sufficient consideration to exist, the employee's continued employment must be conditioned upon signing the agreement. For example, in *Schneller v. Hayes*, at 118, the court held the noncompetition agreement at issue was not supported by sufficient consideration, and therefore did not bar the defendant from entering into business in competition with his former employer. In *Schneller*, the plaintiff, Schneller, operated an optical shop in Walla Walla. He met the defendant, Hayes, through Hayes's work as a traveling salesman of optical products. Schneller offered Hayes employment at his shop. Hayes accepted, and he arranged to move his family to Walla Walla from Montana. After Hayes had resigned his salesman position, but before he had arrived in Walla Walla, Schneller wrote Hayes asking him to sign a written contract agreeing not to engage in the optical business in Walla Walla after the termination of his employment. 176 Wash. at 117. At first Hayes refused, but then he signed such an agreement shortly after he arrived in Walla Walla.

The defendant, Hayes, worked at the optical shop for several months. During Hayes's tenure with Schneller, Schneller continually reduced his pay. Hayes quit after Schneller stated he would probably have to fire Hayes because he could not afford to keep him on. When Hayes opened his own optical shop in Walla Walla, Schneller sued, arguing that Hayes was subject to a noncompetition covenant. The court disagreed. There was insufficient consideration for the covenant, the court held, because Schneller had already employed Hayes at the time the covenant was signed. Thus, Scheller's offer of employment was not conditioned upon Hayes's signing the covenant. Schneller therefore could not prevent Hayes from opening his optical shop.

Racine, at 609, provides a further example. In *Racine*, the employer said nothing to the employee about a noncompetition covenant at the time of employment. However, after the employee's first week at work, and each week thereafter, the employer required him to prepare a report showing the names of the employer's clients the employee was servicing, as well as the number of hours the employee spent on each client during the week. On the report form, immediately above the employee's signature, appeared a noncompetition agreement. The Washington Supreme Court held this agreement was supported by sufficient consideration. The warranty may not have been effective as to the employee's first week of work, the court stated. Yet, it was effective as to every week thereafter, because it was "a basis and a part consideration for future employment." *Id.*

Finally, in *Knight v. Vale and Gregory*, at 368, the employer said nothing to the defendants about a noncompetition covenant at the time they were negotiating the terms of their employment contracts.

> On their first day of work, however . . . [the defendants] were presented with a "Warranty Agreement" containing a covenant not to compete for a period of three years after termination of employment.

37 Wn.App. at 366. The defendants signed the Warranty Agreement, and commenced to work for the plaintiff for the next three years. After terminating their employment with the plaintiff and establishing a competing business, the defendants challenged the validity of the Warranty Agreement. The court held for the plaintiff. Although the parties did not discuss the covenant during employment negotiations, they signed the agreement and were continuously employed and trained for the next three years. 37 Wn.App. at 368. Since "continued employment and training are sufficient consideration for an employee's promise not to compete," the Warranty Agreement was supported by sufficient consideration and was binding upon the defendants. 37 Wn.App. at 368-69. *See, also, Machen, at* 329-32 (1992).

Remedies

Injunctive Relief

An injunction operates to restrain the commission or continuance of some act by the defendant. RCW 7.40.020. A plaintiff may seek an injunction either before trial or during trial, and may also request an injunction as a final order or judgment. *Id.* An injunction is designated by three different terms depending on when the plaintiff seeks its issuance. Before trial, an injunction is termed a "temporary restraining order," or TRO. During trial, an injunction is termed a "preliminary injunction." An injunction entered as a final order or judgment is termed a "permanent injunction." *State ex rel. Pay Less Drug Stores v. Sutton*, 2 Wn.2d 523, 531 (1940), quoting *Rogers v. Kendall*, 173 Wash. 390.

Types of Injunctive Relief

a. TROs

A temporary restraining order (TRO) is "issued on an ex parte order of the judge for the purpose of preventing the doing of some act during the time that an application for a preliminary injunction is pending." *State ex rel. Pay Less Drug Stores* at 529. Thus, a TRO operates to restrain the opposite party "until the propriety of granting a temporary injunction can be determined." *Pay Less*, at 528. *See, also, Davis v. Gibbs*, 39 Wn.2d 180, 185 (1951). "[I]t goes no further than to preserve the status [quo] until that determination" is made. *Pay Less, id.* A TRO is not an injunction, *id.*, and the rules governing its issuance differ from the rules governing the issuance of injunctions. 1 Barker and Scharf, *Washington Practice*, § 12.1 - 12.2, p. 194-96. The following discussion does not address the requirements for the issuance of a TRO.

b. Preliminary Injunctions

"A preliminary injunction is an interlocutory order that is granted at the beginning of or during the pendency of an action. This injunction is designed to preserve the status quo until the action is heard on the merits." 1 Barker and Scharf, *Washington Practice*, § 12.2, p. 195-96. There are three prerequisites that must be satisfied before a court will issue a preliminary injunction. An applicant must establish all three of these prerequisites, or the court will deny the requested relief. *Physicians v. Tacoma Stands Up For Life*, 106 Wn.2d 261, 265 (1986).

> First, the applicant must show a clear legal or equitable right. . . . Second, the applicant must show a well-grounded fear of immediate invasion of that right. Third, the applicant must show that the acts complained of have or will result in actual and substantial injury.

1 Barker and Scharf, *Washington Practice*, § 12.2, p. 196. *See also King v. Riveland*, 125 Wn.2d 500, 515 (1994). "[S]ince injunctions are addressed to the equitable powers of the court, the[se] [three prerequisites] must be examined in light of equity including balancing the relative interests of the parties and, if appropriate, the interests of the public." *Tyler Pipe Indus. v. Dep't of Revenue*, 96 Wn.2d 785, 792 (1982).

An injunction is designated by three different terms depending on when the plaintiff seeks its issuance. Before trial, an injunction is termed a "temporary restraining order," or TRO. During trial, an injunction is termed a "preliminary injunction." An injunction entered as a final order or judgment is termed a "permanent injunction."

c. Permanent Injunctions

"A permanent injunction is an extraordinary equitable remedy; the decision to issue one is discretionary with the trial court." 1 Barker and Scharf, *Washington Practice*, § 12.3, p. 197. In deciding whether to grant a permanent injunction, the trial court considers the same three prerequisites involved in deciding whether to grant a preliminary injunction. *Tyler Pipe Indus.*, at 792. In addition, the court weighs several equitable factors, including 1) the misconduct of the plaintiff, if any; 2) the delay, if any, in bringing suit; and 3) the interest of third persons and of the public. *Id. See, also, Butler v. Craft Eng Const. Inc.*, 67 Wn.App. 684, 692-93 (1992); *Holmes Harbor Water Co. Inc. v. Page*, 8 Wn.App. 600, 603 (1973). Thus, there are three primary defenses to the issuance of a permanent injunction. These are 1) the so-called "unclean hands" defense; 2) the public-injury defense; and 3) the laches defense, including the estoppel and waiver defenses.

Requirements for Injunctive Relief

a. Clear Legal or Equitable Right

To obtain either a preliminary or a permanent injunction, an applicant first must demonstrate that he has a clear legal or equitable right. *Tyler Pipe Indus., at* 792-93 (1982). An applicant for a permanent injunction satisfies this requirement if the entire record before the court clearly warrants a grant of injunctive relief. *Klickitat County v. Columbia River Gorge Com'n*, 770 F.Supp. 1419, 1426 (E.D.Wash. 1991). *See, also, King v. Riveland, supra*, 125 Wn.2d at 517-18; *McInnes v. Kennell*, 47 Wn.2d 29, 38-39 (1955); *State ex rel. Hays v. Wilson*, 17 Wn.2d 670, 672-73 (1943). If there is any doubt regarding the applicant's right to prevail on the merits, an injunction will not issue. *Klickitat County, id. See, also, Tyler Pipe*, 793, quoting *Isthmian S.S. Co. v. Nat. Marine Etc.*, 41 Wn.2d 106, 117-118 (1952) at 117; *Alderwood Assocs. v. Envtl. Council*, 96 Wn.2d 230, 234 (1981), *limited in another respect*, 113 Wn.2d 413 (1989).

An applicant for a preliminary injunction satisfies the "clear right" requirement by proving he is *likely* to prevail on the merits. *Id. See, also,* 1 Barker and Scharf, *Washington Practice*, § 12.2, p. 196. It follows that a preliminary injunction "will not issue in a doubtful case nor where the material facts in the complaint and supporting affidavits, on which the right depends, are controverted or denied." *See, also, Isthmian S.S. Co.; K-2 Ski Company v. Head Ski Co.*, 467 F.2d 1087, 1088-89 (9th Cir. 1972). In other words, a preliminary injunction will not issue unless the applicant's pleadings "make out a prima facie case." *Isthmian S. S.Co.*

b. Well-grounded Fear of Immediate Invasion

The second requirement for the issuance of either a temporary or a permanent injunction is that the applicant have a well-grounded fear of immediate invasion of his clear legal right. *King v. Riveland* at 515. To satisfy this requirement, the applicant must prove "an injury to himself that is distinct and palpable, as opposed to merely abstract, and the alleged harm must be actual or imminent, not conjectural or hypothetical." *Coral Const. Co. v. King County*, 941 F.2d 910, 929 (9th Cir. 1991) ("bald conclusion" that plaintiffs had sustained injury, without proof of injury, insufficient to confer standing to sue for injunction), *cert. denied*, 502 U.S. 1033, 112 S.Ct. 875, 116

L.Ed.2d 780 (1992), *reh'g denied*, 112 S.Ct. 1307, 117 L.Ed.2d 529 (1992). *See, also, Hall v. Elliot*, 15 Wn.2d 518, 520 (1942). In other words, if the harm has not yet occurred, "a plaintiff must show 'a very significant possibility' of future harm in order to have standing to bring suit." *Coral Const., Id.* If the harm has already occurred, "there must exist a cognizable danger of recurrent" injury. *State v. Ralph Williams's North West Chrysler Plymouth, Inc.*, 87 Wn.2d 298, 313 (1976), *appeal dismissed*, 430 U.S. 952, 97 S.Ct. 1594, 51 L.Ed.2d 801 (1977). No injunction will issue for a threatened injury the occurrence of which is "merely possible, or doubtful, or contingent," or "too remote and speculative." *Hall, id.*

For example, in *Hall*, the plaintiffs, city employees eligible to take an examination the passage of which would entitle them to a promotion, sought to enjoin the Seattle civil-service commission from permitting two other city employees, interveners in the action, from taking the examination. The plaintiffs argued the two employees were not eligible under the city charter to take the examination. Apparently, the plaintiffs did not want to compete with the interveners for the promotion. The court declined to issue an injunction, since there was "only a contingent possibility that [the plaintiffs'] rights [would] be invaded if the interveners [were] permitted to take the examination." 15 Wn.2d at 521. Since there was no guarantee that the plaintiffs would pass the examination, or that the interveners, if allowed to take the examination, would pass, there was only a remote possibility that allowing the interveners to take the examination would cause injury to the plaintiffs. Therefore, injunction was not a proper remedy. *See, also, State ex rel. Hays v. Wilson*, 17 Wn.2d 670, 672 (1943) (patrolmen do not have standing to enjoin allegedly ineligible party from taking an examination the passage of which would make that party eligible to be appointed chief of police).

c. Actual and Substantial Injury

The third prerequisite for the issuance of an injunction is that "the acts complained of are either resulting in or will result in actual and substantial injury" to the applicant. *King v. Riveland*, at 515.

If the harm has not yet occurred, "a plaintiff must show 'a very significant possibility' of future harm in order to have standing to bring suit."

Without injury to the applicant no injunction will issue. *King County v. Port of Seattle*, 37 Wn.2d 338, 345 (1950). *See, also, McInnes v. Kennell*, at 35. Moreover, the alleged injury must be irreparable for an injunction to issue. *King County v. Port of Seattle*, at 346. *See, also, Seattle Audubon Soc. v. Moseley*, 798 F.Supp. 1484, 1491 (W.D.Wash. 1992); *Fed'n of State Employees v. State*, 99 Wn.2d 878, 891 (1983); *Venegas v. United Farm Workers Union*, 15 Wn.App. 858, 861 (1976), *review denied*, 88 Wn.2d 1002 (1977). An "irreparable injury" cannot be cured by money damages. *Tyler Pipe Indus.* at 796. *See, also, Mountain Medical Equipment v. Healthdyne*, 582 F.Supp. 846, 849 (D.Colo. 1984).

For example, consider *Tyler Pipe Indus. v. Dep't of Revenue*, at 794-96. *Tyler* involved a preliminary injunction issued by the superior court prohibiting the Department of Revenue from collecting certain taxes from Tyler Pipe pending the outcome of a trial on the merits. The Department argued that the superior court should not have issued the injunction because, *inter alia*, Tyler had not proved actual and substantial injury. The Washington Supreme Court agreed with the Department. Since

> Tyler Pipe's injury [was] simply that it [would] have to pay the tax if the injunction [were not granted] and [would] only receive interest of 3 percent on its refund [if] it [ultimately] prevail[ed], . . .

Tyler's injury was completely compensable by recovery of damages in an action at law. 96 Wn.2d at 794-95. Thus, payment of the tax did not constitute the actual and substantial injury required for issuance of an injunction. *Id.*

d. Application in Trade Secret and Noncompetition Covenant Cases

A trade secret plaintiff is entitled to injunctive relief if he proves either actual or threatened misappropriation of a legally protectable secret. RCW 19.108.020(1). *See, also, Richardson v. Suzuki Motor Co., Ltd.*, 868 F.2d 1226, 1247 (Fed.Cir. 1989), reh'g denied, (1989), *suggestion for reh'g en banc declined*, (1989), *cert. denied*, 493 U.S. 853, 110 S.Ct. 154, 107 L.Ed.2d 112 (1989). The requirements for trade secret status are discussed at Sections IB and IC, *supra*. Although the rules for issuance of an injunction in the trade secret context generally are the same as in any other context, *Wolfe v. Tuthill Corp., Full-Rite Division*, 532 N.E.2d 1, 2 (Ind. 1988) (UTSA "merely articulates the common law" rules for injunction issuance), the Washington Supreme Court has held the "irreparable harm" requirement inapplicable in trade secrets cases. *Boeing Company*, at 62 (1987).

A plaintiff suing on a noncompetition agreement is entitled to injunctive relief if the agreement at issue is reasonable. *Wood*, at 312. As discussed in Section IIB, *supra*, simply because a noncompetition agreement is unreasonable as written will not deprive the plaintiff of injunctive relief. Rather, such an agreement will be enforced to a reasonable extent. *Id.* What constitutes "reasonable" in a particular case is a matter of law for the court to decide. *Perry, at* 698-99 (1987).

Defenses to Injunctive Actions

a. Unclean Hands

"Equitable relief typically will not be granted to an individual who has acted in bad faith with respect to the transaction that has been brought before the court." 11 Wright & Miller, *Federal Practice and Procedure*, § 2946, p. 411. *See, also, McKelvie v. Hackney*, 58 Wn.2d 23, 31-32 (1961) ("inequity practiced against a third person, who does not complain, does not close the doors of equity to a

plaintiff guilty of no inequity as against a defendant"), *citing Langley v. Devlin*, 95 Wash. 171, and *Tait v. King County*, 85 Wash. 491; *Cooper & Co. v. Anchor Securities*, 9 Wn.2d 45, 73 (1941). An injunction is a form of equitable relief. *Wright & Miller, Id.* Therefore, injunctive relief will not be granted to a party who has acted in bad faith with respect to the transaction that has been brought before the court. *Buck v. Gallagher*, 36 F.Supp. 405, 406 (W.D.Wash. 1940), *jurisdiction postponed sub nom.*, 62 S.Ct. 76 (1941), *appeal dismissed sub nom.*, 315 U.S. 780, 62 S.Ct. 579, 86 L.Ed. 1187 (1942). *See, also, Malo v. Anderson*, 62 Wn.2d 813, 817 (1963); *Portion Pack Inc. v. Bond*, 44 Wn.2d 161, 170 (1954), citing *Income Investors Inc. v. Shelton*, 3 Wn.2d 599; *Cooper & Co.*, at 74 (rule inapplicable where plaintiff committed wrongful act under an honest belief as to its validity); *Lenhoff v. Birch Bay Real Estate*, 22 Wn.App. 70, 76 (1978).

This rule is embodied in the "maxim, 'He who comes into equity must enter with clean hands.'" Wright & Miller, *supra*, at 413. *See, also, Cooper & Co.*, at 71-72. "In other words, since equity tries to enforce good faith in defendants, it no less stringently demands the same good faith from the plaintiff." *Wright & Miller, id.* As a result, a court may decline to issue an injunction to an "unclean" plaintiff even where that plaintiff has proven a clear right, a well-grounded fear of invasion, and substantial, irreparable injury. *Wright & Miller, supra*, at 411. *See also O'Brien v. Johnson*, 32 Wn.2d 404, 407-08 (1949). In this event, the plaintiff is left to his remedy at law. *Cascade Timber Co. v. Northern Pac. Ry. Co.*, 28 Wn.2d 684, 711 (1947).

For example, in *Portion Pack Inc.*, the Portion Pack company sued Bond, a former employee, for violating a noncompetition agreement. Bond was a former Portion Pack partner who had developed a patented ice cream-making method and certain trademarks for Portion Pack. When Bond left Portion Pack, he assigned the patent and the trademarks to Portion Pack in return for monthly royalties. Bond had orally agreed to assign some sealing equipment to Portion Pack, but since Portion Pack's lawyer neglected to refer to the sealing equipment in the assignment contract, the sealing equipment was not transferred to Portion Pack.

The day Bond signed the Portion Pack assignment, he fortuitously ran into one Allen, incorporator and primary shareholder of Portion Pack. Allen looked at the assignment contract and noticed the sealing equipment had not been assigned. Allen asked Bond to execute the assignment, but Bond refused. Allen then stopped payment on Bond's first royalty check. Since Bond needed money, he promptly agreed to execute a new assignment that included the sealing equipment. In addition to an assignment of the sealing equipment, however, the new assignment contract contained a noncompetition agreement. The parties had not discussed a noncompetition agreement prior to this time. Bond signed the new contract, but began competing with Portion Pack a short time later. Portion Pack sued, seeking an injunction.

The Washington Supreme Court declined to issue an injunction under the "clean hands" doctrine. Allen was entitled to stop payment on the check since Bond refused to fully execute the assignment he had agreed to. Allen was not

entitled, however, to force Bond to sign the noncompetition agreement. The parties had never before discussed such an agreement, and "it was clearly an afterthought [arising] when [Allen] realized [Bond's] financial predicament." 44 Wn.2d at 170. Thus, "that agreement was procured under such means that [Portion Pack could] not be permitted to enforce it in a court of equity." *Id.*

b. Public Injury

"In determining whether or not to issue an injunction, the . . . court may consider, if appropriate, the interest of the public." *Mains Farm Homeowners Association v. Worthington*, 64 Wn.App. 171, 179 (1992), *review granted*, 119 Wn.2d 1001 (1992), aff'd, 121 Wn.2d 810 (1993). *See, also, Seattle Audubon Soc. v. Moseley*, at 1491 (W.D.Wash. 1992); *Tyler Pipe Industries Inc., at* 792 (1982); *Butler, at* 693 (1992). In so doing, the court weighs the interest of the public against the plaintiff's interest in obtaining the injunction. *Seattle Audubon Soc. v. Moseley, id.; Tyler Pipe*, at 796. The court will issue an injunction where the plaintiff "show[s] [that nonissuance entails] a probability of injury serious enough to outweigh any adverse affects [sic] [to the public] from the issuance of an injunction." *Seattle Audubon, id.* A court will not issue an injunction where such issuance would cause an injury to the public greater than the injury the plaintiff will sustain as a result of nonissuance. *Tyler Pipe, supra*, 96 Wn.2d at 797.

For example, in *Tyler Pipe*, the plaintiff, Tyler Pipe, sought to enjoin the Department of Revenue from collecting certain taxes from Tyler pending the outcome of a trial to determine the propriety of imposing the tax on Tyler. The Washington Supreme Court declined to enjoin the Department from taxing Tyler because, *inter alia*, society's strong interest in efficient tax collection outweighed the harm Tyler would sustain as a result of nonissuance of the injunction. If the injunction were *not* granted, the only harm to Tyler would be that Tyler would have to pay the taxes during the litigation. Since the Department could refund Tyler's money, with interest, if it ultimately lost on the merits, this did not constitute a substantial injury. If the injunction *were* granted, however, the Department would be prohibited from collecting from Tyler during the litigation, raising the possibility that "essential public services dependent on the funds" would be "unnecessarily interrupted." 96 Wn.2d at 797. This was a public injury sufficient to warrant nonissuance of Tyler's requested injunction.

c. Action Barred by Laches, Estoppel, or Waiver

i. Laches

The "'doctrine of laches' is based upon [the] maxim that equity aids the vigilant and not those who slumber on their rights." Black's Law Dictionary 875 (6th ed. 1990). *See, also, Arnold v. Melani*, 75 Wn.2d 143, 147 (1968). Laches is defined as a plaintiff's "neglect to assert a right or claim which, taken together with lapse of time and other circumstances, caus[es] prejudice to [the] adverse party." *Id. See, also, Thorsteinson v. Waters*, 65 Wn.2d 739, 747 (1965), *overruled on*

other grounds, 100 Wn.2d 853 (1984). A court will not award equitable relief to a plaintiff who is guilty of laches. *Id.* Thus, a court will not issue an injunction in favor of a plaintiff who is guilty of laches. 11 Wright & Miller, *Federal Practice*, § 2946, p. 417. *See, also, LaVergne v. Boysen*, 82 Wn.2d 718, 720 (1973); *Johnson v. Schultz*, 137 Wash. 584, 587 (1926); *Ronberg v. Smith*, 132 Wash. 345, 353 (1925).

A plaintiff is not guilty of laches when he has merely delayed in bringing his claim. *Wright & Miller*, at 419. *See, also, Inland Motor Freight v. United States*, 60 F.Supp. 520, 523 (E.D.Wash. 1945); *Estate of Crawford, Matter of*, 107 Wn.2d 493, 501 (1986); *Arnold v. Melani*, at 147; *Thorsteinson v. Waters*, at 747. Rather, the plaintiff's delay must be culpable, and must have resulted in [irretrievably] changed circumstances that will "work to the disadvantage or prejudice [of the defendant should] the claim . . . now . . . be enforced." *Wright & Miller, supra*, at 420, *quoting* de Funiak, *Handbook of Modern Equity*, 2d ed. 1956, § 24, p. 41. *See, also, Sandvik v. Alaska Packers Ass'n*, 609 F.2d 969, 972, 973 (9th Cir. 1979); *Marriage of Leslie*, 112 Wn.2d 612, 619 (1989); *Hayden v. Port Townsend*, 93 Wn.2d 870, 874-75 (1980), *overruled on other grounds*, 101 Wn.2d 280 (1984); *Luellen v. Aberdeen*, 20 Wn.2d 594, 602-03 (1944), *overruled on other grounds*, 104 Wn.2d 710 (1985); *McKnight v. Basilides*, 19 Wn.2d 391, 400-01 (1943); *State ex rel. Hearty v. Mullin, 198 Wash. 99, 105 (1939); Johnson v. Schultz*, at 588; *Ward v. Richards & Rossano Inc.*, 51 Wn.App. 423, 435 (1988), *reconsideration denied*, (1988), *review denied*, 111 Wn.2d 1019 (1988). For instance, the plaintiff's negligent delay may have misled the defendant

> into acting on the assumption that the plaintiff has abandoned his claim, or that he acquiesces in the situation, or changed circumstances may make it more difficult to defend against the claim.

Wright & Miller, id. Laches thus arises where there is detriment to the defendant resulting from his justifiable reliance on the plaintiff's blameworthy delay. As such, laches is a species of equitable estoppel. *Black's Law Dictionary, id. See, also, Hayden v. Port Townsend*, at 875; *Arnold v. Melani*, at 147; *Thorsteinson v. Waters*, at 747; *Bowe v. Provident Loan Corporation*, 120 Wash. 574, 580 (1922); *Gray v. Reeves*, 69 Wash. 374, 378 (1912).

"In deciding whether laches applies, [a court will] assess the inherent equities of [the] particular case [before it]." *Ward v. Richards & Rossano Inc.*, at 435. *See, also, McKnight v. Basilides*, at 401; *Johnson v. Schultz*, at 587. Thus, there are no "hard and fast rules" dictating when laches will bar the plaintiff's claim. *In re Estate of Tuott*, 25 Wn.App. 259, 261 (1980).

ii. Estoppel

Estoppel operates to prevent a party "from denying his own expressed or implied admission, [act or representation], [wrongfully or negligently made], which

has in good faith . . . been accepted and [justifiably] acted upon by another." *Code v. London*, 27 Wn.2d 279, 283 (1947); *Kessinger v. Anderson*, 31 Wn.2d 157, 169 (1948). *See, also, Thomas v. Harlan*, 27 Wn.2d 512, 518 (1947). The estoppel defense is similar to the laches defense in that both operate to remedy a defendant's justifiable detrimental reliance on the plaintiff's conduct. *Royal Air Properties Inc. v. Smith*, 333 F.2d 568, 570 (9th Cir. 1964). *See, e.g., Brown v. Charlton*, 90 Wn.2d 362, 366 (1978); *Leonard v. Washington Employers, Inc.*, 77 Wn.2d 271, 281 (1970); *Adel v. Blattman*, 57 Wn.2d 337, 340-41 (1960).

Estoppel requires proof of three elements: (1) an admission, statement, or act inconsistent with the claim afterwards asserted; (2) action by the other party on the faith of such admission, statement, or act; and (3) injury to such other party resulting from allowing the first party to contradict or repudiate such admission, statement, or act.

Estoppel requires proof of three elements. These elements are (1) an admission, statement, or act inconsistent with the claim afterwards asserted; (2) action by the other party on the faith of such admission, statement, or act; and (3) injury to such other party resulting from allowing the first party to contradict or repudiate such admission, statement, or act. *Arnold v. Melani*, at 147 (1968). *See, also, McDaniels v. Carlson*, 108 Wn.2d 299, 308 (1987); *Kessinger v. Anderson*, at 170; *Code v. London*, at 283; *Thomas v. Harlan*, at 518; *Ward v. Richards & Rossano Inc.*, 51 Wn.App. 423, 434 (1988). If the defendant shows the existence of each of these three elements, the plaintiff's claim will be barred. *Witzel v. Tena*, 48 Wn.2d 628, 632 (1956); *Kessinger v. Anderson*, at 169; *Code v. London*, at 283; *Thomas v. Harlan*, at 518. As with laches, the applicability of the doctrine of estoppel "depends upon the particular facts and circumstances" of the case before the court. *Bennett v. Grays Harbor County*, 15 Wn.2d 331, 342 (1942).

iii. Waiver

"A waiver . . . [is] the [voluntary and] intentional relinquishment of a [known] right, or . . . a neglect to insist upon it." *Kessinger v. Anderson*, at 169 (1948); *Time Oil Co. v. Cigna Property & Cas. Ins. Co.*, 743 F.Supp. 1400, 1419 (W.D.Wash. 1990). *See, also, Royal Air Properties* at 571 (9th Cir. 1964) (actual knowledge of right required; inquiry notice insufficient to support waiver under Securities Exchange Act of 1934); *Birkeland v. Corbett*, 51 Wn.2d 554, 565 (1958). Generally, "all rights or privileges to which a person is legally entitled" are subject to waiver. *Bowman v. Webster*, 44 Wn.2d 667, 669 (1954). *But see Shoreline C.C. v. Employment Security*, 120 Wn.2d 394, 409 (1992) (a person may not waive a right where such waiver violates public policy). A waiver is unilateral in that it takes only one party to create it. *Kessinger, id. See, also, Time Oil Co.*, at 1419; *Bowman v. Webster*, at 670.

In order to create a waiver, it is necessary that this party intend "to relinquish the right, advantage, or benefit" in question. *Wagner v. Wagner*, 95 Wn.2d 94, 102 (1980). *See, also, Public Utility District No. 1 of Lewis County v. Washington Public Power Supply System*, 104 Wn.2d 353, 365 (1985), *modified on other grounds*, 713 P.2d 1109 (Wash. 1986); *State ex rel Madden v. Public Utility Dist. No. 1 of Douglas County*, 83 Wn.2d 219, 222 (1973), *appeal dismissed, cert. denied*, 419 U.S. 808, 95 S.Ct. 20, 42 L.Ed.2d 33 (1974). Without the requisite intent, no waiver exists. *Id.* Such intent may be shown either by an express, unambiguous relinquishment or by the waiving party's conduct. *Wagner, id. See, also, PUD of Lewis County*, at 365; *Bowman v. Webster*, at 669 (1954). Where intent to waive is inferred from conduct, the conduct must unequivocally evince an intent to waive. *Wagner, id. See, also, Birkeland v. Corbett*, at 565. In other words, the conduct must be "inconsistent with any other intention than to waive." *Caterpillar Tractor Co. v. Collins Machinery Co.*, 286 F.2d 446, 452 (9th Cir. 1960). *See, also, PUD of Lewis County v. WPPSS*, at 365; *Birkeland v. Corbett*, at 565. If there is any doubt regarding the party's intent to waive either expressly or by conduct, waiver does not occur. *Wagner, id. See, e.g., Caterpillar Tractor Co. v. Collins Machinery Co., at* 446 (party did not waive right to sue by stating, before litigation was anticipated, that it was trying to be cooperative and did not want to make a legal issue of the matter).

Waiver is distinct from laches and estoppel, although the three defenses often are brought simultaneously. *See, e.g., Royal Air Properties*, at 571. While the waiver defense "spring[s] principally from intent," the laches and estoppel defenses, as discussed above, arise from "injury to [a] deceived party caused by neglect or misleading action" by the opposing party. *Royal Air Properties Inc.*, at 571. *See, also, Caterpillar Tractor Co. v. Collins Machinery Co., supra*, 286 F.2d at 452. *Kessinger v. Anderson*, at 168-69. In contrast to laches and estoppel, therefore, no detrimental reliance is required for waiver. *Royal Air Properties Inc.*, at 571. As a result, the waiver defense may apply in situations where the laches and estoppel defenses are inapplicable. Where waiver is applicable, it precludes the waiving party from asserting his claim. *See, e.g., Bowman v. Webster*, at 670-71. Whether or not waiver exists is a question of fact, and therefore is determined on a case by case basis. *Time Oil Co.*, at 1419. *See, also, Bowman v. Webster*, at 670; *Singer Credit v. Mercer Masonry*, 13 Wn.App. 877, 885 (1975).

Damages

1. Statutory Damages Under the Trade Secrets Act

"In addition to or in lieu of injunctive relief," a prevailing trade secrets plaintiff "may recover damages for the actual loss caused by misappropriation. A [plaintiff] also may recover for the unjust enrichment caused by misappropriation that is not taken into account in computing dam-

ages for actual loss." RCW 19.108.030(1).

Moreover, "if willful and malicious misappropriation exists, the court may award exemplary damages." RCW 19.108.030(2). For example, in *Boeing*, the Washington Supreme Court awarded Boeing exemplary damages for trade secrets misappropriated by Sierracin because Sierracin never "entertained any honest doubt as to the legality of its conduct." The amount of exemplary damages awarded may not exceed "twice any award" made for actual loss and unjust enrichment pursuant to RCW 19.108.030(1). RCW 19.108.030(2).

In addition to exemplary damages, a court may award attorneys' fees to a prevailing trade secrets plaintiff where the defendant's misappropriation was "intentional, willful, and malicious." *Boeing*, at 64, citing RCW 19.108.040.

2. Consumer Protection Actions

The Consumer Protection Act (CPA) renders all "unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce . . . unlawful." RCW 19.86.020. There are no cases expressly applying the CPA either to theft of trade secrets or breach of a noncompetition covenant. The case of *Nordstrom v. Tampourlos*, 107 Wn.2d 735 (1987), however, involves analogous facts and suggests the CPA would apply to both theft of trade secrets and breach of a noncompetition agreement. In *Nordstrom*, the Washington Supreme Court held that a trade name infringement constituted an unfair method of competition under the CPA. Therefore, the defendant Tampourlos infringed upon Nordstrom's trade name and violated the CPA when he named his beauty salon "Nostrum." If stealing a trade name constitutes unfair competition in violation of the CPA, then arguably so does stealing a trade secret or stealing a plaintiff's customers in violation of a noncompetition agreement.

Presuming the CPA applies, a prevailing plaintiff is entitled "to recover the actual damages sustained by him . . . together with the cost of the suit, including a reasonable attorney's fee." RCW 19.86.090. The court may, moreover, "in its discretion, increase the award of damages" to an amount up to "three times the actual damages sustained," although such increased amount may not exceed $10,000. RCW 19.86.090.

For those who view lawyering as a blood sport, the litigation of trade secret and noncompetition claims often involves speed, surprise, and more than a bit of deception.

3. Lost Profits Damages for Breach of Noncompetition Agreements

If a noncompetition agreement does not contain a liquidated damages provision or formula, the general rule is that damages for breach equal the lost profits caused by the breach. The law of lost profit damages is complex, and counsel are well advised to consult the leading treatise, Robert L. Dunn's *Recovery of Damages For Lost Profits* (Lawpress, 4th Ed. 1992) (hereafter, "Dunn"). Generally speaking, however, lost profits for breach of a noncompetition agreement will be recoverable if (1) they were within the parties contemplation at the time the contract was made; (2) they are the proximate result of defendant's breach, and (3) proven with reasonable certainty. The evidence need not establish the loss with mathematical certainty. *Larsen v. Walton Plywood Co.*, 65 Wn.2d. 1, 390 P.2d 677 (1964). Lost profits are generally net profits, without deduction of allocated fixed overhead. 2 Dunn, §§ 6.1, 6.5; *Williams v. Fixdahl*, 6 Wn.App. 24, 491 P.2d 1309 (1971).

The plaintiff has the burden to prove lost profits. Defendants often attack the proximate cause link between the breach and the loss, by, for example, claiming that the plaintiff would have lost the business regardless of defendants' breach. The adequacy of proof can be attacked in several other ways. Such attacks can succeed when a plaintiff provides no substantiation for the lost-profit calculation; or fails to prove loss of a real, nonspeculative opportunity (as, for example, where a business is new and its profitability uncertain). 2 Dunn §§ 7.8-7.11; *National School Studios v. Superior School Photo Service*, at 275-76 (failure to provide substantiation); *Wilson v. Brand S. Corp.*, 27 Wn.App. 743, 621 P.2d 748 (1980) (new business held too speculative).

Practical Considerations

For those who view lawyering as a blood sport, the litigation of trade secret and noncompetition claims often involves speed, surprise, and more than a bit of deception. Departing employees often secrete documents or information months in advance of their move; employers, in turn may be motivated more by the desire to interrupt the former employee's efforts to set up the competing business and solicit customers than by any real concern for loss of ostensibly secret customer lists. The list of tactical suggestions set out here should be reconsidered in light of the specific problem and case.

Representing the employer-plaintiff in litigation

When representing the employer-plaintiff, the following ideas should be considered:

1. Do preventive review and drafting. All the litigation skill in the world won't help your client if they don't have tightly drafted employment agreements that conform to the legal requirements for noncompetition agreements and specify the information that is to be regarded as trade secret. Explain the trade secret requirements for protecting the confidentiality of information. Advise your client to be consistent in enforcing their policies and agreements.

2. Attack as fast as you can. Speed is vital for arguing to the court that you have a serious emergency and need a TRO or preliminary injunction to protect your interests. If the case has sat on your desk for a month, you'd better be prepared to explain to both the court and your client.

3. Attack as broadly as you can. In addition to seeking a TRO, get the court to sign an order compelling expedited discovery and return or sequestration of any documents, computer records, or tangible objects taken.

4. Choose state over federal court. State courts will often rubber stamp TROs and

discovery requests provided that you have a reasonable basis for claiming that colorable trade secrets have been taken or a facially legitimate noncompetition agreement has been breached. Federal judges are much more stingy with temporary restraining orders and often have a more difficult time scheduling hearings on short notice.

5. Provide the bare minimum of notice before a TRO. So long as courts (particularly commissioners) don't exhibit concern for the rights of defendants who are served an hour before the TRO hearing, minimum notice is valuable tool for the plaintiff.

6. Schedule the preliminary injunction hearing as soon as possible. The more discovery time you give to the defendant, the more likely they are to find evidence for equitable defenses such as unclean hands or estoppel.

7. Make sure your client mitigates damages. A good customer is worth more than a good lawsuit. you'll be doing your client a favor if you tell him or her to get on the phone to customers or clients to save their business while you go to court.

8. Be prepared to explain why information is a trade secret. Learn why the customer list is vital to your client's business and can't be reproduced. Document the thousands of dollars that went into producing the list of sales prospects. Be specific on why your client values the information at issue.

9. Above all, try to cast the case as a story of theft. Judges, jurors and arbitrators don't like thieves, but they're sympathetic to struggling underdogs starting new businesses in good old American competition. Make sure your opponent gets typecast as the scoundrel, not your client.

Representing the defendant in litigation

Although the law in Washington favors protection of trade secrets and enforces noncompetition agreements, defendants can still win these cases. Some suggestions for the defense:

1. Counsel the client before departure. Often, a departing employee can avoid litigation by waiting out the term of their contract, or even by negotiating with the employer. If you get the chance, do a cost-benefit analysis for your client (including your assessment of the litigation probabilities) before the break takes place. If your client is taking customer information when departing employment, advise them to take only the information they personally developed and used—not the entire company client list.

2. Beat the TRO. Your opponent may tire quickly if you can beat the TRO. If you expect possible litigation, prepare in advance with declarations from your client and other witnesses, key cases, etc. Avoid the commissioners; insist the matter is so complex that the TRO must be heard by a judge. This may buy you time to have an associate do research or to get witnesses down to the courthouse.

3. If you can't defeat the TRO, narrow it. Argue the rights of third parties that would be impaired to keep the TRO's scope narrow. For example, a TRO that prohibits further solicitation of customers does far less damage to your client than one that prohibits her from dealing with any of those customers.

4. Do discovery before the preliminary injunction proceeding. The best evidence of your defenses to an injunction—lack of harm, availability of damages, estoppel, unclean hands—is likely to come from your opponent and third party witnesses, and your opponents' documents. If your opponent has succeeded in getting expedited discovery from your client, insist on reciprocal discovery from the judge hearing the TRO.

5. Concentrate on equitable defenses. If your client is struggling to start his or her business, they may not be able to survive a long injunction. Concentrate your fire on beating the injunction and you may be able to settle the damage issues later.

6. Bring in the customers. Your client probably has customers or clients who want to do business with them. Get declarations from those customers asking the court not to interfere with their rights by enjoining your client from dealing with them.

7. Cast the case as one of competition. Put on evidence to show that the norm in the relevant industry is rough competition. Paint your client as the defender of free enterprise and open competition. Show that your client will be deprived of their right to earn a living.

8. Be wary of criminal liability in trade secret cases. If you client has taken a genuine trade secret, particularly in tangible form (like a computer diskette) they are potentially exposed to criminal liability for theft. Advise them that their deposition testimony could be used against them later. Consider early, quiet settlement.

Fredrick D. Huebner *is an honors graduate of Macalester College and the UW School of Law and a partner with Helsell, Fetterman, Martin, Todd and Hokanson in Seattle. His practice emphasizes complex securities, ERISA, RICO, employment and fraud litigation. He has written five novels, and he received the Washington Governor's Writers' Award for Best Novel in 1990.*

Yana D. Koubourlis, *a 1994 graduate of Harvard Law School, joined Helsell Fetterman in September 1994. She concentrates her practice in commercial litigation.*

Handbook on Insurance Coverage Disputes, 7th Ed.

by **Barry R. Ostrager** *and* **Thomas R. Newman**, 1,115 pp, binder format. (Prentice Hall Law and Business, 1994. $165. To order, call (800) 901-9074, 8:30-4 EST).

reviewed by **Tammy L. Lewis**

If your practice involves insurance coverage issues, Prentice Hall's *Handbook on Insurance Coverage Disputes* is an indispensable reference, 6th Ed. (1993, 999 pp.). Barry R. Ostrager and Thomas R. Newman updated the handbook to reflect recent trends in decisions in insurance law. It focuses primarily on comprehensive general liability coverage, with special attention to issues pertaining to environmental-coverage disputes. The handbook is informative and provides a comprehensive compilation of relevant case law.

It provides a succinct analysis for the most commonly encountered insurance coverage issues, including general rules of policy construction, the notice requirements under standard, comprehensive, general-liability policies, the roles of brokers and agents, the duty to defend, and an abbreviated analysis of the evolution of comprehensive general-liability insurance over the past several decades.

The handbook also dwells at length on insurance coverage issues pertaining to environmental cleanup litigation, specifically exploring recent trends in interpretation of the pollution exclusion, covered damages, and the scope of the duty to defend CERCLA claims. Ostrager and Newman also provide a useful discussion of bad faith and issues specific to excess carriers. There is also a limited discussion of the roles of insurance brokers and agency issues. All-in-all, the handbook is well-organized for easy reference and can potentially save hours of research into insurance coverage issues. Although few of the cases are discussed in any detail, the handbook provides a good overview of jurisdictional trends in an easily understandable and accessible format. If you are a practitioner with a significant amount of your practice focused on environmental or personal-injury, toxic-tort litigation, this book should be part of your library. While other books and treatises may provide a better background on the philosophy and underlying principles of insurance coverage, this book provides a quick and easy route to the large body of case law in the area.

Editorial Advisory Board member ***Tammy L. Lewis*** *is an associate with Lane Powell Spears Lubersky in Seattle.*

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U.S. Regulation of the International Securities Markets: A Guide for Domestic and Foreign Issuers and Intermediaries (2nd Ed.)

by **Edward F. Greene, Alan L. Beller, George M. Cohen, Manley O. Hudson, Jr., Edward J. Rosen**, (Prentice Hall Law & Business, 1993, 2 vols., $250. To order, call (800) 901-9074, 8:30-4 EST.)

reviewed by **William C. Philbrick**

During recent years, the internationalization of the world's financial markets has been a phenomenon that even the ordinary small investor could not ignore. Securities markets are becoming increasingly integrated as issuers and investors alike are no longer confining themselves to a single nation's boundaries.

As a direct consequence, legal practitioners increasingly need to guide international clients who desire to raise capital in the United States and American clients who desire to raise capital outside

the United States through the legal complexities of U.S. securities laws. Specifically, clients need to know under what circumstances a securities offering will be subject to U.S. jurisdiction, and how to comply with all the rules and regulations enforced primarily by the U.S. Securities and Exchange Commission (the "SEC"), the governmental agency delegated to regulate U.S. securities markets and protect U.S. investors. Alternatively, clients often want to know how to structure securities offerings so that they avoid the maze and perceived burdens of U.S. regulation.

The authors, all practicing attorneys with a major New York-based law firm, have put together this two volume looseleaf book that is an excellent comprehensive description and analysis of U.S. regulation of international securities offerings. Specifically, the set is about U.S. regulation of the international distribution and trading of financial instruments and about U.S. regulation of foreign financial institutions engaged in the United States in the securities business (including transactions in financial instruments subject to commodities law regulation). It describes in understandable detail the U.S. regulatory regime applicable to foreign companies entering the U.S. capital markets and to securities distributions in international markets by issuers with a U.S. presence. It also analyzes how the U.S. regulatory regime applies to entities including, but not limited to, securities brokers and dealers, foreign banks, investment companies and investment advisers.

This is the first publication to compile in one place all the recent initiatives by the SEC, the Federal Reserve Board and the Commodity Futures Trading Commission to accommodate and facilitate cross-border transactions.

Until recent years, many engaged in the world's capital markets would have characterized U.S. regulation and SEC oversight as draconian. This not only dissuaded many foreign issuers from seeking to raise capital in U.S. markets, but also sometimes influenced U.S.-based issuers to seek investors in foreign markets. Simultaneous offerings in U.S. and foreign markets were impractical and prohibitively expensive because of the costs involved with complying with different, and often conflicting, national regulations. The SEC has recognized the trend toward international diversification of investment portfolios and the need for globalization of the world's financial markets. It has responded to that trend by promulgating new rules and regulations designed to facilitate offerings in the United States or involving U.S. investors.

This is the first publication I have seen which compiles in one place all the recent initiatives by the SEC, the Federal Reserve Board and the Commodity Futures Trading Commission to accommodate and facilitate cross-border transactions. Because of these initiatives, there is an increased level of interest by foreign entities in the U.S. capital markets.

The book is easy to use due in large part to a detailed Table of Contents. It is extremely well written, managing to be complete and comprehensive without causing confusion which all too often arises when one tries to write about such complex subjects as securities laws. Nonetheless, I would not recommend the book to a practitioner with no exposure to securities law who might find the comprehensive nature of the two volume set overwhelming.

The book has 14 chapters and is divided into three parts. Part One examines how a foreign company can develop access to U.S. capital markets, and how both U.S. and foreign companies can raise capital outside the U.S. in ways that are clearly outside the reach of the U.S. regulatory system. Part One begins by introducing the key pieces of pertinent legislation. Subsequent chapters expound on the U.S. legal considerations involved in financings in the U.S. and international capital markets. It reviews options along a continuum that ranges from sponsoring an ADR (American Depository Receipt) program to facilitate secondary market

trading of outstanding securities to conducting a full-fledged public offering.

Part Two focuses on the requirements applicable to foreign financial institutions and particular kinds of foreign entities (and their affiliates) that want to do business in the United States or with U.S. residents, including broker-dealers, investment advisers, investment companies, commercial and universal banks and their U.S. affiliates.

Part Three looks at leading pertinent court cases which have established precedent or standards for a variety of securities law jurisdictional issues. The authors say they will distribute at a later date a section which addresses the concerns that foreign companies may have about raising capital in the United States because of the substantive and procedural risks posed by the possibility of U.S. securities litigation.

The practical value of the book is enhanced by the appendix, which includes forms, texts of statutes, rules and regulations, tables of cases, SEC releases, no-action letters, Federal Reserve Board orders and interpretive letters.

Updates to the looseleaf volumes will serve to keep the practitioner current on continuing developments and rule changes by the SEC and other governmental entities. Such rule changes are inevitable in light of the most recent concerted efforts at the SEC to accommodate the U.S. financial markets and U.S. investors with the increasingly global marketplace.

The set has its limitations. There is little discussion of the laws of any of the 50 states (so-called "Blue Sky" laws). Neither is there any discussion of the laws of countries other than the United States, although there are some insightful comparisons between U.S. practice and English practice.

This two-volume set would serve as an invaluable tool to every lawyer who practices any form of securities law, as well as to any other professional in the financial services field who has either foreign clients or U.S. clients who engage in business outside the U.S.

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Until August of this year, Seattle attorney ***William Philbrick*** *will be working in Poland as a guest of the Warsaw Stock Exchange.*

Reciprocity and Retaliation in U.S. Trade Policy

by Thomas O. Bayard and Kimberly Ann Elliot (Institute for International Economics, ISBN #0–88132–084–6, 1994, 400 pp., $25, To order, call (800) 229-3266.)

reviewed by **Kathryn A. Russell**

Until the mid–1970s, U.S. trade policy focused on nondiscrimination and using multilateral (multiple state) efforts to increase free trade. After the first oil shocks and the collapse of the Bretton Woods system for exchange rate management, however, U.S. businesses and policymakers began feeling insecure about the true position of the U.S. in the world system. This insecurity, combined with the economic pressures of the 1980s, led to a shift in trade policy emphasis towards unilateral, independent U.S. efforts to "level the playing field" of world trade.

The tool for implementing this policy has been Section 301, and later Super 301 and Special 301 provisions of U.S. trade law. Using these provisions, the U.S. Trade Representative and successive administrations have practiced what the authors of the book call "aggressive unilateralism." Aggressive unilateralism involves the U.S. unilaterally deciding a trading partner is engaging in unfair trade practices and threatening or taking retaliatory measures against the offending country without offering any concessions in U.S. trade practices to sweeten the deal.

In this surprisingly readable book, the authors provide a comprehensive, relatively unbiased discussion of the history of aggressive unilateralism as U.S. trade policy. Anyone interested in trade policy will find this book informative and interesting. Even those with a strong background in this area of law may want to include this book in their library, because it contains very useful charts and appendices, including detailed discussions of 71 of the 91 cases initiated by the U.S. between 1975 and June of 1994.

As might be expected, aggressive unilateralism has strong critics and vociferous supporters. Despite the controversial nature of the policy, the authors contend there has not been much analysis of the actual effectiveness of the policy in practice. They try to distance themselves from either side of the issue, instead seeking the "truth and consequences" of the policy. Although their choice of words sometimes betrays a slight bias against aggressive unilateralism (supporters as "hawkish"), they avoid pounding any pulpits and, in general, succeed in their efforts to remain uninvolved in the fray.

The book begins with a basic explanatory section tracing the history of the provisions and a description of the Section 301 process. Next, the authors examine 71 selected cases, attempting to debunk the extremes of passionate supporters and rabid critics. In the end, they conclude, aggressive unilateralism is neither a resounding success nor a dangerous failure. Instead, it is a tool that must be cautiously used within the context of a broader trade policy including multilateralism. Without including some multilateral action in trade policy, they warn, the U.S. will lose credibility and hinder further progress towards truly free trade. With the success of the Uruguay round of GATT, the U.S. can no longer justify aggressive unilateralism based on the weaknesses of multilateral action.

Despite the complexity of the topic, this book is fairly easy to follow; the authors include usually readable graphs and diagrams to explain their points throughout. The case study appendix is especially useful, beginning with a chart categorizing the target country or region, actual value of U.S. exports to the target, GATT actions, the type of product or service, and whether the negotiating objecting was achieved or trade liberalization occurred. For those interested in subsequent GATT action, the book lacks original citations to Panel decisions, instead relying on a secondary source, but that information is not impossible to find. In addition, the book has a very comprehensive index and numerous pages of references, which may be used for further research. All in all, *Reciprocity and Retaliation in U.S. Trade Policy* is a well–written, informative book.

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Editorial Advisory Board member ***Kathryn Russell*** *works with the Washington Appellate Project in Seattle.*

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The Death of Common Sense: How Law Is Suffocating America

by Philip K. Howard, 187 pp., hardcover, (Random House, 1995, $18. Available at bookstores.)

reviewed by **Robert C. Cumbow**

Last fall's Republican sweep was accompanied—perhaps not coincidentally—by a wave of new books about what's wrong with American law, politics, and society in general, seen from a vaguely conservative vantage: Patrick E. Kennon's *Twilight of Democracy* (a system that bases leadership on popular vote is doomed to fail); William A. Henry III's *In Defense of Elitism* (individualism, not egalitarianism, is the only way to real achievement); Mary Ann Glendon's *A Nation Under Lawyers* (what to do about all these lawyers?); Philip K. Howard's *The Death of Common Sense* (what to do about all these laws?). This last, an oratorically written little page-turner, is riding high on best-seller lists and is winning comment out of all proportion to its modest length and simple message.

The message is that, in the last two or three decades, American law has moved from the common-law tradition of decisions based on individual facts to the obsessive crafting of statutes and regulations to cover every possible situation. Law increasingly seeks certainty rather than justice; instead of leaving difficult choices to the discretion of skilled professionals in government, it seeks to provide a rule to answer every question. Ironically, the more detailed the book of rules becomes, the more it hamstrings the very system it is supposed to facilitate.

Howard provides a lively and compelling series of horror stories about encounters between individuals and small businesses with the implacable Moloch that U.S. regulatory law has become. The wish for certainty—like the wish for zero risk—ends up merely trading one kind of risk for another. By now, the rules are so voluminous that ignorance of the law, once no excuse, is now inevitable, and everyone is in a continual state of involuntary noncompliance. Businesses are cited for safety violations that, in practice, create no hazard at all, while showing themselves perfectly capable of avoiding actual hazards even without complying with OSHA regulations. Government, on the other hand, is so regulation-happy that it allows real hazards to go uncorrected while handing out citations for failure to keep a hazardous-substance manual up to date or failing to post a "Poison" warning next to a bag of sand.

What bothers Howard about the law, more than its voluminousness and its unknowability, is its inflexibility. "Every situation is different. Judgment and balancing are always required," he urges. Yet the tyranny of procedural compliance has grown so great that, while individual judgment is not yet impossible, it is unlawful. Howard speaks of government officials who bent or broke the regulations in order to make a tough call and get a job done more quickly and economically—at the cost of being censured for their procedural infelicity. Tellingly, most of the examples Howard cites, where individual decision making has done the job that rules could not, have been public emergencies (the New Deal's assault on the Great Depression, the City of Los Angeles's record-time post-earthquake repair). Howard doesn't take up the possibility that public entrepreneurship, to be successful, may have to *be* crisis-driven.

Howard also laments the fact that an insistence on administrative *process* based upon the model of judicial process has virtually supplanted any governmental concern for *results*. Process replaces mission. A government agency spends more time and money complying with procedures for travel reimbursement than it spends on travel. Due process makes it

virtually impossible to fire unproductive workers or expel troublesome students. The need to build a court-required record, and the ability of virtually anyone to sue over a deficiency in administrative process, regardless of the outcome of that process, has given individual interest groups the power to hold government and the public good hostage.

In large part, what has brought about the ability of individuals and small interest groups to hold public action for ransom, Howard notes, is the development of a rhetoric of rights. Since any violation of process may be deemed violation of a constitutional right, government must now turn virtually all of its attention to process as an end itself rather than as a means to action. Public agencies can no longer hear differing views and then decide on a best course of action, since any course of action may conceal within it a violation of the rights of one of the non-prevailing objectors.

Howard is as perturbed with this explosion of rights as with the implosion of a regulation-bound, process-obsessed government. The inability or impracticality of complying with the rights of the disabled, for example, leads to the abandonment of worthwhile and badly needed social programs and public improvements. Such reform tends to erode, rather than fortify, the bulwarks that the civil rights movement originally built against the careless and even hateful intolerance to which minorities and the disadvantaged were long subjected. But a notion of "rights" framed to eliminate inequality now operates as a kind of *property*, making inequality the order of the day.

Regulations hold everyone to the same standard; rights permit different standards; Howard criticizes both. Regulations leave no room for special cases; rights recognize nothing but special cases. What Howard criticizes in both is not their inegalitarianism but their inflexibility. Judgment must be exercised, he reminds us. Choices must be made, and they are not easy, because every assertion of one group's rights curtails another's freedoms. Rights, like regulations, have become absolute, inflexible. We have lost sight of the protections against factionalism envisioned by Madison in *The Federalist*. The struggle for perfect equality, like the quest of absolute certainty and zero risk, ends by checkmating itself.

"Government . . . is so regulation-happy that it allows real hazards to go uncorrected while handing out citations for failure to keep a hazardous-substance manual up to date or failing to post a 'Poison' warning next to a bag of sand."

So what do we *do*? Howard urges a return to simplicity, to minimalist regulation that relies on discretion and individual initiative guided by broad precepts and goals rather than nightmarishly precise, self-defeating details. He envisions a system of waivers, whereby applicable laws, regulations, and rights could be overridden by the particular needs of the situation. One wants him to be right; but he offers no clue how such a system would work and how it could be protected against abuse.

Howard's message of "too much law, too little room for independent judgment and individual responsibility" sounds conservative, even libertarian. Yet he proclaims himself a liberal Democrat, and agonizes over what has become of the governmental entrepreneurship of the New Deal, the idealism of the New Frontier, the social engineering of the Great Society. Once encouraged to ask only what they could do for their country, the liberals of Howard's generation saw the civil rights movement they championed splinter into assertions of hitherto unimagined "rights" for increasing numbers of interest groups asking only what the rest of us could do for them.

Howard tries to rehabilitate the image of the New Deal as synonymous with big government, emphasizing that its strength lay in achieving action where needed with a minimum of rules and a maximum of independent judgment and discretion. He overlooks, however, the *message* of the New Deal—that citizens could turn to government to look after their needs and to reverse their misfortunes. Didn't this, through a half-century process, lead di-

rectly to our era of suffocating rights and entitlements? Or is the new rhetoric of rights perhaps a phenomenon of growth—our way of starting to nip at one another like lab rats in an increasingly crowded cage? Is the explosion of statutes and regulations Howard decries not really the *cause* of the suffocation of America, but merely one symptom of a larger cultural disorder?

When Howard complains that American law should stop trying to bind government officials' every move and instead just "let them do their jobs," it never occurs to him that those officials just might conceive and promulgate regulations and rights-based guidelines precisely to *shield* themselves from that very responsibility. Can he have missed the fact that, for most people, freedom from responsibility is more attractive than freedom of choice? Making choices, after all, is tough; avoiding them is cozy. From *Tom Jones* to *Nobody's Fool*, it has been conventional to depict the dropout who revels in social and fiscal irresponsibility as the only truly free man. Could the problem, then, be more deeply rooted than Howard thinks? Howard is right that, when law tries to do too much, the inevitable results are resentment, backlash and—ultimately—contempt for law. Yet law tries to do, too, only what society expects of it. The real source of the contemporary crisis in American law may well lie in the paradox that Americans' demands on their system of law increase in proportion to their flight from the individual responsibility that is its moral foundation.

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Editorial Advisory Board member ***Robert Cumbow*** *practices in Seattle with Perkins Coie and is a frequent contributor to the* Bar News.

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Managing the World Economy: 50 Years After Bretton Woods

(Institute For International Economics. Edited by Peter B. Kenen. Washington, D.C. 1994. 426 pp).

reviewed by **Tyson Storch**

1994 marked the fiftieth anniversary of the Bretton Woods conference, held in Bretton Woods, New Hampshire. The conference marked the beginning of the Bretton Woods System which helped establish enduring economic institutions such as the World Bank, the International Monetary Fund (IMF) and the General Agreement on Tariffs and Trade (GATT).

To commemorate the occasion, the Institute for International Economics held its own conference on *Managing the World Economy: Fifty Years After Bretton Woods* in Washington D.C. to evaluate the Bretton Woods System. The resulting book is a compilation of papers and commentaries by a noteworthy group of scholars, analysts, and policy makers who comprise divergent and conflicting perspectives and opinions. Participating authors include, among others, Joseph Nye, Kenneth Oye, Robert O. Keohane, Paul Volcker, and Mahbub ul Haq.

The book is divided into four parts: Part I focuses on the first 50 years (providing an overview of the world economy under the Bretton Woods System); Part II deals with managing the world economy (the monetary and trading systems); Part III centers on new international economic issues (suggesting the implementation of a market led global financial system and a global environmental association, among others), and, finally; Part IV focuses on the future of the world economy.

In Part I, Kenen offers illuminating historical background on the genesis and growth of the Bretton Woods System. He maintains that these institutions have remained surprisingly effective and stable considering the intractability of ever-increasing membership. However, the success of the Bretton Woods System and the proliferation of regional economic arrangements, complicated by the end of the Cold War, may have germinated the seeds of its own demise and created the need to build new economic institutions:

> The success of the IMF, the World Bank, and the GATT also encouraged more countries to join, complicating negotiations and sharpening cleavages between developed and developing countries, between exporters of manufactures and of primary products, and between international borrowers and lenders. These cleavages became manifest in calls for a New International Economic Order. [The] end of the Cold War [and] the increased heterogeneity of the international community [are two reasons] for the proliferation of regional arrangements; they represent a quest for homogeneity at the expense of universality, which may be needed to achieve consensus, articulate new rules, and build new institutions. (p.7).

Kenen believes the relative success of institutions such as the IMF, the World Bank, and GATT is due to the combined rigidity and flexibility of these agreements.

Part II focuses on the monetary and trading system. Regarding the monetary system, John Williamson and C. Randall Henning suggest that exchange management is not enough to maintain stable markets and that there is a need for supportive fiscal policies. John Jackson, a preeminent GATT scholar, contributed a paper on the trading system, post Uruguay Round. Most notably, he discusses the newly established World Trade Organization (WTO) and the binding dispute settlement rules which, for the first time in trading history, apply to all members.

Part III offers persuasive arguments for the creation of a Global Environmental Organization (GEO) and discusses the phenomenon of human migration ("economic immigrants") and its economic impact.

Finally, Part IV offers an appraisal of present world economy management as well as a prognosis. C. Fred Bergsten, the director of the Institute, cautions that the end of the Cold War forced some nation-states to shift their focus from international to domestic concerns. Consequently, there is now a pressing need to reexamine domestic economic issues while remaining mindful of international ones.

Both theoretical and practical in its orientation, *Managing the World Economy* is both broad and specific enough to deserve the attention of anyone involved in international matters, legal or otherwise.

* * *

Portland, Oregon attorney ***Tyson Storch*** *practices with James, Denecke & Harris.*

The internet and the practice of law

Cyberspace and the law? Definitely. Lawyers now can take a spin through the world wide webs of the Internet by attending the WSBA CLE seminar "The Internet and the Practice of Law" on Friday, July 7 at the Sheraton Hotel & Towers in Seattle.

A lawyer is only as good as her research, and many lawyers are realizing that the Internet offers almost limitless research possibilities. Need updated legal research? Search the world, not just your library. Want to send a document to an associate in a branch office for review and changes? Send it e-mail as a Word document that he can open and change right on his screen, then e-mail back to you (no wasting paper). Locate foreign economic information and international political news. Promote your firm to millions of users across the country and around the world by printing your staff directory, complete with bios and photos.

Key speakers for the seminar include Neal J. Friedman, of the Washington, D.C., law firm Pepper & Corzzini, L.L.P., which established its world wide web home page (a user "site" that Internet users can access) in 1994. It was the first site exclusively for communications and information law. He will explain the basics of the Internet.

"We were thinking of this as just e-mail and not much else," Friedman explained about his firm's initial step onto the Internet. "When we saw the world wide web we said 'this is something we have to have.' As clients and potential clients look at it they see us as a firm that is on the cutting edge. It has led me into a new area of practice, which is representing clients who are on-line."

Deborah K. Owen, Associate Counsel to President Reagan in 1985-86 and a partner with the Washington, D.C., firm Arent Fox Kintner Plotkin & Kahn, will show you how to take advantage of the Internet to better represent clients. Her firm also has a web site on advertising law and an e-mail newsletter for lawyers using technology to practice law.

Owen has been called an "evangelist" of the Internet. She believes the Net can help a firm enhance communications with clients, understand clients' businesses better, improve efficiency and cut costs, and provide exposure to new sources of information that will

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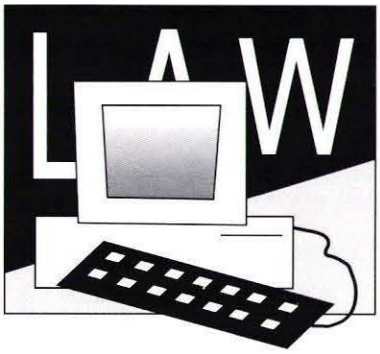

Discipline department adds 8 new staff to reduce case backlog

Thanks to two reports on how to improve the WSBA's discipline system, Barrie Althoff took over as department head six months ago with his eyes wide open. "Not many people are able to approach a new position with as much information about the job — its strong points and its weakness, or with the enthusiastic support of so many people, as I have been privileged to receive," Althoff declares.

In September 1992, the Supreme Court, the WSBA Board of Governors and the WSBA Discipline Board requested an audit from the ABA of our discipline system. After receiving the ABA report in December 1993, the Supreme Court and the WSBA formed a joint task force to review the ABA recommendations and report on needed improvements. The Board of Governors received that report in January and disseminated it widely to individuals and groups for comment. The Board will consider those comments and the Joint Task Force recommendations in the coming months.

Althoff, however, is not sitting still. To meet both long-term needs and to help address the immediate problems of the backlog of grievances, investigations and prosecutions, the Board of Governors authorized the new department head to use some previously budgeted reserve funds. With those funds the WSBA has hired both permanent and temporary lawyers for the Office of Disciplinary Counsel(ODC). The Board also authorized Althoff to seek committed volunteers to work within the ODC.

Within the last few months the department has added eight new attorneys to help in reducing the backlog. "They have the experi-

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Reminders . . .

★ **June 9: Referendum ballots due by 5 p.m.**

★ **June 23: WSBA Board of Governors ballots due by 5 p.m.**

★ **Order the new *Resources* Directory. See page 88 of May *Bar News* for order form or call (206) 727-8214 for more information.**

Just tell it — The good news about lawyers

The WSBA Public Relations Committee has found a way to involve a 20,000-person public relations firm in the campaign to improve the image of lawyers. The firm — you the membership!

Faced with shrinking dues dollars and a growing negative image of the profession, "Never say die" Committee Chair John Powers led the Committee to a new approach in WSBA public relations. "We'll make every member of the WSBA a p.r. agent," became the Committee's cry. With that, they created several new programs. "We know that we, the lawyers, can improve our public perception, one client and one lawyer at a time," Powers explains.

The Committee created a pamphlet to help every attorney tell the good news about the things lawyers do. "Most attorneys do public speaking. Before each speech, take four minutes and tell your audience why you're proud to be a lawyer," says 1995 Committee Chair Evelyn Fielding, explaining that the pamphlet suggests several ways in which this can be accomplished. "We need to blow our own horn. Lawyers provide thousands of hours of pro bono services every year. No one hears about it because no one is telling the public. We, as a profession, have always quietly completed our professional obligations. Now it's time to tell the community how much we do for them."

The Committee is also creating a short videotape showing two versions of how we can use this idea in our own public speaking engagements. "And don't be afraid to start a conversation with a client or a layperson friend by telling the good news either," reminds Powers. "Every one of us can help improve the image."

The Committee has also created the Lawyer's Commitment — a document, suitable for framing, which pledges to our clients that we will be a considerate professional in our dealings with them (see March *Bar News*, p. 25).

This year's committee is working on yet another project that will get each of us involved in improving our image.

Commitments, pamphlets and copies of the video are available through the WSBA Communications Department at (206) 727-8213 or (206) 727-8262. ◆

Young Lawyers urges kids to stay in school

The WSBA's Young Lawyer Division is distributing a video, produced by their counterparts in Oregon and Texas, that hopes to deter secondary school students from dropping out of school.

In the video, six male inmates from the Texas Correctional Facility and six female inmates from the Oregon Correctional Facility discuss their experiences with crime and prison life, urging middle, junior and high school students not to make the same mistakes they did by staying in school.

Educators and youth program directors may receive a free copy of the video by calling attorney Stephen Eggerman at (206) 822-6600.

News we can use...

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

Internet — *Continued from page 57*

facilitate client development. PC Computing Magazine recently named Arent Fox as #16 on their top 101 worldwide web sites.

"I have used it primarily for information gathering. I practice in antitrust, and the key to that type of practice is thoroughly understanding the industries that are involved," Owen explained. She uses the Internet to find business information she wouldn't normally find in a law library. "I think any sizable firm that isn't familiar with Internet technology fairly soon probably isn't going to be around to see the next century."

Other issues covered during the seminar include: Is it safe to send confidential information through cyberspace?; How can you protect your firm from intrusions?; and What legal and technological protections are there for client confidentiality? Also, Bradley H. Bagshaw, managing partner at Helsell, Fetterman, Martin, Todd & Hokanson in Seattle, and David Hensler, the firm's manager of information technology, will explain how their firm operates on the Internet, how to decide who should have access, and how to protect the firm name.

To register for "The Internet and the Practice of Law," call Program Coordinator Sonia Pagonakis at (206) 727-8246 or CLE Director Diane de Ryss at (206) 727-8220. ◆

Discipline — *Continued from page 57*

ence, skills and creditability to vigorously attack the backlog and to work as a team with other members of ODC, WSBA staff, and with other participants in our lawyer discipline system to enhance that system," Althoff says.

While the staff is working to decrease the amount of time it takes for a grievance to be processed, Althoff is instituting the necessary quality controls to assure that quality of work is not sacrificed in the name of quantity.

Next month's issue of *Bar News* will feature the Joint Task Force report. "The WSBA maintains and will continue to maintain a first-rate lawyer discipline system that will become increasingly responsive to both the grievants and our members. Looking critically at ourselves and being willing to change is part of our responsiveness," Althoff concludes.

Copies of the report are available by calling the WSBA at (206) 727-8207. ◆

Life after the law: John Sullivan — lawyer, marathoner, LAP peer counselor

On April 17th, a Monday, 65-year-old Concrete attorney John Sullivan wasn't in his office poring over legal journals and case law. Instead, he laced up his running shoes and joined 10,000 people from across the world in racing through the streets of Boston for one of the most prestigious international races — the Boston Marathon.

Sullivan, who will turn 66 on June 14, placed somewhere around 90th of 168 in his age group of 60-70 year olds. He said he would have placed higher if it weren't for "all those young guys in there." While Boston was the Washington lawyer's biggest-name marathon to date, it wasn't his first, but his 16th. His personal best is 3 hours, 42 minutes, which he clocked twice last year. He'd hoped to do Boston in 3:45, but 10,000 competitors made just getting to the starting line half the battle. "At 5:30 I hit the starting line and I was walking. When I could run freely in the sense that I didn't have to dodge people it was about 14 minutes" after the starting gun. His finishing time was a very healthy 4:03.

Sullivan is a "semi-retired" lawyer. He's in his Concrete office Tuesday, Wednesday and Thursday from about 11 a.m. to 5 p.m. and does mainly wills and smaller stuff; no trial work. He jokes that while he's the best lawyer in Concrete, he's also the only lawyer in town. But, having flexible office hours gives him the opportunity to run whenever and for however long he wants, something he needs to offset the stresses of lawyering.

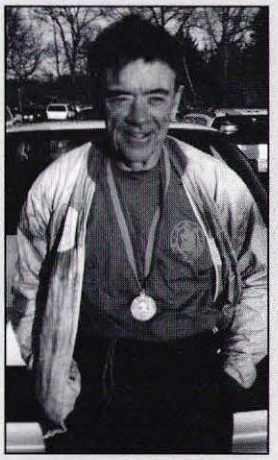
But his life is more than running and the law. He's also one of more than 100 peer counselors for the WSBA Lawyers Assistance Program. He assists fellow bar members who are in the recovery phase of drug and alcohol addiction, or who are going through personal problems. He is on call for Skagit County LAP clients, and is notified either by LAP, the person going through recovery, or perhaps family members. LAP provides the training for peer counselors. He's familiar with how hard the law can be on an attorney's life. Not too long ago, about 15 years, he smoked, drank and was quite a bit overweight. In 1980 he cleaned up his habits, began running, and in 1985 ran his first 10K (6.2 miles).

"I've been so fortunate to have turned my life around, to have been given an opportunity. Part of it comes from running and doing these good things. And I want to give that message out — that it's available to us if we got off our you-know-whats and get going."

He says it was especially nice running in Boston since he was born and raised in the area. His family moved to Richland when he was 14. He eventually became mayor of Richland in the early '60s, was Richland's first city judge, and was also acting city attorney.

He runs with other folks on Sunday mornings and is looking for other lawyers interested in planning a statewide 10K and marathon. Anyone who's interested in Sunday morning runs or in planning a race should contact John Sullivan at his office at (360) 853-8242 or home at (360) 853-8153.

"Lawyers get so wrapped up and business is tough these days. This is a way to get a little piece of life." ◆



John Sullivan wears his Boston Marathon finisher's medallion

CLE implements 2-year deskbook update schedule

Who said a lawyer is only as good as their books? The WSBA CLE Department has found a great way to make us better lawyers — by improving and updating our deskbooks.

"We have recently taken the step of greatly enhancing the value of deskbooks in Washington state," Diane de Ryss, CLE Director, said. "We have embarked on a project to ensure that every one of our deskbooks is updated every two years."

Supplements coming out this year: Motor Vehicle Accident Deskbook — May; Motor Vehicle Accident Insurance Deskbook — May; Motor Vehicle Accident Litigation Deskbook — May; Alternate Dispute Resolution Deskbook (not a supplement but a revised second edition) — June; Commercial Law Deskbook — September.

Deskbooks and supplements are authored by volunteer attorneys. Many of the supplements are written by the lawyers who originally authored the book. The CLE Department's Managing Editor of Publications, Margaret Morgan, coordinates the massive supplemental project.

In 1996, look for supplements on: Family Law; Civil Procedure; Appellate Practice; and Real Property (revised third edition).

To order supplements or deskbooks, call WSBA Order Fulfillment Clerk Jacki Browning at (206) 727-8278, or the WSBA CLE Department at (206) 727-8202. ◆

The WSBA phone-in Jobline, begun in February 1994, has received more calls than expected in its first year. In March of this year, the Jobline received a whopping 1,761 calls. The first three months of 1995 logged a total of 4,198 calls. The Jobline is updated every Friday. Call (206) 727-8261.

On a normal day, the Bar averages between 4,000 - 5,000 calls. With a total of about 80 employees, that's a lot of phone calls to be answered! On a busy day, such as the day exam results are posted, that number jumps to about 5,600 calls.

Congratulations to the 407 spring 1995 washington state bar admittees!

(A) Abelson, Joanne S.; Abraham, Sunil Parayil; Adair, Mark R.; Adams, Cindy L ; Adams, Randall Richmond; Ahern, Joseph Michael; Alaniz, Karen Balter; Aldana, Benes Zapanta; Amato, Virginia M.; Andersen, Karen Anne; Anderson, Delia Aliki; Andersson, K. David; Armstrong, Kelli Kristine; Avallone, Lisa M.; **(B)** Banniettis, Robert Charles; Bardwick, Scott David; Bardwil, Mark Edward; Barnicle, Brendan J.; Barr, Dale C.; Battersby, Julie Anne; Bauer, Robert G.; Bayme, Shira M.; Behrbaum, Paige Trimble; Bellon, Maia D; Berger, Kenneth A ; Bertin, Laura A.; Bierlein, Marna J.; Blair, Donald Alan; Blattner, Christopher C.S.; Block, Lainie Farryl; Bowers, Todd Anthony; Bradach, John F.; Brancato, John Jerome; Breen, Linda; Bromley, Verna P.; Buerger, Alexander F.L.; **(C)** Cahoon, Craig Andrew; Calvit, Maribeth Ann; Cameron, Cheryl Ann; Campau, Douglas N.; Canfield, Brian Robert; Carlson, Raymond Louis; Caron, Julie Levie; Carucci, Roderic Alan; Caudill, Holly Louise; Chang, Sung Yup; Ching, Stephen Alan; Choi, Douglas Yong; Christensen, Brian A.; Christopherson, John Andrew; Christopher, Margaret Diamond; Chun, John H.; Church, Michael H.; Cicierski, Christopher Stephen; Clark, Bernard A.; Cobb, Susan Ridder; Collins, Christopher Michael; Collins, Janene Adrienne; Condello, M. John; Conger, Mary Elizabeth; Conley, Sarah Siobhain; Conover, Matthew B.; Conway, Maribeth; Cooney, Paul A.; Copperwhite, Elizabeth Maxfield; Cortese, Frank Giovanni; Crawford, Joseph Patrick; Cronin, Michael F.; Crumpacker, John William; Cumberbatch, Allison E-M ; **(D)** Danzberger, Diana Priscilla; Dassel, Kathleen A.T.; Davies, Russell E.; Dawes, Steven J.; DeGracia, Steven Joseph; De Guzman, Arnold Moises; Dell, Martitia Mary; Deruiz, Antony Paul; Dickens, Le Roy; Ditchik, Michael; Dixon, Frank JR.; Doherty, Patrick Joseph; Donovan, Darcy Diane; Dotson, La Verne L.; Dringman, Page Carroccia; Duffy, Cheryl Lynn; Dullanty, Margaret Ogden; Duncan, Gina Morrow; Durham, Sharon L.; **(E)** Edens, Stella J ; Ehler, Chad Stueber; Eldemar, Katherine M.; Elder, Elizabeth Convington; Enriquez, Ricardo Jose; Esser, Peter David; Evans, Susan D.; **(F)** Fathi, David C.; Felback, Rachel Lee; Fenstermaker, Scott Lloyd; Field, Joseph Adam; Fink, Janyce Lynn; Flattery, Thomas Hughes; Fleck, Mary K.; Fletcher, Krista Lee; Folse, Parker C. III; Forster, Sharon S.; Foster-Nolan, Elizabeth L.; Fox, James Edward; Frady, Elizabeth Ann; Franz, Kirateye; Freeman, Roger D.; **(G)** Galvan, Veronica; Garen, Clark; Garland, Andrea Jean; Garvey, Thomas J. Jr.; Gee, Vicky Carter; Gilbert, Jayne Marsh; Gilbert, Russell Harold; Gilmore, Lisa Marie; Golan, Alexander Ernesto; Goldblatt, Adam J.; Gonzalez, Michelle; Gordon, Rebecca Hayley; Gossman, Leeanne Gay; Gouveia, Leonard Ronald Jr.; Grayson, James Warren; Greener, Michael D.; Grillo, Phillip Edward; Groesbeck, David; Gross, Steven L.; **(H)** Hamerly, Michael Charles; Hamill, Timothy S.; Hanson, Carole Wiggins; Hanson, Robert B.; Harmatz, Julia Elizabeth; Harper, Edward C.; Hart, Mieko; Hathaway, Steven Charles; Hawn, Wayne David; Hayes, Sandy R.; Heffernan, Patricia Bee; Heine, Margaret A.M.; Helm, Christopher Robert; Heo, Kyun; Hepp, Linda D.; Hettle, Duncan Paul; Hoff, Glen Christopher; Hoffer, Raymond I.; Hoffman, Amelia J.; Hoffman, Schuyler; Holm, Susan J.; Holma, Paul Johannes; Honhorst, Nancy J.; Hornreich, Howard S.; Horton, Thomas Frederick; Howe, Anthony G.F.; Huenink, Jennifer E.; Hurley, Mary M.; Huson, Janet K.; **(I)** Ichimura, Lori A.; Isajiw, Elizabeth A.J.; Jacobs, Jeffrey Paul; Jamieson, Donald Bruce; Janhunen, Kiirsti Holberger; **(J)** Jefferson, W. Larry; Jennings, Andrew Charles; Johnson, Kevin L.; Jonas, Lynda Jeanne; Jones, Kimberly Jill; Jones, Martin A.; Jorgensen, Eric Jorgen Jens; Judd, Gary Alan; **(K)** Kadlecek, Ann T.; Kaes, Christy A.; Kaholokula, Rosemary Hawkins; Kamula, Matthew Roman; Kanne, Allena Maria; Kaplan, Marlene; Karam, Steven Harrison; Karjeker, Shaukat A.; Kemmerer, Linda Gail; Kerk, Chun Lung; Kibukawa, Masaru; Kinney, Chad Christopher; Klein, David Allan; Knauss, Janet; Knight, Elizabeth M; Kocher, Gary J.; Kohn, Rodger Ian; Kolbrener, Jonathan; Kopilak, David; Kosbie, K. Gretchen Ulmer; Kowalski, S. Michael; Kramer, Margot; Kraus, Peter Augustine; Krueger, Lisa A.; Krueger, Pamela Weidler; Kwong, Kevin Tsingman; **(L)** Lalone, Theresa Lynn; Larrabee, Steven Henry; Larson, David Charles; Lassalette, John M; Launer, Charlene A.; Le Doux, Gabrielle Ruth; Lee, Edwin; Lee, Karen Turner; Lee, Moongyu; Lerner, Spencer Anthony; Lesher, Arthur B.; Lieberman, David Allen; London, Robert Jacob Louis; Lukins, Denise Joan; **(M)** MacDonald, John M.; Mackey, Cynthia L.; Mac Naughton, Craig E.; Malhotra, Deepak; Mallory, Gregory Wallace; Maltby, Michael; Manley, Patrick Joseph; Manske, Karen Laree; Marr, Kristi Rae Sweep; Marsh, Lisa; Martino, Randall S. ; Marvin, Harold Bruce; Matulka, Edith E.; Mazurkevich, Marko; Mc Crackin, Karen Anne; Mc Daniel, Beth A.; Mc Dowell, David E.; Mc Elroy, Stephen Kelly; Mc Kinley, Shelley Elaine; Mc Lean, Brian Patrick; Mc Nally, Teresa Louise; Mc Neese, Charles Bradley; Meagher, Kelly Adrienne; Medeiros, Martin F.; Melby, Jane; Meneses, Gilma Leonor; Merrens, Margaret Lamb; Merrifield, Lawrence Stanford Jr.; Meyers, Robert Adam; Miller, Jeffery Lane; Miller, Maureen Shellooe; Miller, Paul Michael; Mills, Rodney R.; Mitchell, Billy S.; Moeller, Tonya Lynn; Moller, Diana E.; Moore, Judith Ann Poffenroth; Morales, Debra A ; Moran, Timothy Michael; Morikawa, Carolyn Kanani; Moro, Dolores A.; Morse, Laraine Chee; Mortensen, Daniel Ray; Mowers, Davette Marie; Muchmore, Allan Hansen; Mulligan, Tim Ryan; Murray, Sally J.; Myers, Michael Jay; Myles, Kevin M.; **(N)** Nagai, Kevin Ernest Harada; Neff, Kristin L.; Nelson, Kristin A. ; Nelson, Lawrence Wilfred; Newman, Claudia MacIntosh; Nicholson, Douglas Warr; Nolen, Kelly Ann; Nowak, Yolita J.; Nye, Hillery Lore; **(O)** O'Connor, Shauna Claire; Osborne, Lisa; **(P)** Panos, Athena A.; Patel, Anil K.; Patton, Jennie; Pedersen, Jamie D.; Pellman, Amy W.; Peng, Chieh Leo; Peng, Wei; Perrin, Lejune; Peters, Allen R.; U, Michael Thomas; Phalen, Graham Grove; Pham, Bichhathi; Platis, Damon Alexander; Plotkin, Stacy Jo; Pohlman, Molly Ann; Porter, Gloria Finn; Potak, Jacob L. ; Pothering, Christine A.; Powell, Carolyn Elizabeth; Proszek, Catherine E.; **(Q)** Quada, Karen L.; **(R)** Raeber, Jeffrey Daniel; Ran, David Bruce; Raskin, Paul R.; Reed, David C.; Reeve, Lana Christine; Reich, Steven Thomas; Reinhardt, Mark A ; Rice, Sarah S.; Ridgway, Deidre Kathleen; Rogers, Phyllis; Rogers, Teri Celeste; Rongerude, Janina Diane; Rowlett, Victoria Janette; Rozen, Marc Aaron; Ruby, David P.; Rudkin, Michael J.; **(S)** Saeed, Shawna Rae; Safford, Susan Norris; Sands, Robert Holden; Santarelli, Bryan Anthony; Saperstein, Scot Todd; Sato, Emily C.; Saunders, Jason Brett; Scharfstein, Steven R.; Schiffer, Shawn Royal; Schildkraut, Robert S.; Schleifer, Rebecca Ann; Schnackenberg, Marke; Schock, Eileen Margaret; Schoonover, Kirstin; Schroeder, Laura A.; Schwab, Jeffrey; Schwieger, Scott Steven; Scott, Robert E.; Shah, Ketu; Shaub, Joseph A.; Shea, Pat; Sheehy, Patricia R.; Sherman, Craig Elliott; Shipley, Glen; Shirts, Chul; Shishmanian, Leo Peter; Shui, Joyce; Silenas, Rima V.; Simpson, Sandra L.; Sinder, Riley M.; Sitz, Herbert Emil; Sjolander, Kelly C.; Skoch, Edwin A. II; Slown, David J.; Smith, Alan D.; Smith, Audra B,; Smith, Donald J. Jr.; Smith, Martin Lester; Smith, Oliver G. Jr.; Smythe, Mark C.; Solis, Scott B.; Southworth, Gregory J.; Spinelli, Karen A.; Staples, Rex Arthur; Steinmetz, Harry S.; Stephens, Cinnamon; Stewart, John C.; Sudarshan, Beth; Sullivan, Brian J.; Sutherland, Lisa J.; Sweeney, Erin Elizabeth; Szeker, Cynthia Cecilia; **(T)** Talbott-Lloyd, Dawne Cheri; Tarantino, Natalie A.; Tavares, Christine E.; Terrall, Travis L.; Thomas, Theodore W.; Thompson, Dennis Patrick; Thomsen, Susan Elizabeth; Tingley, Sara Louise; Tormey, Petra I ;Truman, Robert Matthew; Tsai, Amy C.; **(U)** Umberger, Rodney L. Jr.; Umland, Carrie D.; Umuolo, Uche Humphrey; **(V)** Valentine, Brian Kenneth; Van Orden, Eric R.; Verrall, Richard L.; Vibbard, Mark S.; Vincent, Elizabeth Tyrrell; Vinnedge, Sydney D.; **(W)** Walker, Laura J.; Wallace, Katherine J ; Walters, Winnabel Isle; Walther, Donald E.; Watson, Wesley Jr.; Wechkin, Robin E.; Weight, Eric Michael; Weiner, R. Leonard; Weinrich, Ann Carin; Wickens, Sean P.; Wilkinson, Kerry V.; Williams, Brett P.; Williams, Margaret Ruth; Williamson, Kim Craig; Winter, Manuela; Wolfe, Edward Emmett; Woody, Elizabeth M.; Wright, John A.; Wright, Nolan Lincoln; Wurtz, Edward Joseph; Yancy, Emily; Yand, Mark C.; **(Y)** Yari, Julie Masumi; **(Z)** Zackula, Christine L.; Zeeck, Valarie Standefer; Zipperer, Bonnita Rachel Dolata.

NEWS FROM HOME

Carolyn Ladd has joined Lane Powell Spears Lubersky as an associate in Seattle. She concentrates her practice in labor and employment law, having been previously employed by the State Accident Insurance Fund in Oregon and the National Labor Relations Board in Washington, D.C. **Ann Stoloff Brown** has joined the firm in Fairbanks, Alaska, as the firm's partner-in-charge. She is a former partner with the law firms of Guess and Rudd and Hughes Thorsness Gantz Powell and Brundin.

Former Congressman **Jay Inslee** has joined Gordon Thomas Honeywell Malanca Peterson and Daheim P.L.L.C. as a member of the firm's resource strategy group. Inslee was previously a lawyer in Selah and represented the 4th Congressional District from 1993 to 1995. The firm has also added two associates, **Stephanie Bloomfield Schultz** and **Mario D. Parisio**.

Perkins Coie has appointed **David J. Burman** as a member of the firm's management committee and **Michael T. Reyvaan** as head of the Seattle labor and employment practice group.

The law firm of Heller Ehrman White & McAuliffe has announced the appointment of **John W. Hanley, Jr.** to chair the firm's Northwest business practice group.

Mike Reynolds has been hired as City Attorney for the City of Auburn.

Randall R. Stichen, formerly with the Seattle office of Stoel Rives Boley Jones & Grey has joined Bogle & Gates, where he will head the firm's construction and design law practice group.

Faulkner Banfield Doogan & Holmes in Anchorage, Alaska, has added **Susanne K. Ishii-Regan** as an associate. **Theresa Hennemann** has become a shareholder in the firm, and **William D. De Voe** has been added to the firm's partnership as well.

Barbara E. Barnhart has joined Tousley Brain after spending 17 years with the U.S. Securities & Exchange Commission, the last ten of which were as special counsel to the enforcement division.

Tousley Brain has also announced the addition of **Albert H. Hughes, Jr.** as an associate practicing in the areas of real property, real property finance and corporate finance.

Joseph Nappi, Jr. of Hemovich & Nappi has merged his practice with the law firm of Huppin Ewing Anderson & Paul, P.S. in Spokane. A former governor of the Washington State Bar Association, Nappi practiced for many years with the late **Michael J. Hemovich**, another former governor and president of the WSBA. Nappi's current practice includes civil litigation, business, probate and insurance law.

Stafford Frey Cooper has added **Michael C. Bolasina**, formerly an associate with Perkins Coie, as a member of its litigation practice group. **Larry E. McMullen**, formerly of counsel with Loucks & Lamb, has joined the firm as a member of its commercial practice group.

Culp Guterson & Grader has added three partners in the firm. **Kristi M. Wallis** is a 1984 graduate of the University of Oregon School of Law. Her practice has focused primarily on commercial and maritime litigation. **Marc O. Winters** practices in the area of real estate and real estate finance. **Lawrence Ream** practices exclusively in workouts, Chapter 11 reorganizations and other debtor/creditor transactions.

Davis Wright Tremaine has announced the appointment of **Donna M. Peck-Gaines** as partner-in-charge in Seattle. She replaces **Jeff Van Duzer**, who returns to full-time practice after three years as partner-in-charge. **John Parnass** has been named a partner in the firm, practicing in the areas of commercial litigation, construction and tax disputes.

Gregory L. Stevens and **Paul E. Clay** have become principals in the Spokane law firm of Winston, Stevens & Clay, P.S., formerly known as Robert W. Winston, Jr. P.S. **Rockie J. Ulrich** has joined the firm as an associate.

Former WSBA CLE director and executive director **John J. Michalik** has been named executive director of the international Association of Legal Administrators, to take effect in June. Since 1991, he has served as assistant dean of the University of Washington School of Law, director of the law school's alumni association and executive director and secretary of the independent Washington Law School Foundation.

Jon D. Floyd has become an associate with Chase Hayes and Kalamon in Spokane. He practices in the areas of labor law, workers compensation, employment law and commercial law on behalf of employers.

Paul A. D'Aloisio, formerly with the U.S. Department of Justice, joined Short Cressman & Burgess in Seattle as an associate earlier this year. A professional engineer, he focuses his practice on construction litigation and

government procurement issues.

Heather Houston, appellate consultant with the law firm of Gibbs Houston Pauw, has been appointed chair of the appellate-practice committee of the Federal Bar Association for the Western District of Washington.

Williams Kastner & Gibbs has added **Jon M. Schorr** and **Richard D. Thaler** as partners in the firm's Seattle office.

Stoel Rives Boley Jones & Gray has announced that **Timothy G. Fielden** and **William J. McNichol, Jr.** have been named partners in the Seattle office.

Riddell Williams Bullitt & Walkinshaw has added three partners—**Judith L. Andrews, Bruce T. Goto** and **Lucy Lee Helm**.

Marilyn Allen (Seattle University, 1995) is one of eight National Association for Public Interest Law fellowship recipients. She will create an advocacy program to assure that parenting teens in a two-county area have access to vital social services, such as day care programs—so the mothers can stay in school, adequate housing, mental-health services and jobs that pay a living wage. Now in its third year, NAPIL Fellowships for Equal Justice is a collaborative effort of federal judges, prominent lawyers and law students, which works to send talented new lawyers to help communities that desperately need legal assistance. The initial money for the fellowships came from the remaining funds in two federal antitrust cases; from this base, NAPIL has established a $3.1 million endowment.

OLD PHARTS PRACTICING IN CHELAN COUNTY BEFORE 1960 BAR ASSOCIATION REPORT

by **CHARLES W. CONE**

The spring quarter meeting of the OPBA was held March 31, 1995, again at O'Reilly's in East Wenatchee.

Six members were present. **Bernie Burke** appeared late because he didn't wake up to check his busy schedule until noon, and **Earl Foster** spent the morning touring Chelan/Douglas County trying to locate O'Reilly's. Both were marked, "Present, but Tardy."

The program began with the telling of Lowell stories. Lowell Sperline, a member of our group and a lawyer in East Wenatchee for 40 years, fell asleep in his easy chair on March 11 and failed to waken. Lowell was unique as a person and as an advocate for his clients. Lowell stories will be told and retold whenever and wherever his colleagues at the bar assemble.

The program continued with a thorough review of recent medical attention received by the members. Operations were described in detail and bowel and bladder reports were made by several of those present. All reports were optimistic until **Ed Engst** presented the doleful news that his rototiller will expire before summer.

Bob Hensel reported on his extended tour to Antarctica and his study of the penguins. Judge **Robert Graham** had reported that he had observed many exotic "birds" on the sidewalks of Palm Springs, and **Bernard Burke** reported on the activities at Eagles Aerie No. 204.

We will meet again in June.

CLARK COUNTY REPORT

by **TERRY LEE**

The recent bosses' night celebration with **Greg Ferguson** as master of ceremonies was memorable, sort of a cross between **Howard Stern** and **Rodney Dangerfield**. **Tom Phelan**'s name was often mentioned and associated with restroom facilities.

Allison Chin, the racquetball champion of Broadway, was there showing off her fine form as Justice **Gerry Alexander**, a former New York City marathoner, hobnobbed with the locals. Judge **J. Dean Morgan**, of Division Two/Court of Appeals, made his second appearance in Clark County in the last five days. The appellate court backlog of cases has absolutely nothing to do with the social calendar of those distinguished judges. **Greg Price** and **Jerry Eline**'s sober demeanor throughout the evening was quite evident. Someone mentioned it was the realization that they were in the law profession that created that mood while others would say it is a false rumor to help them balance the hilarity/wine-induced festivities at their table. **Jeff Barrar** appeared in his **Kevin Duckworth** physique with a **Mitch Miller** goatee fashion. It was quite chic until one realized that his socks, one white and one blue, had not been washed for some weeks. Actually, not since the last time he won a hearing.

Bud Gallup made an appearance as did **Dave Hutchinson** and **Randy Ferguson**. It wasn't until the night was almost over they realized that no CLE credit was to be given for the event.

The comic relief of the night was as always presented by the now Honorable Judge **John Nichols**. In referring to the 1994 Beagle Award winner, **John Meader**, he flashed a picture upon the screen representative of the initial interview between Meader and his clients. The picture showed a local movie house and on its billboard were "Disclosure" and "Interview with a Vampire." The rapid fire program, evidently, moved along well so that Meader's acceptance speech for the Beagle Award, which lacked humor, wisdom or insight (much like his argument), went on for 30-odd minutes. Odd is a good description for much of it.

With summer break and golfing season upon us, it is expected that **Art Bennett**, **Hugh Knapp** and **Howard Marshack** will disappear into a semi-retirement sabbatical for the next month or so.

GREATER SEATTLE LEGAL SECRETARIES REPORT

by **LEANNA ANDERSON**

The GSLSA elected their 1996-96 officers on March 7, 1995. They are **Lisa Miner** PLS (Warren, Kellogg, et al.), president and NALS representative; **Marcia Heying** ALS, PLS (Law Office of Gary W. East) vice president; **Linda Kniss** (The Boeing Company) secretary; **Denise Hoopes** (Stoel Rives) treasurer; **Lisa Rudgers** (Stanislaw, Ashbaugh) governor. The newly elected officers were installed at the April 4 GSLSA dinner meeting.

LAW FUND REPORT

by **LAUREN MOORE**

LAW Fund would like to extend a special thank you to the private attorneys who have contributed countless hours of their time working on the Equal Justice Coalition to preserve federal and state funding for civil legal services in our state. Deserving special recognition for their incredible time commitment on the Equal Justice Coalition working group are **John McKay, Ragan Powers, Nancy Isserlis, John T. Powers Jr., Paula Boggs, William D. Hyslop, Paul Bastine Lucy Isaki** and **Anne Bremner.**

At the end of March, five members of the Equal Justice Coalition travelled to Washington, D.C. to meet with members of the Washington State Congressional Delegation and speak with them about federal funding for the Legal Services Corporation. Thanks to **Ed Shea, Robert Patrick, Nancy Isserlis, John McKay** and **Barbara Clark** for making that important trip.

The mission of LAW Fund is to ensure access to justice by raising funds to preserve and expand civil legal services for low-income people in Washington state. If you would like to make a contribution to LAW Fund or learn more about the critical work of the Equal Justice Coalition, please call (206) 623-5261, or write 1326 Fifth Avenue, Suite 815, Seattle, WA 98101.

PIERCE COUNTY REPORT

by **GEORGE S. KELLEY**

While the major leagues are in the midst of a labor dispute, for Pierce County lawyers, it's baseball as usual. For the past quarter century or so lawyers have managed to field a softball team. Some historians think that the team was formed by returning Vietnam veterans while others say that it was started by refugees from Woodstock. Most agree that the team was started as an excuse to get out of the house, yell at umpires (one is not allowed to cuss out a judge but an umpire is fair game), and drink beer.

This year the team is sponsored by Columbia Bank. During the off season contact was made with a Seattle brewery about sponsorship. Unfortunately the beer officials opted to go with the other baseball team in Tacoma which claims to have younger, faster and more talented players.

Larry Couture returns as general manager. His primary task is to negotiate player compensation, the amount each player is to contribute to team expenses in order to play. **Skip Stansbury** is the field manager and decides who is going to play out of those who show up. He has never started the same line up in successive games. New recruits to the club include **Brad Maxa**, who might be able to play shortstop, and **John Bell**, who says he can play in the outfield.

Brad Poole has been made an admiral in the Navy reserve. He follows in the footsteps of the late **Robert Copeland,** the last lawyer/admiral we had around here. Copeland was a naval hero in WW II whose ship was sunk by the Japanese in the battle of Leyte Gulf. The Navy named a ship after him. In these more peaceful times Brad's biggest problems may be reduced defense spending, chaperoning aviator conventions and dodging an occasional Toyota on his way to lunch.

Phil Sloan has returned from a four week vacation in India. We will not speculate what there is about India that would warrant a vacation or why it would take four weeks to see/do it. Phil says that on one Saturday morning while staying in the Indian city of Goa, he caught O.J. from L.A. on CNN.

The second annual TPCBA bar convention is scheduled for the weekend of September 22-24 at the Alderbrook Inn on Hood Canal. After the Saturday evening dinner the convention committee has scheduled a magic show in the place of the usual speaker. This is in recognition that spouses and children are expected to be in attendance and that bar members, after a hard day of CLEs, golf tournaments and a few pre-dinner libations, tend to nod off easily. For those who insist on a boring after dinner speaker, tapes of a panel discussion of an ABA subcommittee on proposed changes to the Model Probate Code will be available for viewing.

Jack Rosenow has joined the staff of JAMS/Endispute in Tacoma.

SOUTH KING COUNTY REPORT

by **THERESA AHERN**

Finally, the long-awaited column of the South King County Bar Association's poorest scrivener of record appears. An important announcement before I begin: *The annual SKCBA golf tournament will be held on Friday, August 11, not on the last Friday of July. And now, the year in review:*

June 1994: Befitting our esteemed president, **Jane Rhodes**, the year began with a nautical flair. She and her entourage were sworn in at a dinner cruise on Lake Washington. This was a combined outing with our good friends in the East King County Bar Association. One of the many luminaries attending was Justice **Richard Guy**.

July: Fun was had by all at the annual SKCBA Golf Tournament. Well, maybe fun was not had by the East King County contingent, who were soundly defeated by the SKCBA aces, including our own **Eric Aaserud**, who subsequently left the practice of law for whiter pastures in the mountains of Sun Valley.

August: A SKCBA foursome invaded the East King County's turf and upheld our honor at the EKCBA's annual golf tournament. The word is that the SKCBA representatives also took home many of the fancy door prizes. This dishonor resulted in some entertaining correspondence between **Bob Kuvara** and **Alex Wirt**.

September: The monthly dinner meetings at Anthony's HomePort in Des Moines began with a talk by **Theron Morgan** about batterers' treatment in King County.

October: King County Superior Court Presiding Judge **Anne Ellington** visited us for the annual State of the Court address. She brought with her some fancy drawings and a nifty model of the new Kent Regional Justice Center (complete with little trees). Also in October we had some sad news. Long-time SKCBA member **Alva Long** passed away. His nattily attired self will not soon be forgotten.

November: Attorneys from the SCKBA schmoozed with bankers and accountants. The theme was "Working Together to Benefit our Clients." Showing remarkable restraint, I have resisted adding any smart-aleck comments. On the political front, our own **Steve Johnson** was elected to the state senate. **Bob Stead** was elected judge of Federal Way District Court. **Linda Thompson** was elected to Aukeen District Court.

December: Our annual Winter Holiday Party took place at the Glenacres Golf & Country Club. Although several couples were given bum directions, everyone eventually made it to the party. A good time was had by all.

January: **Ronald Gould** and **Howard Todd** invoked spirited debate with their arguments on Pro/Con Positions on Mandatory Dues Referendum—Should the SKCBA Take a Position? Parliamentary debate ended the discussion. President Rhodes objected to the technical arguments, reminding us that she ran on a platform of "Fun, fun, fun." On a sad note, long-time Renton attorney **David Dobson** passed away.

February: Our debate from January continued without the presence of Mr. Gould and Mr. Todd. We finally agreed that we would not take a position on the referendum. Also in March, we completed our first food drive, which was a success. This event was co-chaired by **Dave Tracy** and Judge **Judith Eiler**.

March: We had our annual dinner with the Supremes in Olympia. Justice **Barbara Madsen** regaled us with her personal ancedotes about the other justices in attendance.

April: Our membership was encouraged to hear from King County Law Librarian **Jean Holcomb** and King County Superior Court Judge **George Mattson** that 5,000 square feet of the new Kent Regional Justice Center will be devoted to a new branch library. Yippee!

Miscellaneous:

The Stork Cometh (especially in this office): It was a boom year for babies in South King County: **Kim Adams Pratt** and her husband, a baby girl; **Jennifer Ewers** and her husband, a baby girl; **Van Collins** and his wife, a baby boy; **Bonnie Lindstrom** and her husband, a baby boy; **Kennlyn Gallinger** and her husband, a baby boy; **Phil Dunlap** and his wife, a baby boy. In fact, with number two, Phil is now a stay-at-home dad.

Engagements:

Our past-president, **Mike Salazar**, narrowly escaped arrest to become engaged. We all expect to be invited to the nuptials scheduled for next summer.

Welcomes:

Congratulations to **John Ryan** who joined Curran, Kleweno & Johnson in December.

Promotions:

Heidi Peacock was made a partner at Eide, Vogel & Peacock in January

Golf Tournament:

As indicated above, due to scheduling difficulties(you know who you are, **Bob Thompson**) the annual SKCBA golf tournament will not take place on the last Friday in July. The tournament will be held on Friday, August 11th at Enumclaw. We look forward to summarily dispatching the East King County contingent as we have in prior years.

Hellos and Goodbyes:

"Hello," to our new incoming president **Tom Campbell**. "Goodbye," to outgoing president **Jane Rhodes**, who was an oustanding leader (and I am not just saying that because she is my boss).

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Prior to joining Davies, Roberts & Reid, Ms. Aglion was law clerk for the Honorable Robert F. Utter, Justice of the Supreme Court of Washington, and the Honorable C. Kenneth Grosse, Washington State Court of Appeals. Ms. Aglion graduated from Brandeis University (B.A., magna cum laude, 1983), Georgetown University (M.A., International Relations, 1986), and the University of Washington (J.D., with honors, 1991) where she was Order of the Coif and Executive Articles Editor of the University of Washington Law Review (1990-1991).

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We wish our many friends and former colleagues at Bullivant continued success. We will miss your camaraderie.

*Admitted in Washington and Oregon.

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Lawyer Ethics & Discipline Former WSBA Chief Disciplinary Counsel

Leland G. Ripley
Ste. 3620, 1000 2nd Avenue
Seattle, WA 98104-1004
(206) 223-2082
fax (206) 382-1105

announces his availability for consultation, association or representation regarding lawyer ethics issues, defense of disciplinary grievances, as well as consultation, association, or expert testimony regarding plaintiff's claims for lawyer malpractice.

Professional Malpractice

Joseph J. Ganz
is available for consultation, association or referral of substantial claims of professional malpractice.

Kraft, Kimbrough & Ganz
11033 N.E. 24th, #200
Bellevue, Washington 98004
Phone: (206) 451-1202

Police Misconduct

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Theodore Spearman, P.C.
755 Winslow Way East
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fax (206) 682-0675
toll-free (800) 247-2157

announces his availability for consultation, association or referral of substantial claims of white-collar malpractice.

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Roger K. Anderson,
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AssociatePosition—Five-attorney Vancouver, WA firm seeks an associate

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Resumés sought: Seattle-based nonprofit institute providing legal and policy advice to noncommercial overseas organizations now accepting resumés from attorneys for future positions. Applicants should have practiced for minimum of 3 years, have experience in real property law, international development or policy analysis, demonstrated interest in less developed countries and willingness to live overseas. Women and minorities encouraged to reply. Send resumé in confidence to Box 458, WSBA.

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Employment and union-side labor law firm seeks attorney with experience in these areas. Excellent writing and communication skills necessary. All inquiries confidential. Send resumé and writing sample to Clifford Freed, Frank and Rosen, 705 2nd Avenue, Seattle, WA 98104. No telephone calls please.

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Edna P. McBain: seeking any wills dated after 02/17/89 of Edna P. McBain. Call Landrum & Balkema (206) 524-2775.

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Average Coupon Equivalent Yields from the Auction of 26-week Treasury Bills: 1985 to Date

These are the average coupon equivalent yields from the auction of 26-week treasury bills from December 1984 to date. The highest rate of interest permissible under RCW 19.52.020(1) is computed by the addition of four percentage points or is 12% per annum, whichever is higher.

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

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

The average coupon equivalent yield from the first May 1985 auction of 26-week treasury bill applicable to the computation of the maximum allowable interest rate for June 1985 is 8.38%. According to the state treasurer's office, the maximum allowable interest rate for June 1984 is 12.38%. Note that when the equivalent bond yield is below 8%, the maximum interest allowable remains at 12%.

MONTH	YIELD	RATE
1985		
January	9.19	13.19%
February	8.48	12.48%
March	8.78	12.78%
April	9.54	13.54%
May	9.06	13.06%
June	8.38	12.38%
July	7.53	12.00%
August	7.44	12.00%
September	7.93	12.00%
October	7.69	12.00%
November	7.71	12.00%
December	7.69	12.00%
1986		
January	7.64%	12.00%
February	7.48%	12.00%
March	7.42%	12.00%
April	7.22%	12.00%
May	6.46%	12.00%
June	6.37%	12.00%
July	6.72%	12.00%
August	6.11%	12.00%
September	5.98%	12.00%
October	5.38%	12.00%
November	5.34%	12.00%
December	5.52%	12.00%
1987		
January	5.69%	12.00%
February	5.79%	12.00%
March	5.83%	12.00%
April	5.76%	12.00%
May	6.07%	12.00%
June	6.46%	12.00%
July	6.40%	12.00%
August	5.95%	12.00%
September	6.45%	12.00%
October	6.66%	12.00%
November	7.33%	12.00%
December	6.55%	12.00%
1988		
January	6.42%	12.00%
February	6.67%	12.00%
March	6.41%	12.00%
April	6.20%	12.00%
May	6.21%	12.00%
June	6.41%	12.00%

MONTH	YIELD	RATE
1988, continued		
July	7.05%	12.00%
August	7.04%	12.00%
September	7.52%	12.00%
October	7.79%	12.00%
November	7.86%	12.00%
December	8.13%	12.83%
1989		
January	8.73%	12.73%
February	8.86%	12.86%
March	9.04%	13.04%
April	9.18%	13.18%
May	9.38%	13.38%
June	9.16%	13.96%
July	8.44%	12.44%
August	8.05%	12.05%
September	8.12%	12.12%
October	8.31%	12.31%
November	8.36%	12.36%
December	7.89%	12.00%
1990		
January	7.69%	12.00%
February	7.93%	12.00%
March	8.15%	12.15%
April	8.22%	12.22%
May	8.24%	12.24%
June	8.28%	12.28%
July	8.03%	12.03%
August	8.01%	12.01%
September	7.56%	12.00%
October	7.75%	12.00%
November	7.59%	12.00%
December	7.41%	12.00%
1991		
January	7.31%	12.00%
February	6.82%	12.99%
March	6.91%	12.00%
April	6.36%	12.00%
May	6 06%	12.00%
June	5.87%	12.00%
July	5.98%	12.00%
August	5.98%	12.00%
September	5.85%	12.00%
October	5.63%	12.00%
November	5.30%	12.00%
December	5.00%	12.00%

MONTH	YIELD	RATE
1992		
January	4.56%	12.00%
February	4.00%	12.00%
March	4.08%	12.00%
April	4.28%	12.00%
May	4.16%	12.00%
June	3.91%	12.00%
July	3.84%	12.00%
August	3.42%	12.00%
September	3.40%	12.00%
October	3.00%	12.00%
November	2.86%	12.00%
December	3.37%	12.00%
1993		
January	3.57%	12.00%
February	3.38%	12.00%
March	3.19%	12.00%
April	3.14%	12.00%
May	3.13%	12.00%
June	3.07%	12.00%
July	3.32%	12.00%
August	3.19%	12.00%
September	3.35%	12.00%
October	3.12%	12.00%
November	3.17%	12.00%
December	3.35%	12.00%
1994		
January	3.37%	12.00%
February	3.39%	12.00%
March	3.51%	12.00%
April	3.88%	12.00%
May	4.16%	12.00%
June	4.57%	12.00%
July	4.70%	12.00%
August	4.92%	12.00%
September	4.93%	12.00%
October	5.08%	12.00%
November	5.61%	12.00%
December	5.93%	12.00%
1995		
January	6.63%	12.00%
February	6.73%	12.00%
March	6.38%	12.00%
April	6.29%	12.00%
May	6.18%	12.00%
June	6.12%	12.00%

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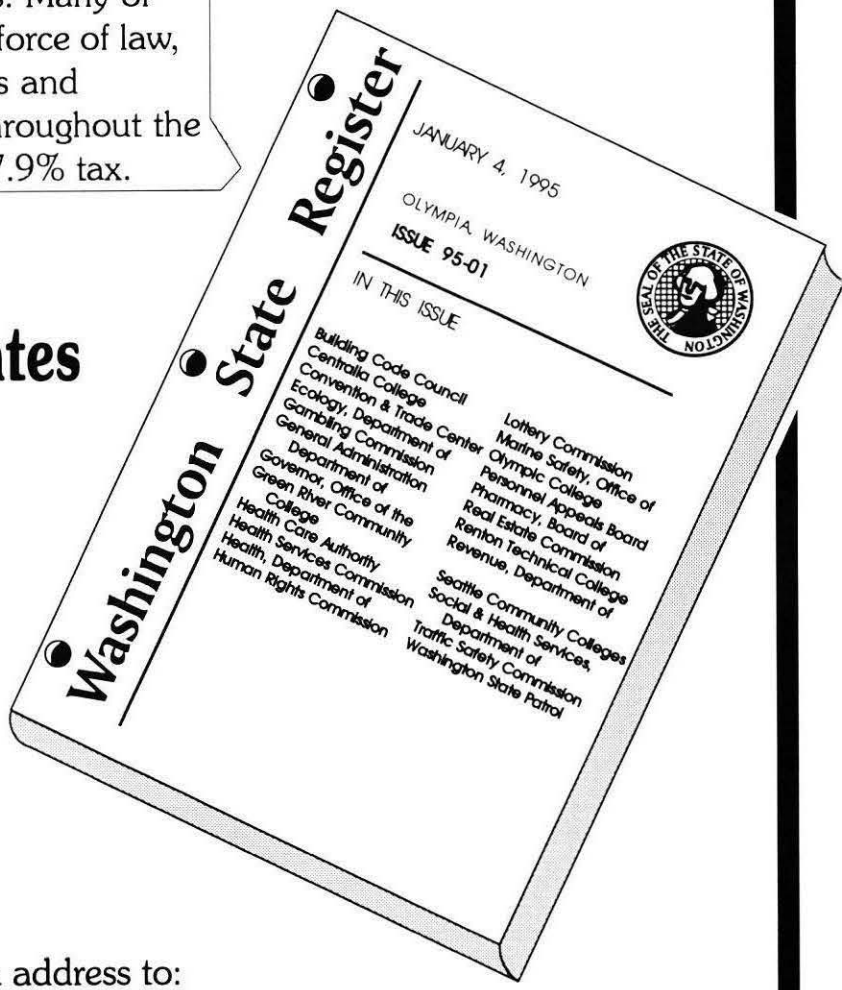

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