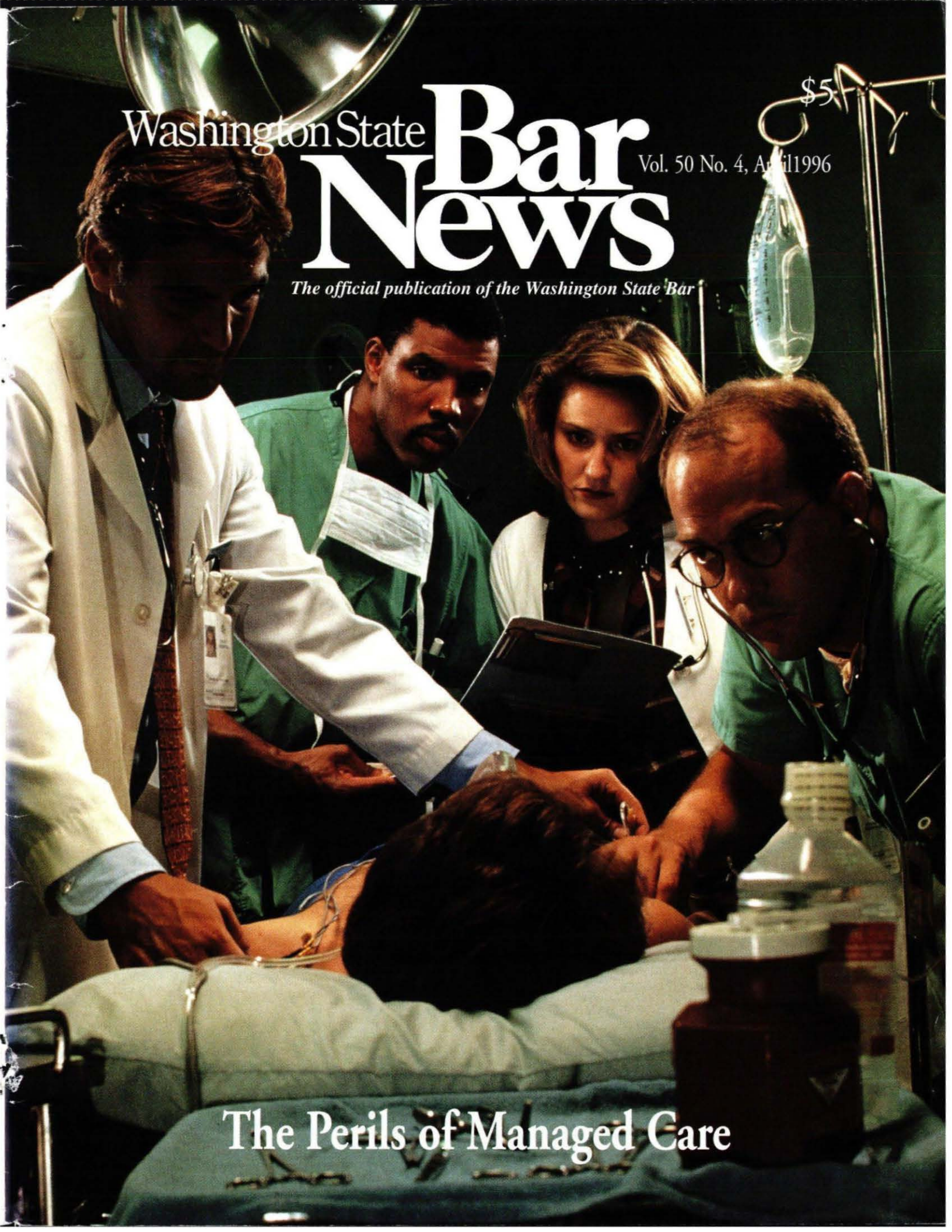

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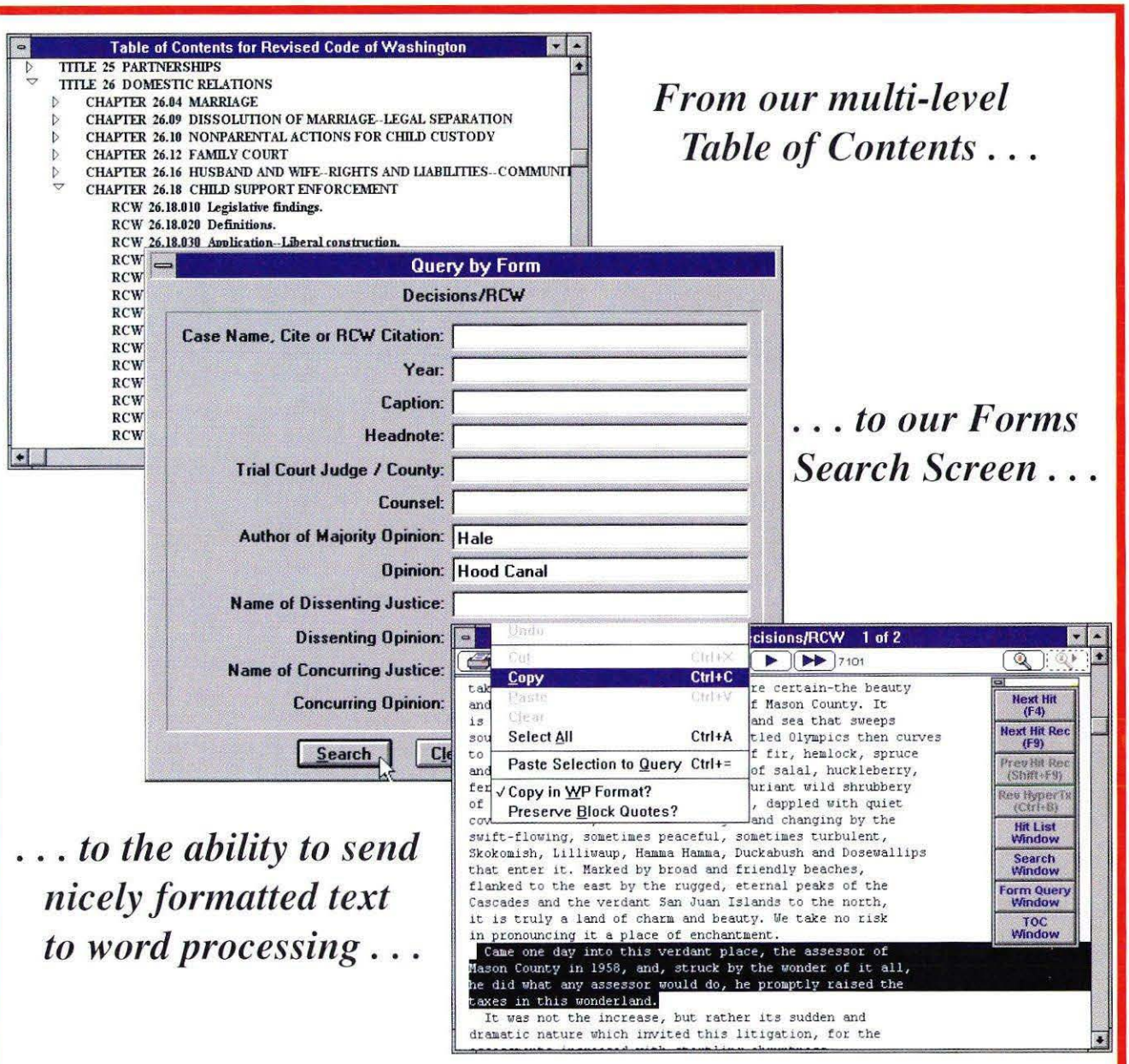
Washington State Bar News

Vol. 50 No. 4, April 1996

The official publication of the Washington State Bar

The Perils of Managed Care



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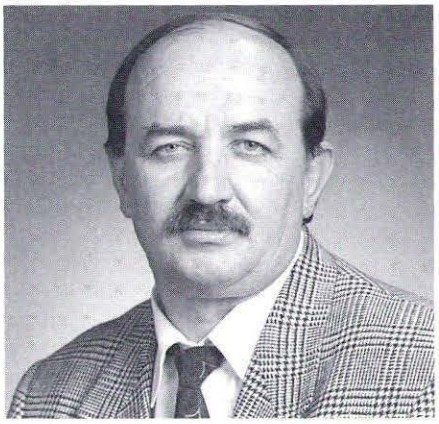

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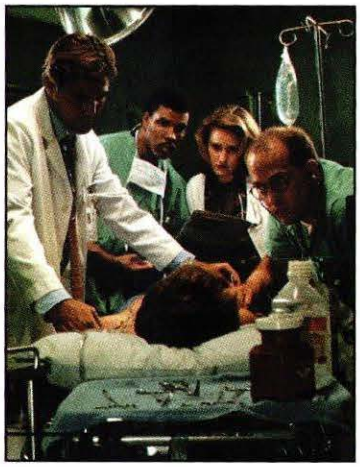

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Vol. 50 No. 4 April 1996

The official publication of the Washington State Bar

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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.

Law Practice for Sale

Editor:

My congratulations to Michael Keller on his article "Law Practice for Sale" in the February 1996 *Bar News*.

I believe this issue will affect more lawyers than nearly any other issue considered by our Bar Association.

Every chance I get I ask Bar presidents and Bar governors, "What are you going to do for me as a practicing lawyer?" So far, I haven't received answers that I thought were designed to help me as a practicing lawyer. Let me try again.

Dear President Shea and Members of the Board of Governors of the Washington State Bar Association: Are you willing to take an active role in sponsoring and requesting an appropriate change to the Rules of Professional Conduct that will allow for the sale of a law practice?

If your answer is yes, how soon?

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EDWARD C. BEEKSMA
Oak Harbor

Alva & Groucho

Editor:

In his February 1996 "Exec's Report," while trying to say that the liaison to the WSBA Board of Governors representing both WACDL and the South King County Bar Association wasn't Alva Long, Dennis Harwick implied that Alva wasn't a member of WACDL ("He [Alva], like Groucho Marx, wouldn't belong to any association that would accept him as a member!").

Here are the facts: Alva Long was one of the first criminal defense attorneys to join WACDL. We accepted him as a member. In fact, you might say we did more than accept him: In one of our first association journals, Steve Hayne's "trial tips" column, turned out to be a piece in praise of Alva Long ("While many prosecutors considered Alva Long a raving lunatic . . . the fact remains that few could successfully try a case against him, and fewer still could stand to try more than one.")

Even after we printed the article, Alva continued to pay his dues and show up for occasional WACDL CLE programs. Just before he died, he came by to pick up a set of mailing labels for WACDL members so he could mail them information about the dues referendum.

You might even say that Alva kept paying his dues to WACDL after he died. His brother, Bill Long (also a WACDL member), donated a set of Alva's ties to WACDL; we made some money for the association by auctioning them off at our holiday party. That auction also provided one more opportunity for some of our members to acknowledge their love and respect for Alva.

They talked about his work, and they talked about how he did it. It reminded me of one other thing Steve Hayne wrote in that 1988 "trial tips" article: "I didn't realize it at the time, but Alva taught me the most valuable lesson I've learned in this profession: to quit taking this business so seriously, to stop every once in awhile and laugh at myself. As 'trial tips' go, that advice tops my list."

TERESA MATHIS
Executive Director, WACDL

Update from the Front

Editor:

In early December I received word that I would be going to Bosnia to serve as a legal advisor to the Peace Implementation Force (IFOR) commander. This came as a complete surprise to me, but it seems that the Force Commander had heard of my work in Somalia and made the request for me to join him. This will be very different than Somalia!

After a two-week delay in getting my orders, I departed California on Christmas Day, reporting in to Fort Benning for training on 26 December. This was the first time I had been at Fort Benning since I reported in for Jump School as an NROTC midshipman in the summer of 1966 (it CAN'T be nearly 30 years!) I was placed in a platoon with a strange mix of civilians, Air Force E-3s, and field grade officers. We were assigned open squad bays in a small outlying camp that had once been an NCO academy. I spent more time marching in formation that week than in the previous 15 years. On the positive side, the contract mess halls were great, and there was plenty of hot water in the showers. What more could a Marine require!?

I flew from Atlanta to Germany on a commercial flight on New Year's Eve, and reported in to Marine Headquarters at Panzerkaserne near Stuttgart when they opened on 2 Jan. On the 3d I flew to Brussels to be briefed by the NATO legal advisor, and had a productive afternoon meeting the people who drafted the Rules of Engagement and who will serve as my higher headquarters for this operation. On the fourth I flew back to Germany for my last phase of training at Hohenfels, an Army base in eastern Bavaria near

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Nurenburg. I was assigned to a 16-man tent with a congenial group of reservists and civilian augmentees; we successfully completed cold weather training; (it was about 5 degrees F. after the stove died). It is still not clear to me if you can train for cold by being cold. The following day we marched out in formation to watch a 30-lb. antitank mine being detonated. Result: a VERY big hole in the ground and a new found respect for mines. In the second full day we finally got down to business, mine awareness and recognition of the potential dangers. There was an excellent "field practice" session where we were shown trip wires and booby traps, and how to deal with an incident if a mine is detonated and someone is injured or killed. Training was completed on 6 Jan.; I was eager to depart so I could get to work in my new assignment.

I arrived in Zagreb on Sunday 7 Jan. 96; this is the location of the main IFOR headquarters. Admiral Smith has moved his "forward" elements to Sarajevo, keeping the bulk of the staff here due to space limitations there. I had only a couple of hours turnover with Army Col. Jim Burger; he departed on Monday morning to Sarajevo, leaving me to run the legal office here in Zagreb. I have an Air Force Master Sergeant legal chief, no other lawyers yet, and we share office space with the Pol/mil advisors. I have been very busy, taking the 0630 shuttle from my hotel and returning with my laptop computer at about 8:30 PM. This is truly an international staff. I work for a French two-star general (Maj. Gen. Fleury) Deputy Chief of Staff, and U.S. personnel make up only about 30% of the headquarters staff of about 200 people. We have one-star generals as all our assistant chiefs of staff, including a Turkish intelligence officer and a Greek personnel officer. I am in a NATO position here, and have a much broader responsibility than simply a U.S. role. In other words, I have to think of myself as multinational command advisor, and I have to look objectively at the way the U.S. (or any individual nation under our control) conducts its business.

In my first week I worked on a number of interesting projects, including advice to a German Lt. Col. on the Rules of Engagement and how they can be implemented by the German Forces. On Thursday I participated in negotiations with the Croatian Ministry of the Environment concerning the proposed environmental annex to the Status of Forces Agreement (SOFA). My partners in the negotiations were two British officers, one is the legal advisor for our support command. Friday I advised a Canadian Lt. Col. on the question of airport landing fees and whether they are payable under the SOFA with Croatia. I had dinner that night with the Swedish commander of their contingent that recently arrived in Croatia. My biggest project for the first week has been the development of written guidance on the detention and delivery of war criminals indicted by the International Tribunal in the Hague. We have a very limited mission with respect to the 52 alleged war criminals, but have to make plans in the event we take one into our custody.

The Zagreb Railway Station was the starting point for one of the great travel books of this century, Dame Rebecca West's *Black Lamb and Gray Falcon*. In the rainy spring of 1937 the author began a six-week journey by train through Yu-

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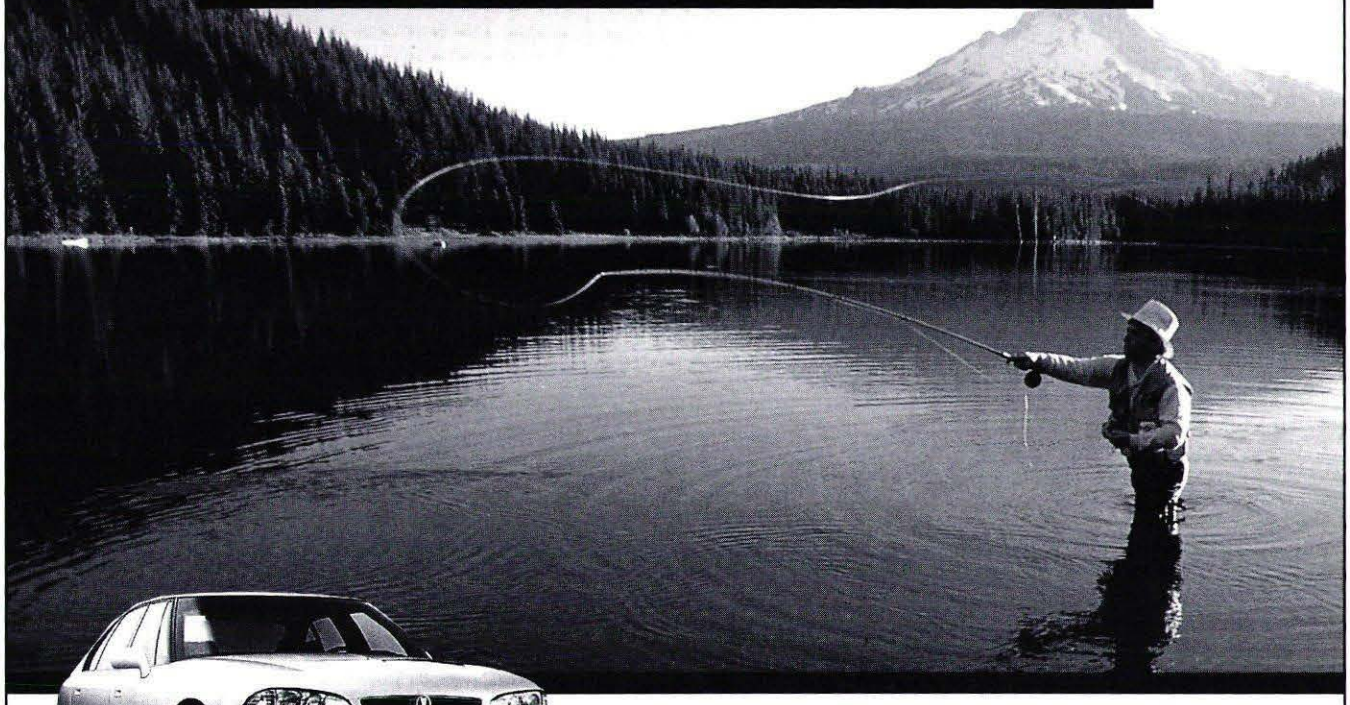

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goslavia. She "had come to Yugoslavia to see what history meant in flesh and blood." Her statement is significant for me as I begin this assignment as part of the Peace Implementation Force. In her book she was able to chronicle the long-standing conflict and tension that was about to erupt into World War II. Tonight I walked over to the Esplanade Hotel, built in 1925, and still one of the great Hotels in Europe. I don't think the building changed that much since Rebecca West stayed there after arriving by train from Austria. Zagreb means "behind the hill"; the hill is the site of the upper town which dominates the lower town, where my hotel is located. The main part of the city consists of gloomy, turn-of-the-century neo-Renaissance buildings and pavilions, separated by tree-lined boulevards. One travel writer said that Zagreb requires a chilling drizzle to show it off, and I had enough of that during my first week in town. As a result of my long hours at the office I have yet to see my hotel in the daylight, or use the wonderful park across the street. I would like to come back to this city with Joan and take long walks in the middle of the day, visiting the many parks and museums.

Overall, I am pleased and excited to be part of this operation; the living conditions are much better than I expected, and the work is fascinating. I even have time for a local Ojuscko Pivo (beer) with my dinner at the UN mess in the evening. I still hope to move to Sarajevo in about a week as more space opens up in the forward headquarters. Marines are supposed to be the first ones into the fray, and I am eager to be with the Commander, Admiral Smith, closer to the decision-making process. I will try to maintain my e-mail capability from Sarajevo. My regular mail address will be:

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Capital Punishment, Affirmative Action & Unity

Editor:

I anticipate that you will receive considerable adverse comment to your editorial on page 11 of the February issue of the *Bar News*.

Consequently, I want to rush this note to you: Your editorial in my opinion is right on! Also, it took considerable courage to write that editorial — and that is appreciated.

ROBERT G. MOCH
Seattle

Editor:

I have just read your February editor's page about the WSBA courageous award made at last September's annual luncheon. The recipients of these awards are selected (often from nominees made by the membership at large) by the Board of Governors after evaluation and recommendations by its Awards Committee. As a governor, I had the privilege of serving on that subcommittee this past year. I was the person who nominated Mr. Ford for this award and had the humble honor of presenting it.

To suggest that a "courageous award" is ill-advised because the recipient might not meet the current litmus test for political correctness would be the antithesis of courageousness by the bar. Why is it "nonsense" to honor an individual who has displayed exceptional courage in his practice of law, regardless of its current political popularity? You advocate, "We should honor an individual only if his or her courage is exercised in the pursuit of a just goal. And if a majority of our members do not believe the goal is just, then honoring such an individual on behalf of those members is inappropriate." Your "just goal" and mine might differ considerably.

My other nominee for the same award was Richard Sanders, who has through an exemplary career consistently displayed courageous actions on behalf of unpopular persons, from the mentally ill to the South African Consulate, the Second Amendment Foundation, Lyndon LaRouche, and property rights activists, often at considerable expense with no remuneration, and high-profile pillory in the press. Justice Sanders was not further considered because after my nomination he announced his campaign for the Supreme Court and it was felt inappropriate in the height of a campaign for the organized bar to be giving awards to one of the contestants for the highest judicial office. I hope he will be considered in the future.

To suggest that we honor only lawyers who advocate goals that the majority agrees with seems to me to ignore one point of the award and one of the nobler aspects of the profession. Under those criteria, the profession would never have honored John Adams, Abraham Lincoln, Clarence Darrow, Thurgood Marshall, or William Dwyer. To be criticized for offering a "controversial" courageous nominee strikes me as ironic, and for future Boards and Awards Committees to cower to such criticism would certainly be less than courageous.

The issue was not whether you agreed or disagreed with the death penalty. The issue was whether you acknowledged the courage of an attorney who, despite the unpopularity of his clients, the popularity of the death penalty, the often hopelessness of the cause, the great personal sacrifice and risk, and the awesome burden of the responsibility, repeatedly undertakes to represent the condemned.

It did occur to me that those who failed to see the difference might resent the award. It never occurred to me not to have the courage to give it.

JAN ERIC PETERSON
Seattle

Editor:

I am enjoying reading your editorials in the *Bar News* as well as your comments to certain of the letters published in it. I am quite happy that you are fond of expressing your opinions. I write, however, to disagree with certain of your opinions expressed in the most recent issue where you wrote of "Capital Punishment, Affirmative Action and Unity."

My partner, Jan Peterson, presented one of the awards you mentioned. My purpose in writing is not to justify what motivated Jan; he is quite capable of doing that. My purpose is to take issue with certain of your presumptions.

As I understand your comments, you felt that the "Courageous Award" ought not to be awarded to Tim Ford because capital punishment is likely favored by a majority of Washington lawyers.

You are right when you characterized the death penalty as controversial. That, coupled with the fact that a majority of lawyers, if not residents of Washington state, oppose the death penalty makes it even more appropriate for Mr. Ford to be awarded recognition for his work on behalf of death row inmates.

It took courage for him to take on the cause of individuals who are unpopular.

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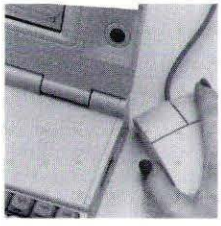

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It took courage to devote substantial skill, effort and time to assist these individuals. It took courage to devote a legal career to helping those most people think unworthy of help.

Were the Bar Association to recognize only those individuals who have done good work on behalf of clients or causes of which a majority approve, I would probably ask, "Why?" That doesn't take courage.

Were your criterion about appropriateness of recognition to be in place in 1930s Germany, it would be inappropriate to recognize the courage of those speaking up against the Chancellor of Germany at that time.

I do believe that our profession recognizes that we have an ethical obligation to take on causes with which we do not agree. However, I also believe that a majority of members of our association do not practice that way. I also believe that a majority of members of our association will agree that good legal work on behalf of unpopular causes and people ought to be recognized, if only to encourage more participation in our ethical responsibility towards the poor, the downtrodden and hopeless.

I do not believe for one minute that there are many people in support of the death penalty who resent Mr. Ford's award. They may be jealous that his skills are not used on their side.

Thus, I disagree with your conclusion that to honor an individual simply for displaying courage is nonsense. Mr. Ford met your requirement of "pursuing a just goal" by his efforts on behalf of people that a vast majority of our profession would pay to avoid. The "just goal" furthered by Mr. Ford's work is the "cause of the defenseless . . ." mentioned in paragraph 8 of the Oath of Attorney.

With respect to the affirmative action award, my fear is that you use a loaded term in its most pejorative sense. In doing so, you give credibility to "sound bite-itis." If affirmative action is meant to denominate mindless quotas then your comments may have force and meaning. However, affirmative action may mean as little as remembering that certain minorities may be uncomfortable in a room filled with people who do not share their background. This may be true with respect to racial or religious or sexual minorities.

Affirmative action does not have to be a sin. It can be an aspiration, a hope or a goal. By condemning a term because of its extreme usage I fear that you are likewise condemning the broader idea of inclusion.

I hope that lawyers who do the work that Tim Ford has done will continue to do so. It is also my hope that lawyers who aspire for inclusiveness will not be demeaned by use of a sound bite approach to what underlies true affirmative action.

Thanks for being thought-provoking. There is unity in our association in recognition of good skills practiced well. There is unity, also in the affirmative action of dealing with all lawyers as members of an honorable profession and by not excluding those who probably don't look like they would fit into a picture taken of the WSBA Board of Governors 75 years ago.

I will enjoy reading your future columns.

KELBY D. FLETCHER
Seattle

It's articulate, thoughtful letters such as yours (and Jan's) that make it a pleasure to have someone disagree with you. Please view my response in the same spirit of constructive discourse.

Unlike one attorney who contacted me, you do not confuse affirmative action with equal employment. The latter, as you know, is legislation which ensures equal hiring practices; a goal no-one should dispute. The former, by contrast, is a controversial method to impose "balance" in the work force through preferences, set-asides and quotas.

However, you do travel between affirmative action and the more nebulous goal of "inclusion" with ill-advised ease. You state that, "affirmative action may mean as little as remembering that certain minorities may be uncomfortable"; or that it, "can be an aspiration, a hope or a goal." I submit that such definitional fuzziness precludes a clear discussion of the issue. Thomas Sowell said it best when he stated:

> *With affirmative action coming under increasing attack in both the courts and in the political arena, its survival depends primarily on the ability of its advocates to confuse the issues. The first line of defense is to define "affirmative action" so broadly and so vaguely that it includes almost anything that is done to help advance minorities.*

I therefore assert that we must apply an accurate definition to affirmative action when we are discussing this award. And if we employ such a definition, we are left with a partisan award which alienates those who object to affirmative action. We should not be so quick to discount the contrary beliefs of our fellow members.

We face a choice: alienating colleagues, or conducting our affairs in a manner befitting the mandatory status of our bar. - Ed.

Editor:

I found it very difficult to follow the logic in your editorial that appeared in the February 1996 issue of the *Bar News*. In this piece you argued that the latest recipient of the WSBA Courageous Award, Mr. Tim Ford, was not worthy because the courage he displayed in representing death penalty inmates was "irrelevant" because the cause was not just in the eyes of the majority of the bar.

I submit that practicing the courage of one's convictions in the face of public opposition demonstrates great courage. It was by standing firm against the odds that great injustices have been avoided. In the movie "Twelve Angry Men," for example, Henry Fonda's character held his own against the wishes of 11 other jurors who wanted to convict an innocent man. Clarence Darrow, Gerry Spence and Dr. Martin Luther King took stances in support of minority-held positions and, in doing so, challenged the beliefs and laws of the majority. If we were to accept the premises of your argument, we should consider the courage displayed by these individuals irrelevant and unjust.

I ask you and those who agree with your article to consider where the state of American Justice would be today if not for the courage exhibited by people such as Mr. Ford. As Clarence Darrow stated:

> I have lived my life, and I have fought my battles, not against the weak and the poor — anybody can do that — but against

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power, against injustice, against oppression, and I have asked no odds from them, and I never shall.

It is very shortsighted to suggest that only those views held by the majority are worthy of public accolades. By doing so, we denigrate the achievements and beliefs of those who stood up for what they believed in.

The WSBA Board of Governors did well to salute the bravery exhibited by Mr. Ford in defending unpopular clients against capital punishment.

EVAN LOEFFLER
Spokane

WSBA Protectionism

Editor:

Washington is one of 26 states that deny reciprocity to out-of-state lawyers. There are two apparent reasons for denying reciprocity: (1) the laws of Washington are so unique that the applicant must be tested to prove his understanding of them; and (2) no lawyer should be allowed to practice until his character has been vigorously scrutinized by the Washington bar. A closer examination of these reasons shows that both crumble under investigation, revealing the true reason behind such enormous barriers to admission — protectionism.

The primary reason advanced by the prevailing anti-reciprocity crowd is the purported unique nature of Washington law that requires individual testing before admission. While Washington law has slight nuances that differ from other states, it is derived from the common law, a thread shared by all but one state (Louisiana). One need only glance through bar review outlines from different states, or read case law from other jurisdictions which cite Washington opinions as persuasive authority (and vice versa), to see the similarity of Washington law with the law of other states. To require the transplant attorney to suspend his trade for several months, while re-memorizing a similar batch of bar material, does little more than inhibit the attorney's attempt to resume his career.

The second apparent reason behind Washington's no-reciprocity policy is that a licensed lawyer should not be able to march into town and set up practice before she has met the rigorous character requirements of the Washington bar. This reason implicitly assumes that the original state which licensed the lawyer, under a character assessment system virtually identical to that used in Washington, should not be trusted and may have allowed a scoundrel to become licensed. Aside from the arrogance of such an implicit presumption, it illustrates the kind of bureaucratic logic that prompted De Toqueville to note more than a century ago that government (i.e., the state bar) generally stands in the way of free enterprise, rather than enables it. An attorney who has been granted a license to practice in another state should be freely admitted in Washington, subject to a brief post-licensing disciplinary history check.

The real reason behind Washington's denial of reciprocity is protectionism. The Florida and California bars, the two patron saints of protectionism, instituted the anti-reciprocity policy decades ago as a means of discouraging carpetbagger lawyers from "invading the turf" of native lawyers. Washington, with its own saturated legal market, has joined the majority, enacting its own admission restrictions that make an out-of-state lawyer think twice before having the audacity to relocate. While judicial relief is the usual remedy for challenging inequity suffered at the hands of a self-regulated monopoly such as the bar, the courts have refused to intervene, rejecting claims of anti-competitiveness and deferring to the local bar's masterful minefield of obstacles.

Rather than remain within the comforts of a protectionist blanket, Washington should abandon the majority and join the 24 states that still offer reciprocity. The minority recognizes that a lawyer who has passed a bar and has no subsequent disciplinary history problems has demonstrated her ability to spot issues, write coherently, and analyze legal problems — qualities that are easily transferable. By abandoning the anti-reciprocity policy, Washington will allow open competition in the legal field and ensure that its doors are not locked by a group which has been given the only key. Moreover, such a new policy will benefit Washington practitioners, as they will be able to avoid taking another bar exam if they relocate to a reciprocity state, since states in the minority generally confer reciprocity only if the applicant's home state does the same to their practitioners. Come on Washington, open your doors!

(The author is a licensed lawyer from Virginia who recently moved to Seattle, where he has been relegated to working as a "law clerk" while studying for the bar and completing yet another character assessment.)

PHIL BRENNAN
Seattle

Judicial Races

Editor:

This is a reply to your Editor's Page in the *Bar News* of January 1996.

Let us turn first to 1990. When I became Chief Justice in January 1989, the Chief Justice of a comparable mid-west state said to me that he was going to do nothing but campaign for the next two years. I felt that was wrong.

The first six months of 1989 were busy with the legislature endeavoring to place constraints on the judiciary through placing unacceptable power in the Judicial Qualifications Commission in response to the Judge Gary Little problem. Then the Supreme Court was out of the Temple of Justice while it was being remodeled. I worked on the details of the remodeling during the two years of my administration with the contractor and the Department of General Administration. Then I was appointed by Chief Justice Rehnquist as the sole state court representative on the Federal Courts Study Committee. This required 12 trips to Washington, D.C. and other cities as well as much committee work. I carried a full load of writing assignments as well as the administrative duties of the Chief Justice. I appointed the Commission on Washington Trial Courts in the hope that they would recommend ways to give state trial judges the same control of trials as federal judges have of jury selection and discovery. When filing time came I was exhausted and came down with phlebitis which put me in the hospital for a substantial time before the election.

Further, my Pierce County lawyer friends said that my opponent was not a threat and my supporters from 1984 were not motivated to work on what appeared to be an easy win. In addition, all the media was given to the more newsworthy Guy-Spellman race and, it being a primary, there was no voter's pamphlet covering the election.

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1992 was a five-person race and the "Year of the Woman." The two women in the race got into the finals while I finished third. Again there was no voter's pamphlet for the primary. In both of these races I received the endorsement of the Bar Association and 95% of the newspaper endorsements.

In 1989 there was a case called *Sofie v. Fibreboard*. As Chief Justice I presided and voted last. When the vote came to me it was 6 to 2. I felt that the issue regarding the relationship of the legislature to the judiciary and the right of jury trial deserved a full discussion and, since my dissent would make no difference in the outcome, I, too, dissented. Thereafter, since I had had the temerity to file such a dissent, the leaders of the plaintiff's bar shunned and ostracized me. So much for intellectual freedom; so much for judicial independence.

So long as you have an elected judiciary, you will have a subservient judiciary — beholden to the plaintiff's bar or the insurance companies, business or labor, the environmentalists or the polluters. An elected judiciary is chosen by whim, by name familiarity, by money and publicity. Selection on the basis of experience, merit and judicial record counts for little.

You criticize a lack of communication. I concede that most judges are not good politicians. They are, after all, interpreters of the law, not policy makers. Would you have judges campaigning year 'round? Would you spend the years before an election campaigning or doing the job? The court held sessions all over the state in the years preceding 1990, and yet the media finds little newsworthy in court proceedings or judges unless the proceedings involve a celebrity or shocking facts or unless the judge acts outrageously.

Walk a mile in a judge's moccasins; spend several hundred thousands of your own money in a campaign.

KEITH CALLOW
Seattle

I appreciate your response; however, I must take issue with some of your assertions. You state that, "So long as you have an elected judiciary, you will have a subservient judiciary." I disagree; rather, "So long as you have an elected judiciary, you will have an accountable *judiciary." The people are not well served by the assertion of one branch of government that it should be treated differently from the others.*

Regarding your assertion that "An elected judiciary is chosen by whim, by name familiarity," surely your defeat refutes that argument: You were the incumbent, you received 95% of the state's newspaper endorsements (with the attendant publicity) and you enjoyed name familiarity far beyond your original Supreme Court victory. Yet you did not prevail. Rather, I think you hit the nail on the head when you stated, "my Pierce County lawyer friends said that my opponent was not a threat and my supporters from 1984 were not motivated to work on what appeared to be an easy win."

Reelection does not require a judge to campaign "year 'round;" rather, it requires him or her to communicate with the electorate at election time — as you did in 1984. - Ed.

Yes, More on Nullification

Editor:

I have been following the continuing debate over jury nullification" — the juror's power to acquit against clear evidence of guilt — in this letters section with interest. In the January 1996 issue of the *Bar News*, the text of HJR 4205 appeared, which resolution requires that judges advise jurors of this power. In 1920, Justice Oliver Wendell Holmes acknowledged, ". . . the jury has the power to bring a verdict in the teeth of both the law and the facts." *Horning v. District of Columbia*, 254 U.S. 135, 138, 65 L.E. 185, 41 S.Ct. 53 (1920). This power of the jury to nullify laws has never been overruled, and it remains viable in the state of Washington with or without HJR 4205. *See*, e.g., *State v Salazar*. 59 Wn. App. 202, 211, 796 P.2d 773 (1990). The only material debate over HJR 4205 is whether jurors should be advised of their power in a trial setting.

As for the claim that selective nullification of laws by juries may breed contempt for laws in general, there is no evidence for the same in the four states where jury nullification is already an enumerated constitutional right: Maryland (Dec. of Rights, Art. 23), Georgia (Art. 1, Sec. 1, Para. XI), Indiana (Art. 1, Sec. 19) and Oregon (Art. 1, Sec. 19). Attempts to

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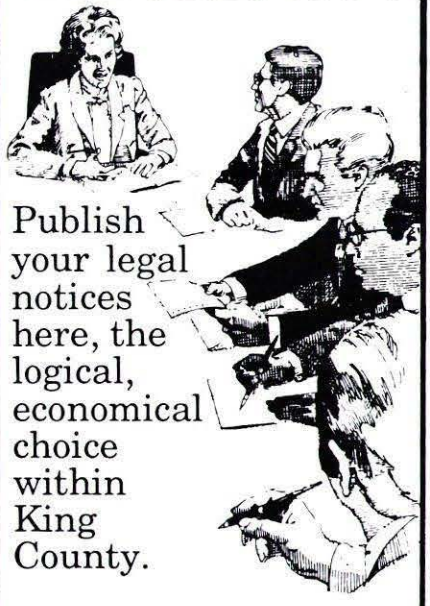

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have these state nullification clauses declared unconstitutional under the Fourteenth Amendment of the U.S. Constitution have failed *See,* e.g., *Wylie v Warden, Md. Penitentiary,* 372 F.2d 742, cert. denied, 389 U.S. 863, 88 S. Ct. 121, 19 L. Ed. 2d 131, rehearing denied, 389 U.S. 997, 88 S.Ct. 484, 19 L.Ed. 2d 500 (1967).

But the Washington bench and bar has a more immediate problem. Washington Pattern Jury Instruction 1.02, commonly used in criminal trials, contains a statement that jurors must accept the law as given by the judge, whether they agree with it or not. Jurors are regularly asked during voir dire about their willingness to obey the instructions of the judge. Those who are unwilling are dismissed for cause. Challenges to the statement, the questions or dismissals are regularly denied, without citation to any authority. Regardless whether telling jurors that they can "nullify" the law is a good idea, it is patently incorrect — and an outright invasion of the province of the jury — to tell jurors that they must accept the law, or the justice of the same, just because the judge gives it to them!

RICHARD SHEPARD
Tacoma

Losing a Big Case

Editor:

Please forgive the following opinion. For years I've read the stories on the Lawyers' Assistance Program page. Each month some lawyer finally realizes that it's hard to use illegal drugs or excessive alcohol and still maintain a law practice. Duhhhh.

In the January 1996 issue, the LAP page went too far. It presented a lawyer who was in "misery" because he lost a case! He said, "I seemed doomed to my quiet anguish forever." What a wimp! The guy said that he went into the trial as a boy and came out a man. No, I'm sorry, he's still a boy.

His mentor who "heard" his pain should have told him to grow up and stop whining. Instead, the misguided mentor acted like a liberal psychologist looking for a long-term patient and told him that he would never recover and that "no lawyer who cares — ever does." Eat my briefs. Good lawyers empathize with their clients but they don't put their own emotional future on the line every time they take a case. Neither do good surgeons, good EMTs, good detectives, good hospice nurses, good basketball coaches, etc.

This guy said, "I loved the case and felt we had a good claim." Wrong. You should love the law and feel that *your client* has a good case. Sure it hurts to lose a trial, but do we really need a LAP-sponsored men's support group for trial losers? If you say "yes" then you should consider a different career. From now on I'll see LAP and think some Lawyers Are Pathetic.

JOHN PANESKO
Chehalis

Recusal &Governance

Editor:

Ordinarily, reading the *Bar News* is not my favorite activity. However, I've just finished reading the Editor's response [January *Bar News*] to Mr. Acosta's letter; the latter was suggesting that all Roman Catholics "by definition" are biased on subjects to which the Pope has spoken and therefore should recuse themselves from cases involving those subjects. What a refreshing reply by the Editor! It has always amazed me that some nonreligious people seem to think that they alone are the paragons of objectivity, having jettisoned all bothersome religion-based scruples and dogmas. The Editor's response to Mr. Acosta correctly stated what should be obvious — that all of us have world views, philosophies, and/or principles of higher law which color our judgment. God forbid that we ever have inhuman judges who lack a conscience!

What Mr. Acosta overlooks is the logical outcome of his recusal suggestion: that only nonreligious citizens (such as himself) would be qualified to judge matters touching on religious and moral issues. Those of us who concentrate on religious liberty defense already have enough difficulty trying to educate judges as to the significance of religious exercise and autonomy to the believer. Mr. Acosta would exacerbate this challenge to the First Amendment.

As your Editor's reply noted, the other outcome to which Mr. Acosta is oblivious is the logical conclusion that all unbelievers such as he would have to recuse themselves from cases involving religious or moral issues because those judges do not have "neutral" personal views; on the contrary, they have personally rejected the claims to allegiance that the litigating or accused believer is seeking to exercise or express. Hardly a qualification for judicial fairness!

Finally, on another note, thank you for speaking out against a change in the governance of the WSBA. The only aspect of the present system that is undemocratic and "needing fixing" is, as you correctly observed, the complete disenfranchisement of those of us who are WSBA members but practice outside of the state. Please give us a voice in the organization to which we are required to be members.

Thank you again for bringing to the *Bar News* some much needed fresh air.

STEVEN T. McFARLAND
Annandale, Virginia

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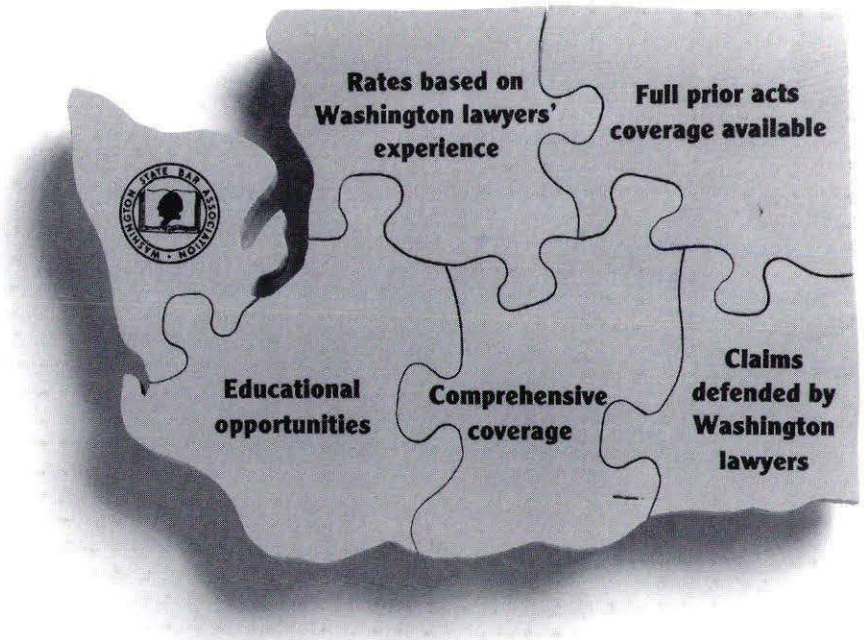

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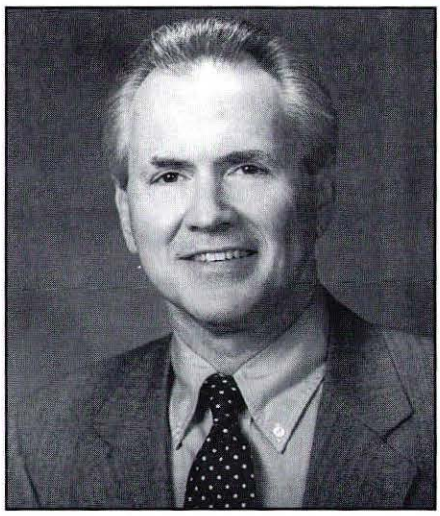
May 1st is Law Day

by **Edward F. Shea**
WSBA President



Edward F. Shea

May 1st is Law Day — every year. But for many of us a single day of the year is just not enough of a celebration of our profession. With no likelihood of relief from the incessant critics of the profession and the negative publicity from high-profile trials, we need more than a single day to spread our message in our communities. Our message is that our profession is filled with honorable lawyers who are imbued with a sense of public service. It is also "on message" that our legal system is not only working well but the undisputed model for all the world. Imperfect, of course, but what should be reassuring to our citizens is that the legal system is constantly scrutinized by concerned groups inside and outside of our profession in an effort to deliver on the promise of equal justice under law contained in the U.S. Constitution.

While President Eisenhower established Law Day U.S.A. in 1958, Congress, by joint resolution in 1961, designated May 1 as the official date for celebrating it. The American Bar Association has made celebration of Law Day U.S.A. a point of emphasis for years. In addition to providing strong support and materials, the ABA also makes several awards for outstanding programs each year. The Washington State Bar Association also has a contest for the best Law Day program in two categories: staffed and unstaffed local bar associations.

The theme chosen by the American Bar Association for this year's Law Day is: "The U.S. Constitution — the original American dream."

I encourage all local and specialty bar associations and the law schools as well to do at least one program in their local communities. A particularly easy one to undertake is a courthouse visitation program in conjunction with your local judges. With lawyers as guides and judges as lecturers this is a favorite with teachers and students from the local schools. Another program reverses this process and finds lawyers and judges visiting schools to answer questions from students in classes. This is as valuable in the junior high and middle schools as it is in the high schools.

For the more ambitious, the American Bar Association has produced booklets and materials that can be adapted for local use including essay contests, mock trials and many other programs. Call the ABA at (312) 988-5522. There is no need to struggle for innovative programs with the availability of materials from both the ABA as well as your fellow bar associations here in Washington.

There is no lack of material for Law Day programs. Consider the celebrated trials of the last few years. After the Rodney King trials, the Menendez brothers trial, the Reginald Denny trial, came O.J. and months of criticism of the system. No one emphasized that the legal system seemed to work in the Mike Tyson trial, the Susan Smith trial, the World Trade Center bombing trial and countless others. But it did work — in different parts of our country with very different defendants each charged with heinous crimes in high profile cases.

The trial of O.J. Simpson took almost 11 months from the time the jury was seated in November of 1994 to the verdict on October 3, 1995. With the civil trial seeking damages for the wrongful deaths of Ron Goldman and Nicole Brown Simpson this year, the media will be anything but restrained in commenting on the events surrounding the trial. Both the civil and criminal trial provide us with an abundance of material for creating programs that will educate the public about the law, the legal system, and the legal profession. And who would dispute the obvious need to do just that — educate the public about the law, the legal system, and the legal profession?

Random House, the New York publisher, has had two best sellers in the last year. Each was an apocalyptic vision of a segment of the legal system. In *The Death of Common Sense,* subtitled *How Law is Suffocating America,** attorney Philip K. Howard recites story after story of individuals frustrated by nonsensical legal procedures required by government. Frankly, had anyone of us been the subject of these bureaucratic entanglements we would also have been upset. Howard criticizes the legislative and administrative process observing, "To most experts, the highest art of American lawmaking is precision. Only with precision can law achieve a scientific certainty. By the crafting of words, lawmakers will anticipate every situation, everyone will know where they stand. Truth emerges in the crucible of the democratic process, and legal experts use their logic to transform it into a detailed guide for action. The greater the specificity, the more certain we are that we are providing a government of laws, not of men." Later he controversially declares, "The idea of a rule detailing everything has had the effect of reversing the role of law. We now have a government of laws against men."

These and many other points are made as he reviews the problem areas and proposes solutions. Emphasizing the importance of restoring judgment to the decision makers throughout the legal system, Howard makes a case worth analyzing for civic clubs, chamber of commerce gatherings and other public forums. Many elected officials and business owners have read this book.

Of course, there are at least as many anecdotes about the abuses of the law by individuals and businesses that provided the impetus for the system we now have. The history of fraud, graft, corruption and intentional disregard of health and safety

**See Robert Cumbow's review on page 54 of the June 1995* Bar News.

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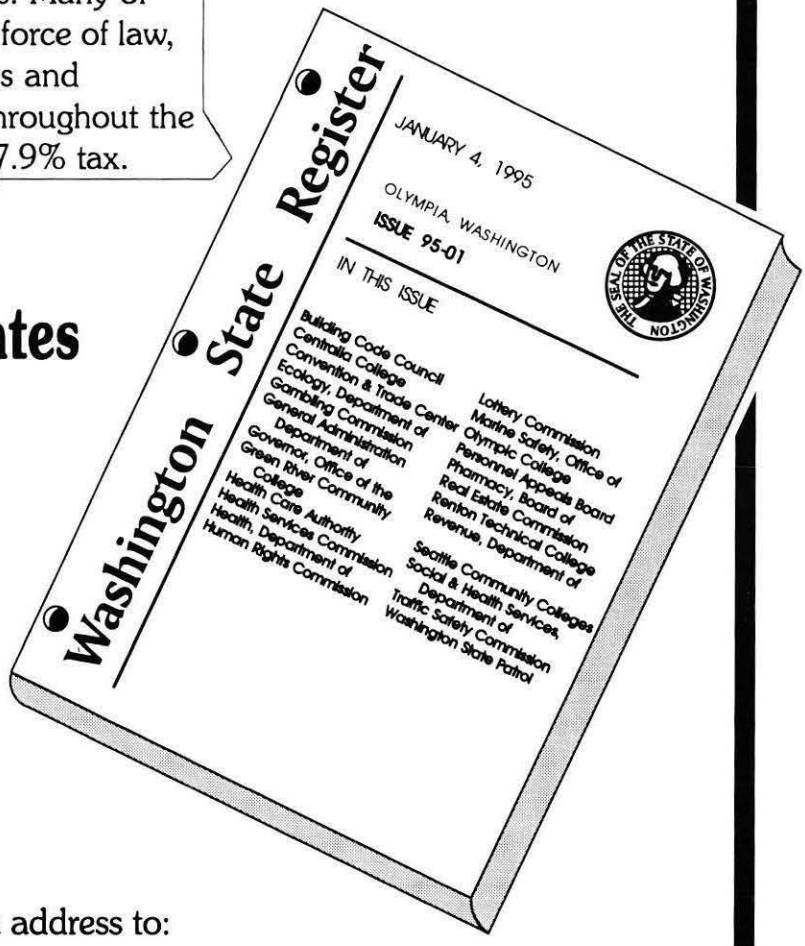

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laws in America provides a wealth of reasons for much of our regulatory system and a poignant counterpoint to the Howard criticism. Your bar could adopt a debate format and send teams of lawyers out to public forums where the public could be informed about the differing viewpoints. From the reasonable man standard to the right of due process to the need for a vital common law and the importance of health and safety regulations, the Law Day programs are limited only by your creativity and the time available.

The second Random House book, one on the criminal-justice system, was published, by happy coincidence, around the conclusion of the O.J. trial, when many programs on CNN, C-SPAN and CNBC were analyzing and discussing both the jury verdict and the initiation of discovery in the civil suit for damages brought by the families of the two murder victims. *Guilty: The Collapse of Criminal Justice* by Judge Harold J. Rothwax, a New York trial court judge, details a number of criminal cases of apparent miscarriages of justice where the guilty were freed on technicalities. Judge Rothwax, an experienced trial judge, proposes several controversial remedies including modification of the exclusionary rule, reduction in the number of peremptory challenges, and 10-2 jury verdicts for conviction in criminal cases. Again, such proposals are controversial and offer the opportunity to debate the factual basis for Rothwax's belief that criminal justice has collapsed, his proposals for its revival and the meaning of specific Constitutional rights.

Is common sense dead? Did the Law suffocate it? Has the criminal justice system collapsed? Are radical solutions necessary to revive it? Is the original American dream — the U.S. Constitution — still alive? Whatever your view, these are provocative issues that can be the basis for lively and timely discussion in your community. Those and many other issues provide your bar association with creative opportunities to educate the public about the law, the legal system and the legal profession.

I hope that every bar association and all three law schools will celebrate May 1, Law Day, in some way. It is undeniably one day of the year when we each should celebrate who we are, what we do and what we stand for.

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Is there life during the law? After the law?

In response to member requests, the WSBA Lawyers' Assistance Program (LAP) is forming a discussion group for women laywers who've been in practice 15 or more years: meetings are the first Friday of each month at 1 p.m., starting April 5. Please call (206) 727-8268 for more information.

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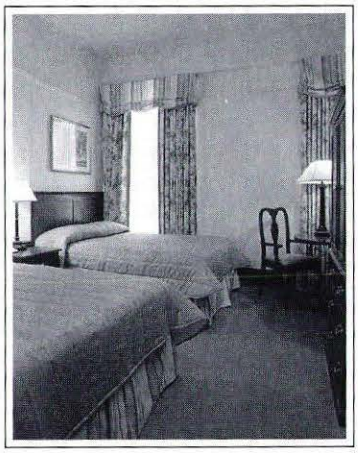

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WSBA Revenues/Expenses/Fund Balances

	1995	1994	1993	1992	1991	1990
Revenues						
Licensing Fees	3,730,881	3,610,103	3,459,595	3,311,696	3,161,134	2,999,637
Access to Justice	7,348	9,800				
Administration (interest earned)	171,515	103,306	68,656	65,218	106,357	137,796
Admissions/Bar Exam Fees	667,617	707,444	731,041	640,519	579,973	621,989
Audits (random and for cause)	682	2,128				
Bar News	361,890	337,951	309,418	255,525	267,737	246,590
CLE - Publications	426,797	352,353				
CLE - Seminars (combined pre-FY94)	1,573,993	1,534,681	1,753,037	1,244,676	1,367,231	1,491,765
Communications	25,947	39,869	28,026	33,347	30,361	
Convention			1,094	159,678	107,617	172,822
LAW-BBS (electronic bulletin board)	33,832	28,566				
Law-Related Education/MENTOR	0	6,412	28,843	31,663	31,434	
Lawyers Referral Service				31,086	38,415	49,415
Mandatory CLE Fees	103,382	110,089	110,967	120,851	111,575	
Membership Records	52,821	63,014	56,497	55,266	30,455	
Resources Directory	121,134	88,599	6,752	28,901	45,156	42,487
Sections	420,858	412,458	349,350	280,165	264,908	245,896
Young Lawyers Division	45,760	48,242	42,338	31,105	24,453	18,587
Other Income	146,657	132,477	123,900	116,606	62,221	152,811
Total Revenues	**7,891,114**	**7,587,492**	**7,069,514**	**6,406,302**	**6,229,027**	**6,179,795**
Expenses						
Access to Justice	130,464	92,674	15,359	14,993	29,812	
Administration	776,387	695,828				
Admissions/Bar Exam	571,689	585,366	362,104	357,887	418,053	286,621
Audits	93,263	114,864				
Bar News	554,184	482,050	281,200	291,890	292,872	257,575
CLE - Publications	434,463	284,398				
CLE - Seminars (combined pre-FY94)	1,479,313	1,437,100	1,206,832	917,750	963,722	924,801
Communications	150,367	154,952	36,742	63,584	73,369	191,038
Convention			20,771	132,771	159,484	192,590
Court Rules	16,015	15,786				
Discipline	1,529,945	1,005,660	45,972	52,925	100,218	58,021
Fee Arbitration	23,463	19,997				
LAW-BBS (electronic bulletin board)	31,654	22,884				
Law-Related Education/MENTOR		6,605	18,293	44,210	72,615	
Lawyer Referral Service				23,597	21,502	19,991
Lawyers' Assistance Program	220,564	229,355	13,728	21,436	24,508	21,902
Lawyers' Fund for Client Protection	44,511	109,826	100,000	8,751	34,609	35,920
Leadership	241,465	266,513	129,867	107,626	153,299	146,367
Legislative Activities	167,933	164,996	40,114	33,252	37,066	32,619
Local Bar Support	13,554	34,871	588	12,476	12,103	
Mandatory CLE	169,518	106,056				
Membership Records	331,473	261,994	40,631	32,470	35,586	
Resources Directory	48,876	43,428	43	64,993	66,556	60,384
Sections	396,809	339,886	245,096	227,309	250,817	237,765
Young Lawyers Division	138,409	121,966	98,233	92,025	84,507	83,045
Other Expenses	41,285	30,319	104,553	126,478	150,778	209,991
Salaries	*	*	2,134,869	2,149,647	2,129,965	1,829,217
Employee Benefits	*	*	611,111	596,136	538,577	460,164
Rent, Taxes, & Utilities	*	*	387,845	394,625	394,390	355,374
Postage and Supplies	*	*	198,098	176,980	132,067	207,065
Equipment Rent & Maintenance	*	*	190,977	158,942	190,677	127,050
Depreciations & Amortization	*	*	156,252	102,537	85,950	67,100
Interest	*	*	36,539	29,283	19,845	27,161
Insurance	*	*	29,030	29,046	28,530	30,371
Professional Fees	*	*	15,847	18,375	21,088	49,366
Loss of Asset Dispositions	*	*	7,306	2,279	17,664	
Write-down of Fixed Assets	*	*			48,175	
Provision for deferred compensation		203,000				
Total Expenses	**7,605,604**	**6,830,374**	**6,528,000**	**6,284,273**	**6,588,404**	**5,911,498**
Revenues Over (Under) Expenses	***285,510***	***757,118***	***541,514***	***122,029***	***(359,377)***	***268,297***
Fund Balance - beginning of year	1,481,929	724,811	183,297	61,268	420,645	152,348
Fund Balance - end of year	**1,767,439**	**1,481,929**	**724,811**	**183,297**	**61,268**	**420,645**

*Allocated to various programs based on staff time sheets

Annual Financial Report

by **Pat M. Dieken**
Director of Finance and Administration

The WSBA ended its 1995 fiscal year in the black, with revenues exceeding expenses by $285,510. Your bar has now had four years in a row with revenues exceeding expenses, thereby building the fund balance from a low $61,268 at the end of fiscal year 1991 to $1,767,439 at the end of the last fiscal year.

These results were achieved over the last several years by eliminating some programs, controlling expenses, and increasing non-dues sources of revenues. Dues have not increased since 1987. Each year a greater portion of the budget is spent on regulatory functions.

The public accounting firm Dodd Wing & Co. completed its audit of the WSBA financial statements for the year ended September 30, 1995. Their independent auditors' report gave an unqualified opinion on our financial statements. Please call or write to me at the Bar offices to request a copy of their report (500 Westin Building, 2001 Sixth Avenue, Seattle, WA 98121-2599; telephone (206) 727-8241.)

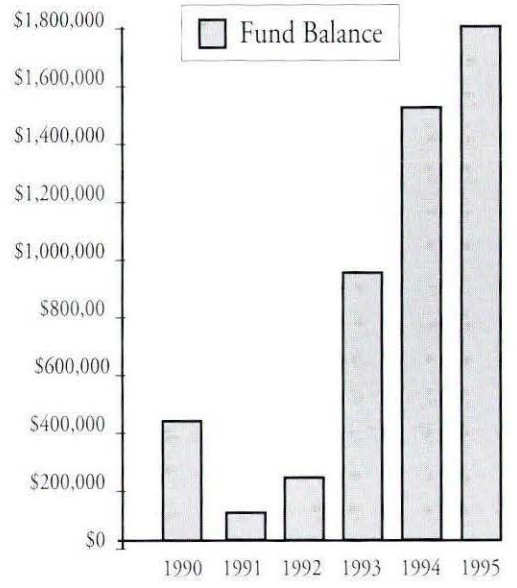
Outlook for 1996

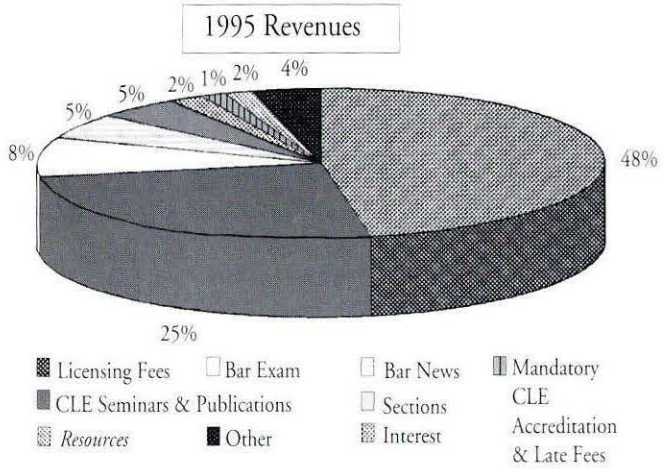
A greater portion of our budget will be spent on regulatory functions, including a significant increase in costs for discipline. We will see the full effect of adding eight attorneys in late 1995 who are addressing the backlog of discipline cases. 1996 is budgeted to break even.

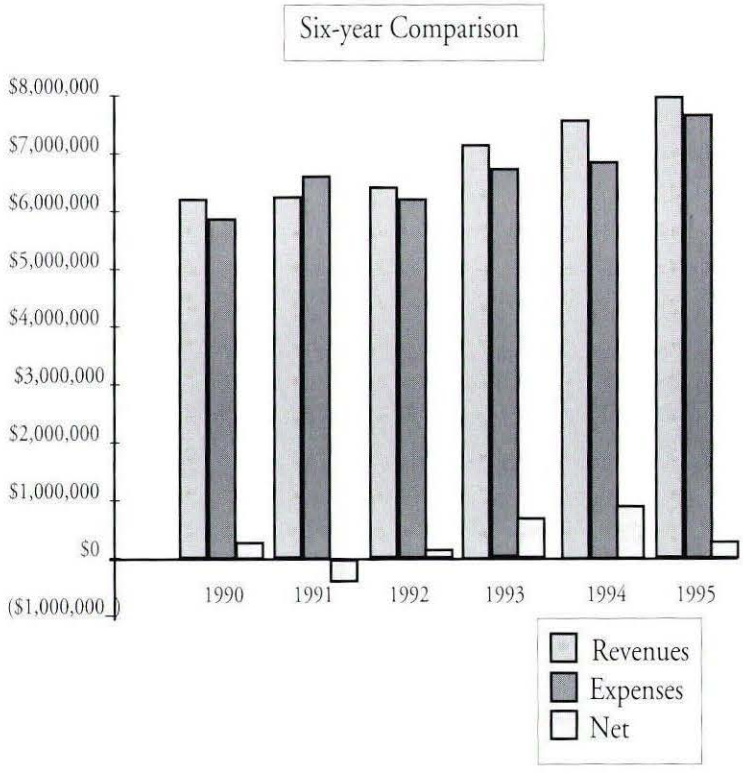
Highlights

The following page details our revenues and expenses by program for the last six years. The charts below show:

- Dues account for less than half of our revenues.
- While revenues have exceeded expenses since 1992, the gap narrowed in 1995.
- One of our major financial goals was to increase the fund balance to provide some cushion for the unexpected. Since 1991 the fund balance has increased to $1.7 million.







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The Perils of Managed Care

by **Patricia K. Greenstreet**

Managed care is at the center of a health care revolution in this country, with far-reaching effects for patients, health care providers, and attorneys. This article will outline the basic principles of managed care, and the problems and conflicts which it presents to our clients.

What is Managed Care?

The AMA defines managed care as "a system or techniques that affect access to and control payments for, health care services."[1]

Managed care is not a new idea. The first managed care entity was probably a 1929 Rural Farmers Cooperative Health Plan in Elk City, Oklahoma. Organized to build a hospital, the plan sold $50 shares to 6,000 citizens who received discounted hospital fees.[2]

The better-known Kaiser plan in California pioneered the idea in the 1930s that patients would receive care through a single "seamless" system as they moved from wellness to illness and back to wellness again. Continuity of care, prevention, and early intervention are stressed.[3]

Today, managed care is growing at an impressive rate; 75% of physicians in the U.S. practice in the context of managed care in some form.[4] In 1991, 47% of U.S. patients belonged to a managed care plan. By 1994, that number had increased to 65% and it continues to climb.[5]

What Does Managed Care Look Like?

Unlike the "one stop shopping" approach of the early Kaiser system, there are many hybrid models today:

1. Under a **Capitated Payment System**, hospitals, physicians and other providers negotiate set payment rates for the services they provide, or for the number of patients for whom they are responsible. Unlike traditional indemnity plans, in which the insurance company bears the financial risk and burden of patients requiring more complex and costly care, capitation places the risk and burden on the health care provider. The hospital or practitioner agrees to accept a set amount of money to provide care for a patient. When patients require care that is more costly than the negotiated amount, the burden of the extra cost is borne by the contracting health care provider. The financial incentive, therefore, is to provide preventive care as well as only those services which are thought necessary.

2. **HMOs** are the most tightly structured form of managed care. They require patients to use designated physicians for all but emergent care. The physicians can be in a multi-specialty group which contracts with the HMO, or they can be actual employees of the HMO. In our state, for example, Group Health Cooperative of Puget Sound is a hybrid which has both employee and contract physicians.

3. An **Independent Practice Association (IPA)** is a group of physicians who form a legal entity for the purposes of contracting with payers to provide health care services, but who maintain their separate offices and individual corporate identities.

4. **Preferred Provider Organizations (PPOs)** are entities through which employer group health plans or other insurance payers contract to purchase discounted health care services. Locally, for example, Blue Cross of Washington & Alaska contracts with preferred providers.

There are many other forms of managed care entities whose acronyms are a virtual alphabet soup. These are the most common models you and your clients will encounter.

Regardless of the model utilized, the concept of managed care today has become synonymous with cost containment. The strong incentive is to withhold what a managed care entity considers nonessential care in order to maximize profits. Maintaining quality of care gets lip service as a goal of managed care, but it is often relevant only in attracting purchasers of insurance coverage.

Health care institutions are struggling to position themselves favorably to compete in a managed care market. David Keepnews, the director of the Office of Policy for the American Nurses Association, notes, "As the health care industry runs more along traditional business lines, 'competition' takes place through mergers, acquisitions, expanding into new markets, or increasing market share, and not on quality."[6]

The power within the health care delivery system was formerly with the physician, then it moved to the hospital, and now it is in the hands of the large insurance coverage purchaser. These purchasers of insurance coverage have an overriding albeit understandable concern about cost, not quality.

How Do Managed Care Entities Hold Down Costs?

Such systems manage or control the physician's and patient's behavior through financial and administrative restrictions, including: the use of case managers to coordinate medical care in expensive cases; offering monetary rewards (or penalties) to encourage physicians to "conserve resources"; excluding some services from the benefits package; and requiring primary care physicians to serve as "gatekeepers" to control access to specialty care, tests and technology.

Managed care as a cost containment strategy has been effective at least on a short-term basis, although no one knows whether the same will hold true in the long run. There is at present no reliable evidence that health care costs and expenditures are significantly lower in an area with long-term utilization of managed care.[7]

The use of a primary care provider who acts as a gatekeeper, limiting access to more expensive specialists, tests and technologies, definitely saves money on a short-term basis. Many studies confirm that primary care physicians can effectively manage 55% of the problems of their patients, and they do so for 25% of the cost of a hospital setting in the short term.[8] Another study shows that internists order 23% to 47% fewer tests than their specialist colleagues on admitted patients.[9]

Although the trend of using gatekeepers with financial incentives to hold down costs may be penny-wise, it is possible that over the long run it will prove to be pound-foolish. I hear horror stories each week from specialists who receive referrals only when the patient's condition has markedly deteriorated after every less-expensive treatment modality has failed. The patients then require *more* expensive care, and have worse outcomes as a result of the delay in making the referral. These observations were echoed in a recent study by researchers at Duke University, which concluded that elderly heart attack patients who were immediately treated by a cardiologist were 15% less likely to die than patients whose initial treatment was provided by a family practitioner.[10]

In many systems, managed care has also changed the fundamental roles of the insurance company and the health care provider. Financial risk of expensive care was traditionally borne by the insurer. Managed care entities have learned how to shift the risk of cost overruns to the providers: mainly physicians, hospitals and commercial laboratories. This has resulted in enormous profits for some managed care entities; and a financial disincentive for those bearing the risks to provide costly treatment when such therapy may be required.

Contrast Kaiser Permanente's "Medical Loss Ratio" of 95% (meaning 95% of every premium dollar is spent on medical services for members) with US Healthcare's rate of 68.9%. This difference is what allowed US Healthcare (one of the largest managed care entities with 1.7 million members) to earn a net profit of $105 million in a recent quarter.[11]

If we project those profit margins throughout the remainder of the market, there is a potential $60 billion profit in managed care annually. Thus, it should come as no surprise that patients are increasingly referred to as "clients."

Of course, the group calling the shots, the large insurance coverage purchaser, is happy: The cost of employer-sponsored health benefits, which was rising an average of 17.1% in 1990, declined an average of 1.1% last year. Some health plans are offering to cut large employers' rates by as much as 10% this year.[12] Employers may be happy, but patients and their families are suffering.

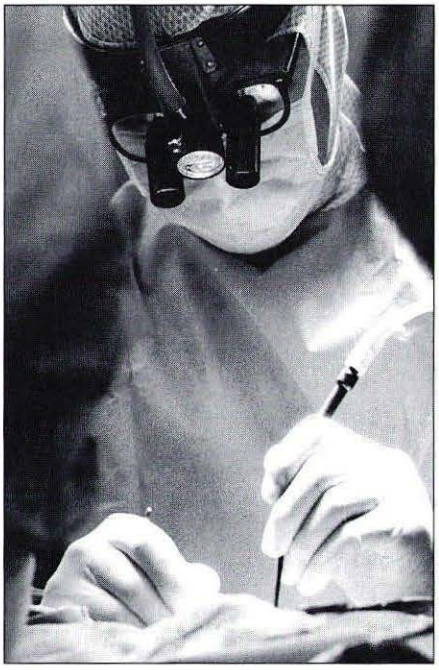

Photo by Beth Fenstenwald. Courtesy of Concord Hospital, New Hampshire.

A Recent Example

A few months ago, you may have read about the Long Island Jewish Medical Center in the *New York Times*. There were three anesthesia-related deaths of otherwise healthy patients in less than three months at that hospital, an incidence which is fortunately unusual. Investigators concluded that the deaths were the indirect result of the impact of managed care. Rather than continue to contract with the experienced private group of anesthesiologists earning $350,000 annually, the hospital terminated their contract and hired salaried employees at the rate of $100,000 to $200,000 per year, attracting graduates fresh from residency and foreign-trained physicians. This move, to increase operating room profits, cost at least three healthy people their lives.[13] Similar horror stories have appeared in many publications of late.

Managed Care Developments in Washington State

The health care community in Washington is awash in turmoil, uncertainty, and anxiety. Health care providers are having great difficulty concentrating on patients when they are facing layoffs, mergers, loss of autonomy & power, and pressure to contain costs. The overwhelming concern at every interface is the profit margin, so institutions are reconfiguring themselves to increase profits.

For example, in addition to unprecedented mergers and acquisitions, almost every hospital in Washington is eliminating large numbers of nursing jobs. Nonprofessional technicians, also known as unlicensed assistive personnel, or "care partners," are being hired and trained to provide bedside nursing care. Some of these employees are high school graduates with four to six weeks of training. There is no consensus about minimum requirements for these positions, and the duties and extent of responsibility differ from institution to institution. The result is fragmented care and an opportunity for missed patient assessment and intervention.

Nurses Are Not the Only Providers Affected

These economic forces are also having a deleterious effect on the physician-patient relationship. Managed care can result in:

- Decreased patient choice in selecting providers;
- Decreased incentive for competence at the expense of productivity;
- Decreased communication due to productivity pressures;
- Decreased compassion (who has the time?);
- Decreased continuity of care as employers shift from one plan to another, and;
- *Increased* opportunity for conflict of interest between physician and patient because of economic incentives for the physician *not* to use medical services.[14, 15]

For example, HMOs frequently withhold 15-30% of physicians' or hospitals' fees until the end of the year, and pay those fees only if the physician meets a set of resource utilization goals.[16] Payments may be made in inverse proportion to a physician's average patient cost: the more costly the care, the less they will be paid per unit of service as a disincentive to provide "costly" care.

Some HMOs or PPOs even allow a primary care physician to keep all funds budgeted for the care of his or her patients left unspent by the end of the year. Others offer incentive payments to physicians based upon medical outcomes and cost performance.

Needless to say, patients are not informed of these secret deals. They believe that physicians are recommending a course of care which is in their — the patients' — best interest, not the physician's best interest. Patients are at a disadvantage when it comes to detecting withheld care, because they usually have no idea that certain treatment options even exist.

There is Widespread Career Dissatisfaction Within the Medical Profession

Physicians I have recently encountered are demoralized by being forced to consult an insurance company staff member — who sometimes has little relevant education or background — to seek authorization to provide care which they believe is medically necessary.

Moreover, overhead in physicians' offices has increased significantly to keep up with the paperwork requirements of utilization review and insurance companies. At the same time, reimbursement rates by insurance companies have fallen. In primary care practice, the discount may range from 12.4% for a routine office visit to 36% for a complete history and physical. But overhead remains fixed at 50-60% in primary care.[17] As a result, physicians' incomes have declined significantly in recent years.

Consequently, most physicians with whom I have contact are planning their eventual exodus from the medical profession.

Moreover, competition among health care providers for a shrinking job pool is now the rule, rather than the exception. This overabundance of doctors significantly diminishes a physician's ability to challenge a contrary medical decision by the managed care entity. If a physician orders too many tests, the entity can simply cancel its contract with that doctor and replace him or her with a more pliable, "cost-conscious" physician; or, in some cases, by a nonphysician. For example, in a recent obstetrical conference in San Francisco, obstetricians were complaining that nurse midwives and other physician extenders were taking jobs formerly held by board-certified obstetricians. As one speaker commented in a classic understatement, "Things are becoming quite unpleasant."

In this insurance market, the physicians most likely to be approved for providing patient care services are the primary care providers, typically family practitioners. They are the gatekeepers to the specialists, who will no longer be able to be directly accessed by patients. These family physicians, who have long been at the lower end of the respect and remuneration ladder, are now earning more than some specialists.

Not surprisingly, therefore, a significant emphasis in that obstetrical conference was on the topic of how obstetricians could become qualified as primary care providers. Are obstetrician gynecologists adequately prepared to provide total primary care for women? Perhaps. Are they adequately prepared to provide primary care for men and children? Probably not.

APPEALS

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The Eroding Standard of Care in the Managed Care Environment

The critical issue for hospitals is no longer whether care is reasonable and appropriate, but whether it is time-limited and cost-effective. The source for this determination is not practice parameters, but a utilization review study called the Milliman & Robertson Healthcare Management Guidelines, generated by a Seattle actuarial consulting firm. It prescribes what are represented to be reasonable lengths of hospital stays for various conditions, and outlines necessary services. Milliman executives assert that health plans' medical bills can be lowered by 15% when guidelines are followed. Among others, Prudential, U.S. Healthcare, and some Blue Cross and Blue Shield plans currently use the Milliman guidelines when making coverage decisions. Many hospitals use the guidelines as an information source; physicians are expected to discharge their patients within those guidelines or they will be held accountable.

The American Medical Association asserts that the guidelines are unreasonable because they are based on a minority of patients who have the shortest length of stay, and also assume that home health services are available to the patient.[18] Physicians individually feel that their professional judgment has largely been supplanted by fiscal policy, and as a result patient well-being is potentially at risk.

Nevertheless, America now has the shortest length of hospital stay of any country in the industrialized world. Managed care plans discharge patients from hospitals twice as quickly as traditional fee-for-service plans. While this may not be a completely negative trend, we should be mindful of patient outcome results including readmission rates, infection rates, and complication rates in general.

The United States has also become a world leader in reducing the number of expert bedside nurses in hospitals across the nation. Moreover, the future of teaching hospitals is in question because of declining resources: no one wants to pay to maintain excellence and innovation. One example is UCLA which, in response to the fact that 40% of its patients are under managed care contracts, announced that it will no longer train students in medical subspecialties like cardiology and nephrology — they will train only generalists or research scientists in an effort to reduce costs.[19]

In an effort to maintain quality of care while reducing costs, professional associations are also developing clinical practice guidelines. Development is time-consuming and expensive, taking an average of five years and $300,000 to $400,000 per national-level guideline.[20] Potential hazards include making the guideline overly broad to be useful in clinical decision-making, or overly narrow to allow for modification in individual complex cases. Some local physicians fear that the end result of guideline proliferation may be "cookbook medicine" delivered by ancillary health care providers and overseen by physician administrators. They see this as yet another step in supplanting their professional judgment and depersonalizing medical practice.

Emerging Liability Theories

As utilization of managed care increases, various theories of liability have been asserted, some with success. Due to space constraints these emerging theories can only be outlined, but the references cited can provide a starting point for further research.

One issue causing confusion and conflict among health care providers is how to weigh the patient's right to know the full scope of treatment alternatives, versus only those treatments a managed care entity is willing to fund. When does an insurer determine the range of choices the patient is allowed to evaluate and consider? In a recent case involving whether a managed care entity should fund bone marrow transplantation in a patient with advanced breast cancer, an oncologist queried, "If you know that someone's a Health Net patient, do you talk to them differently than if they're somebody else?"[21]

RCW 7.70.050 outlines a health care provider's duty to secure an informed consent from the patient, including "The recognized possible alternative forms of treatment."[22] Failure to inform a patient of available treatment alternatives because they would not be approved by the patient's insurer violates the basic trust foundation of the physician-patient relationship, as well as the doctrine of informed consent.

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As patient choices are limited in managed care, the vicarious liability of managed care entities will expand. The extent of liability will depend to some extent on the architecture of the managed care entity; some are merely administrative conduits while others exercise control of the patient care provided.

The most direct approach to establish liability against a managed care entity is the theory of *respondeat superior*. One may overcome the independent contractor defense by showing that the managed care entity exercised a right to control the health care provider. For example, IPAs and PPOs customarily require preauthorization for hospital admissions, and concurrent reviews of lengths of stay and fees for both inpatients and outpatients. Failure to abide by these regulations may result in a provider being removed from the panel of approved health care providers. These factors may be sufficient evidence of control to constitute an employer-employee or principal-agent relationship. Additional factors to consider include how and by whom fees are set, and how the provider is paid.[23]

Under the theory of ostensible agency, an entity can be held liable for the acts or omissions of an independent contractor if, considering all of the facts and circumstances, a patient reasonably believes that the physician is an employee of the entity, the belief is generated by some act of the entity, and the patient justifiably relies on the appearance and representation of authority.[24, 25, 26]

Factors to consider as possible evidence of ostensible agency include the degree of choice a patient may exercise in selecting a physician, how the relationship between the entity and the physician is described in the entity's promotional materials, and whether the entity's name appears on the building, office, name tag, stationery, reports or bills of the physician.

Just as hospitals under the doctrine of corporate negligence owe an independent duty to their patients to exercise reasonable care in selecting, retaining, and supervising the performance of their medical staff,[27] so may managed care entities.[28, 29] The basis of liability is the hospital's duty of reasonable care to protect its patients from harm. Given the managed care entity's selection of health care providers, and the restriction of the patient's choice of health care providers under managed care, it seems probable that the doctrine of corporate negligence will be extended to managed care entities. A further theoretical extension of the corporate negligence doctrine is the imposition of liability on employers for the selection of a managed care entity for employees, if the employer has failed to reasonably investigate and review the managed care entity.

Finally, a number of cases have been brought against managed care entities for underutilization: liability for unreasonable cost-containment efforts causing patient harm. These efforts are part of the process of utilization review in which the managed care entity reviews medical care for medical necessity, and attempts to ensure that care is rendered by health care providers within the managed care system. Cases have most frequently involved the issue of patient injury resulting from the denial of coverage for requested services, typically either allegedly experimental treatment or extension of a previously approved length of hospital stay.

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Managed care entities have argued that they are merely denying payment, not treatment, but this approach may not insulate them from liability. For many people, denial of payment is equivalent to denial of treatment given their limited economic resources. Liability will be determined in part by weighing the societal benefit of cost-containment against the risk of harm caused by the denial of benefits, and the reasonableness of the patient care rendered.[30, 31, 32, 33]

The liability of health care providers may continue under certain circumstances despite denial of payment for requested services. A hospital in North Carolina was found liable for negligently discharging a patient upon the expiration of the patient's insurance coverage. A North Carolina appeals court in upholding the verdict found that the hospital in discharging the teenaged psychiatric patient two days after the expiration of his insurance coverage was negligent in having such a policy or practice which interfered with the physician's medical judgment. The patient's physician had requested a two-day extension of his hospitalization pending receipt of the results of a blood test to determine his serum medication level. The request was denied, the patient discharged, and two weeks later he ingested a fatal dose of his medications.[34]

Conclusion

Absent legislation prohibiting monetary incentives (or penalties) between managed care entities and physicians (including physicians employed by the entity), and recourse enabling physicians and patients to challenge such abuses, horror stories will multiply. The fault lies not with the physician, but with a system which shamelessly promotes a conflict of interest between the managed care entity, the doctor, and the patient.

Applying marketplace economic theory to health care is fraught with peril: The health care system is not about cost containment, it is about sickness, aging, vulnerability and death. Once that essential moral content is eradicated from the system, it is replaced by a corporate system ruled by money; and the Hippocratic oath, to "first, do no harm," becomes an anachronism.

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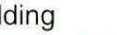

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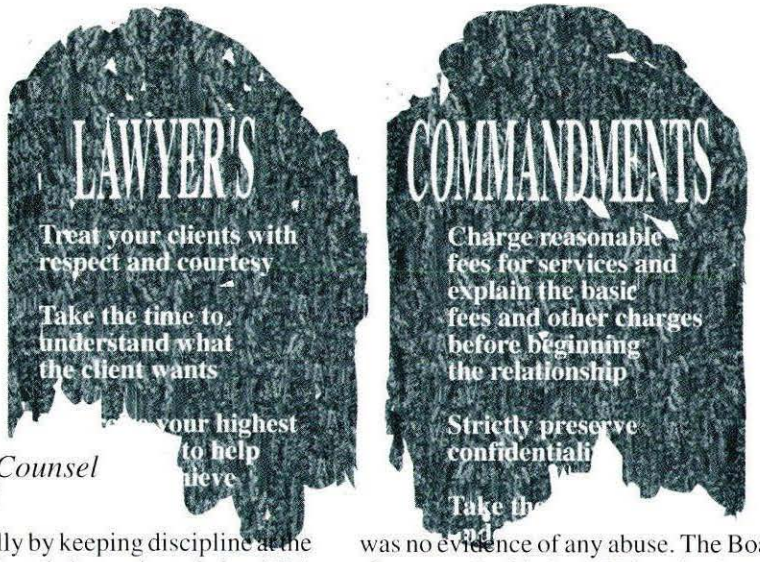

by **Barrie Althoff**, *WSBA Chief Disciplinary Counsel*
& **Randy Beitel**, *WSBA Disciplinary Counsel*

Introduction

The WSBA Board of Governors at its February 1996 meeting approved new services and changes in the lawyer discipline system intended to make the system more responsive to members and the public. The Board also recommended keeping lawyer discipline functions at the Bar (rather than transferring them to the Supreme Court), and providing stable and adequate funding for lawyer discipline through membership dues rather than special mandatory assessments.

The Board recognized that the Bar's responsibility for lawyer discipline must go beyond the traditional concept of merely prosecution/punishment for lawyer misconduct. The Board thus voted to implement programs for mediation of disputes, for diversion of less serious misconduct, for office-management assistance and training, and for mandatory fee-arbitration. Implementation of the new programs, expected to take several years, will depend on funding being available. This will likely require an increase in bar revenues (including bar dues) to raise new money to pay for these programs.

The Board has spent the last year considering the recommendations of the Joint Task Force on Lawyer Discipline ("JTF")[1] and member and public comments on the JTF's widely-circulated December 1994 Final Report. The JTF, made up of members of the Supreme Court, the bar and the public, analyzed the recommendations made in September 1993 by the evaluation team of the American Bar Association's Standing Committee on Professional Discipline ("ABA").

Keeping Discipline at the Bar

The Board agreed with the JTF that improvements in our discipline system could be made more expeditiously and economically by keeping discipline at the Bar. The Board thus rejected the ABA recommendation that discipline be under a Supreme Court agency separate from the Bar.[2]

The ABA was concerned that discipline at the bar gave an appearance of a conflict of interest if elected bar officials could improperly influence particular discipline cases. Neither the ABA, the JTF, nor the Board, however, found any evidence of any improper influence. The JTF concluded that putting discipline under a new agency at the Court would simply transfer the appearance problem to the Court. While the appearance problem might be solved by ceding lawyer discipline to non-lawyers via an agency created by the Legislature, this would conflict with the Court's long-held position that it has exclusive jurisdiction over lawyer discipline.

The Board has long limited its discipline role to administrative oversight with no involvement in individual discipline cases. The Board reaffirmed that policy and removed itself even further by giving up the few remaining discipline functions where the Board of Governors currently has a role in individual cases. Specifically, the Board recommended a rule change to eliminate the need for disciplinary counsel to obtain the Board's permission to appeal to the Supreme Court from a Disciplinary Board decision. The Board also recommended that appeals from a denial by the Character and Fitness Committee of a petition for reinstatement after disbarment be made to the Disciplinary Board rather than the Board of Governors.

The Board of Governors agreed with the JTF that the Board should continue to have access to confidential disciplinary information solely to administratively oversee discipline. The ABA had recommended ending this access, although there was no evidence of any abuse. The Board also agreed with the JTF in rejecting the ABA recommendation to remove the Board of Governors from involvement in approving changes to the Rules for Lawyer Discipline, noting that GR 9 requires all rule changes be reviewed by the WSBA which acts through the Board of Governors.

Funding Lawyer Discipline

The ABA's recommendation to remove discipline from the Bar was premised in part on past difficulties in providing adequate and stable funding for discipline. Bar dues today are the same as they were in 1988, eight years ago. The ABA concluded:

> The principal problem facing the Washington Lawyer Regulation System is a lack of adequate personnel and resources. This problem is produced, in part, by a lack of adequate funding . . . . Funding of the disciplinary system must receive the highest priority of the bar. If the bar association is unable to provide sufficient resources to the disciplinary system, the Supreme Court must exercise its authority and impose an appropriate annual assessment on all lawyers under its jurisdiction in order to insure adequate funding.
>
> ABA *Report on the Washington Lawyer Regulation System*, Sept. 1993, p. 5.

This lack of funding and resources led to a large backlog of, and long delays in processing, grievances and investigations which we are now trying to address. The JTF recommended either a separate mandatory discipline assessment by the Supreme Court or making the disciplinary

portion of the WSBA budget and dues not subject to member referendum. The ABA's reference to the referendum reflected the fact that the ABA's evaluation took place in 1993, the year after members by referendum rolled back a then-scheduled dues increase.

Much has changed in the three years since the ABA's 1993 visit. The Board has, for example, provided substantial new resources to lawyer discipline, increasing disciplinary counsel from 6 to 16 in number. The addition of the disciplinary counsel was an extraordinary action taken to address a serious problem. This action made clear that the Board was prepared and able to adequately fund the discipline system, without the need for the system to be taken over by the Supreme Court, without the need for the coercive effect of a mandatory discipline assessment by the Court, and without disturbing the WSBA members' referendum rights. The Board stated as a matter of policy that "Adequate and stable funding is essential to the Washington Professional Conduct System. The determination of the amount to be budgeted should remain within the discretion of the Bar Association."

Additional Services to Members and the Public

Besides reaffirming that lawyer discipline should stay at the bar and be adequately and stably financed, the Board voted to implement new services for members and the public as funding becomes available. These will be encompassed in a "Department of Professional Conduct" which, in addition to the office of disciplinary counsel which will remain as the prosecutorial arm of the discipline system, will include four new alternatives to traditional discipline:

- **Mediation of Discipline Disputes.** A voluntary program of mediation will be developed in conjunction with the ADR Section to use volunteer WSBA members to mediate discipline-related disputes either voluntarily submitted by the parties or referred by the Department of Professional Conduct.
- **Lawyer Practice Assistance.** A program of lawyer practice assistance, skills training and law office management will be developed in conjunction with the Law Office Management Section, the CLE Committee and the General Practice Section. These services will be offered as a diversion alternative for lawyers who have shown a need for such assistance in order to avoid formal charges for misconduct, incompetence or neglect; as a referral; or on a member's own request. Its functions will include auditing, monitoring and mentoring, with problem-specific training, education and supervision.
- **Diversion Program for Less-serious Misconduct.** Based on criteria to be developed, lawyers charged with less serious misconduct may be offered the option of agreeing to a diversion plan designed to rehabilitate, educate or train in lieu of prosecution.
- **Mandatory Fee Arbitration.** Currently WSBA arbitration of fee disputes between lawyer and client is voluntary. Lawyers now often decline to arbitrate these disputes. To be more responsive to public and client expectations, a program mandatory for the lawyer (but not for the client) will be developed in conjunction with WSBA's ADR Section.

"There is no such thing as justice- in or out of court."

-Clarence Darrow (Quoted by the New York Times, April 19th, 1936)

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A central intake office at the Bar will coordinate referrals to the new programs and track and monitor cases so that traditional prosecution can be re-instituted where the respondent lawyer is not cooperating with the agreed-upon assistance or diversion program.

The JTF also recommended other functions be included within the Department of Professional Conduct. However, the Board disagreed that the Bar's two auditors need be in the Department and left that issue to the Executive Director's discretion. The Board also decided to wait and consider at a later time the JTF recommendation to have an ombudsman handle consumer inquiries and complaints and resolve disputes which are neither violations of the Rules of Professional Conduct nor specific to the other programs and offices in the Department of Professional Conduct, such as appointing file custodians for disappeared or deceased lawyers. However, the Board agreed with the JTF recommendation against setting up a system to voluntarily arbitrate malpractice claims.

Discipline Should Be Public at the Investigation Stage

Although not considered by the ABA or the JTF, the Board — in July 1994 and again in September 1995[3] — considered and ultimately recommended opening to the public information regarding grievances at the investigation stage, once the respondent lawyer had been given an opportunity to file a response to the grievance. Under current rules that information remains confidential unless and until public disciplinary charges are filed. In December 1995 the Court returned this proposed rule change to the Board for reconsideration within the context of other JTF recommendations. The Board will consider this issue at its March 1996 Board meeting, with any changes to be included with other rule changes as a result of JTF recommendations. The JTF also recommended that federal judges be given access to confidential disciplinary information; thus, a proposed rule change provides that any judge of a court of record may be advised of the status of a disciplinary grievance and provided with requested confidential information; the judge would be required to maintain that confidentiality.

"The Board has provided substantial new resources to lawyer discipline, increasing disciplinary counsel from six to 16 in number."

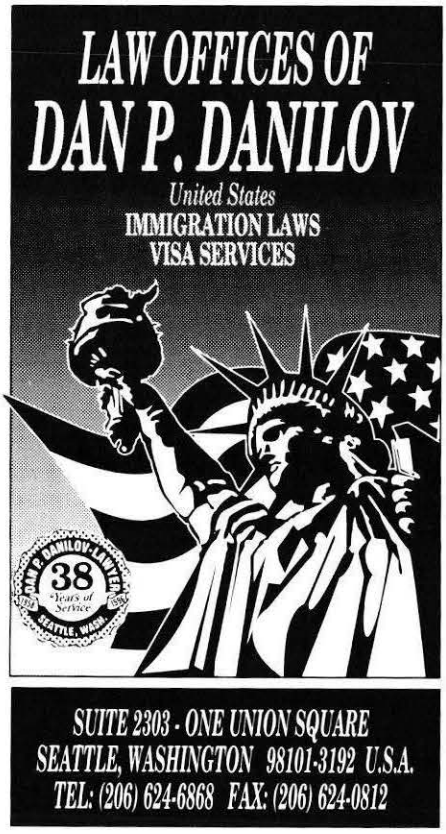
More Timely and Improved Resolution of Grievances

The Board also approved a number of changes in the discipline system designed to assure a more timely and improved resolution of grievances:

- **New Disciplinary Counsel.** The Board confirmed its 1995 addition of new disciplinary counsel positions. In due time this will reduce the current backlog of disciplinary cases and keep new matters current.
- **Professional Investigators.** Professional investigators will be used under the direction of disciplinary counsel to improve the quality of investigations by having trained professionals examine documents and evidence and interview witnesses rather than relying solely on respondents and grievants to provide documents and written statements.
- **Review Committee Orders.** An order of dismissal from a Review Committee is to be sent to the grievant within 14 days.
- **45-day Limit to Protest Dismissals.** With proper notice to grievants, a 45-day time limit will be placed on grievants protesting dismissal of their complaint; there currently is no time limit.
- **Detailed Analysis Letters Retained.** The Board concurred with the JTF in rejecting the ABA recommendation of cursory dismissal letters, retaining the current practice of giving a detailed analysis of the basis for a dismissal.
- **"Conditional Dismissal" Changed to "Dismissal."** References in the Rules for Lawyer Discipline to "conditional dismissal" by disciplinary counsel will be changed to "dismissal."
- **Time Lines To Be Developed.** The Board directed disciplinary counsel to prepare appropriate time lines for processing disciplinary matters for consideration by the Board at its May 1996 meeting.
- **Tolling Statute of Limitations When Custodian Appointed.** The ABA recommended that whenever a file custodian is appointed under RLD 8.6 because of the disappearance, disability or death of a lawyer, all statutes of limitation relevant to a client's case be tolled by the appointment of the custodian. It appears this can only be accomplished by a legislative change and will be referred to the WSBA Legislative Committee.

Improving the Use of Hearing Officers

The ABA recommended that hearing officers be reduced from the current 90+ volunteers to no more than five hearing officers. The Board decided for now to retain volunteer hearing officers, but to reconsider every two years the number of hearing officers and to reconsider one year after these changes are implemented whether they should be compensated. The Board made a number of other changes regarding hearing officers:



• **Reduce Number of Hearing Officers.** The hearing officer list will be reduced from the current 90+ to 55.

• **Qualifications and Terms of Appointment.** Hearing officers will be appointed for five-year staggered terms rather than three-year terms. In addition to the current requirement of at least seven years' membership in the WSBA, new appointees must have experience as an adjudicator and/or advocate in contested adjudicative hearings, and not have a record of disciplinary misconduct.

• **Streamlined Assignment and Hearing Scheduling.** Hearing officers will be assigned on a rotating basis, where possible, taking into account geographical and expertise considerations. The hearing officer should be assigned within 30 days of service of the formal complaint. Within 30 days after service of the order of their appointment the hearing officer should establish a date for the hearing within 180 days of assignment of the hearing officer.

• **Hearing Officers to Write Own Findings.** Although any party may submit proposed findings of fact, conclusions of law and recommendations, the hearing officers should write their own findings and conclusions.

• **Disciplinary Board to Monitor Hearing Officers.** The Disciplinary Board will monitor the performance of hearing officers.

Improving the Use of Special District Counsel

The Board and the JTF rejected the ABA's recommendation to eliminate use of volunteer lawyers as investigators ("special district counsel" or "SDCs") in lawyer discipline matters. The Board agreed with the JTF, however, on a number of changes to better use SDCs:

• **Reduce Number of SDCs.** The number of SDCs will be reduced from 340+ to about 75.

• **Qualifications and Terms of Appointment.** New SDCs will be required to have at least seven years membership in the WSBA and no disciplinary record. The current term of three years will be changed to five years, made on a staggered basis.

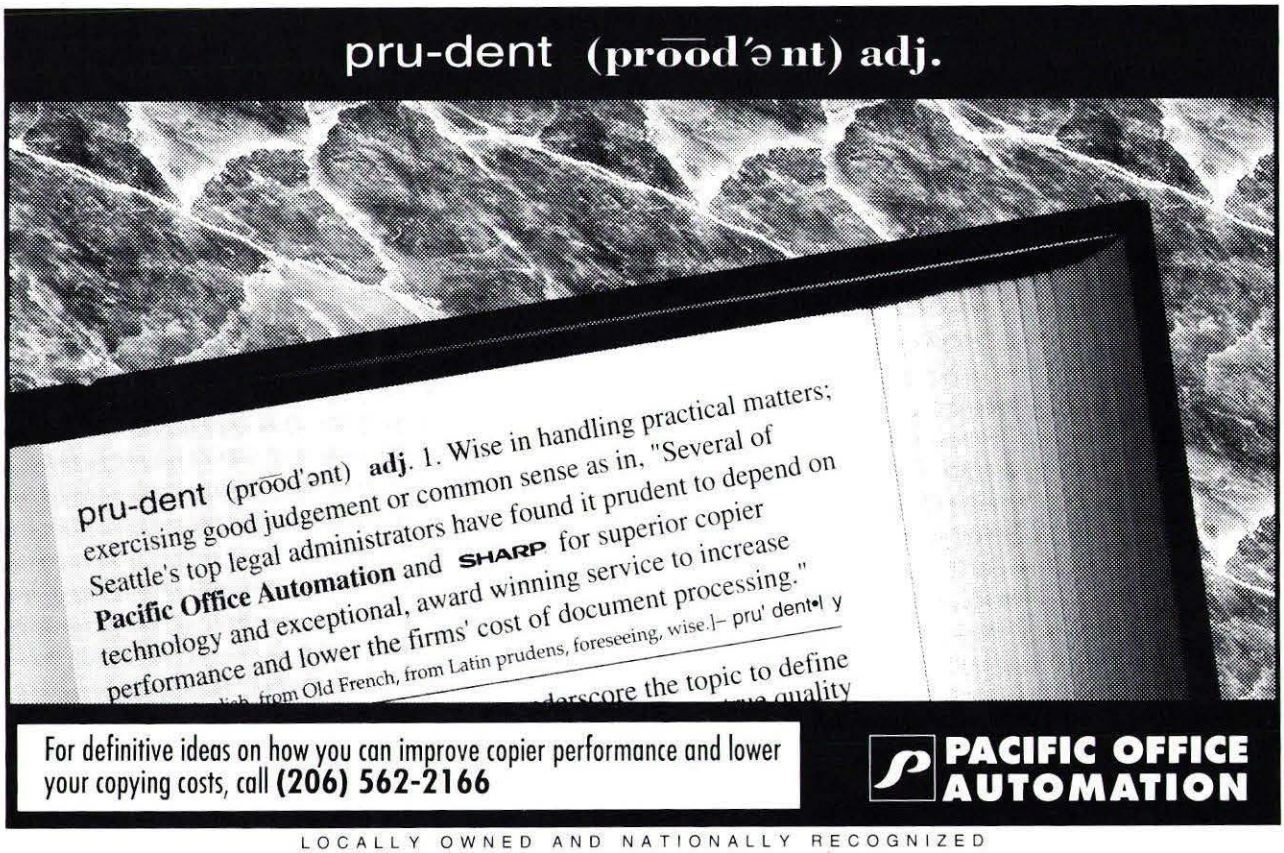
• **Training and Supervision by Disciplinary Counsel.** SDCs are to be utilized to assist the Office of Disciplinary Counsel. They are to be trained in the investigation and prosecution of discipline cases, subject to assignment and monitored by disciplinary counsel, and required to meet case schedules and deadlines.

Supreme Court Matters

The Board also made a number of recommendations relating to the Supreme Court's involvement in the lawyer discipline process:

• **Finality on *Sua Sponte* Review.** The Board agreed with JTF that the Court should retain authority to *sua sponte* review Disciplinary Board decisions as well as to hear appeals by disciplinary counsel or respondents, but that to provide some certainty to respondent lawyers, the Court should adopt a procedural rule establishing a time limit for initiating *sua sponte* review.

• **Expedited Review of Discipline Matters.** The Board recommended that the Court should continue its policy of expedited review of discipline matters. The Board will propose a rule change providing that in disciplinary matters,



parties are to obtain the record within 10 days from filing the notice of appeal; the opening brief is to be submitted within 30 days of obtaining the record; the responsive brief is due in 30 days; and the reply brief within 20 days or 14 days before oral argument, whichever is shorter, unless otherwise ordered by the Court.

• **Expedited Interim Suspension.** The Court should hear motions for interim suspension as quickly as possible and not later than two weeks from the issuance of the order to show cause. The Board will recommend a rule allowing the Chief Justice or a designee to act on a petition for interim suspension when the Court is in recess, subject to approval by the full Court.

• **Summary Transfer to Disability Inactive.** The Court should adopt an interim-suspension show-cause procedure to immediately transfer to "disability inactive" status any lawyer who alleges in the course of a disciplinary proceeding the inability to assist counsel.

Disciplinary Board and Support Staff

The Board of Governors also made a number of determinations relating to the role of the Disciplinary Board and bar staff servicing that Board:

• **Appointments To Reflect Diversity.** Appointment of Disciplinary Board members, hearing officers, review committees and other appointed positions should reflect diversity in gender, ethnicity, geography and practice experience.

• **Disciplinary Board to Function as an Appellate Body.** The Disciplinary Board should not automatically review determinations of hearing officers, except recommendations for suspension, disbarment or for transfer to disability inactive status. The right of appeal by disciplinary counsel and the respondent should be retained. The Disciplinary Board may *sua sponte* review a hearing officer's decision, subject to appellate standards of review.

• **Appellate Standard of Review for Disciplinary Board.** The Board directed rule changes to provide that the Disciplinary Board shall apply an appellate substantive review standard in reviewing findings of fact, but shall retain de novo review with regard to conclusions of law and recommendations for sanctions, and in the event new evidence is to be presented, the matter shall be remanded to the hearing officer.

• **Staff Support for Disciplinary Board.** The Board of Governors recommended that the Disciplinary Board be serviced by full-time counsel, that a staff support position be added, and that the Disciplinary Board be consulted in the hiring, evaluation, and retention of counsel to the Board.

Ethics Calls to Be Independent

Prior to 1993, ethics "hotline" calls were rotated among the disciplinary counsel. In 1993 these calls became the responsibility of the Director of Licensing/Professional Responsibility Counsel with part-time assistance from the counsel to the Disciplinary Board. The Board agreed with the JTF recommendation that neither disciplinary counsel nor counsel to the Disciplinary Board should be answering ethics calls. Staffing of this function is left to the discretion of the Executive Director.

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Disciplinary Counsel

• **Uniform Case Handling Policies.** The Board directed disciplinary counsel to promulgate uniform written nonjurisdictional policies regarding the screening, investigation, dismissal, referral, and prosecution of cases for use by the Department of Professional Conduct and Central Intake Office. The policies should ensure that allegations concerning client funds and lawyer trust accounts are investigated.

• **Criteria for Staff Evaluations and Professional Development.** Written general criteria will be adopted for evaluation of the performance of disciplinary staff and, as the staff grows, the Chief Disciplinary Counsel will structure positions to allow employees to grow professionally within the organization.

• **Vertical Communication in the Discipline System.** The Board supports the concept of a formal structure of regular communications between the Board of Governors and disciplinary staff.

• **Remove Nonprosecutorial Functions From Discipline Staff.** The Board has directed that all liaison work by disciplinary counsel be limited at the discretion of the Executive Director. The Board decided that disciplinary counsel may continue to serve as presiding officers at bar exams.

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Increased Professionalism in the Discipline System

• **Training Programs for All Disciplinary System Personnel.** Disciplinary counsel will develop training programs for all discipline system personnel as to policies, procedures, and Washington disciplinary case law. Staff will continue to attend relevant training programs such as the National Organization of Bar Counsel and the ABA Center for Professional Responsibility.

• **Publish Disciplinary Board and Hearing Officer Decisions.** Reports of final decisions of hearing officers and the Disciplinary Board will be published and sold by the WSBA.

Continued Support for the Lawyers' Assistance Program

The Board of Governors affirmed that the Lawyers' Assistance Program ("LAP") is an essential program and the Board will continue to place a high priority on adequate funding for it. By necessity, LAP operates independently from the discipline system, but it can serve as an effective alternative for the diversion program. To afford LAP clients a greater sense of confidentiality the LAP offices should, to the extent practical, be physically separate from other Bar offices.

Lawyers Fund for Client Protection

The ABA made several recommendations related to the Client Security Fund. Most of these were made moot by the adoption of APR 15, which established the Lawyers' Fund for Client Protection. The issues remaining for consideration are: (1) whether to raise the current aggregate maximum of $50,000 per lawyer; (2) whether to pay claims quarterly rather than annually; (3) whether to seek a court rule granting the fund subpoena authority; and (4) whether to grant the fund authority to seek appointment of custodial receivers. The Board has asked the Lawyers' Fund for Client Protection Committee to make recommendations on these remaining issues at the Board's May 3-4, 1996, meeting.

Implementation Schedule

The Board of Governors has acted on virtually all of the JTF recommendations. At its May 1996 meeting it will take up the few remaining items and will review a proposed implementation schedule. Many of the changes will require changes to the Rules for Lawyer Discipline and other rules. Those which can be drafted now will be presented to the Board for its review at the May meeting. Following that review, a packet of proposed rule changes will be sent to the Court for consideration. As to the four new programs, for mediation, lawyer practice assistance, mandatory fee arbitration, and diversion, each must first be developed with the help of various sections and committees of the Bar. Once the programs are developed and implementation rules are drafted at a later date, they will be reviewed by the Board and submitted to the Court for consideration.

What Will it Cost?

Implementing and operating the four new discipline-related programs will obviously cost money. The estimated annual cost of funding all four of the new programs is about $560,000, or about $28 per active member. It is expected that the new programs will take several years to fully implement and will be phased in as adequate funds become available. Since the bar's current revenues barely cover existing operating costs, however, funding is unlikely to be available without an increase in revenues (including bar dues) to cover the expected costs of the new program.

Endnotes

[1] *See*: "Redefining Lawyer Discipline in Washington: A Multifaceted Approach," *Washington State Bar News*, August 1995, pp. 15 - 19. For a copy of the report itself, call the WSBA Communications Department at (206) 727-8213.

[2] American Bar Association, *Lawyer Regulation For a New Century*, February 1992, Report of the Commission On Evaluation of Disciplinary Enforcement (McKay Commission) at 23.

[3] *See*: "The Board's Work," *Washington State Bar News*, September 1994, pp. 36-37; "Washington Needs A More Open Discipline System," Leland G. Ripley, *Washington State Bar News*, November 1994, pp. 47-48; "The Oregon Experience With an Open Disciplinary System," George Riemer, *Washington State Bar News*, November, 1994, p. 49; and "Board of Governors Recommends to Court Expansion of Disclosure of Lawyer Discipline Records," *Washington State Bar News*, September 1995, p. 55.

Usury Rate

The average coupon equivalent yield from the first auction of 26-week treasury bills in March 1996 is 5.00%. ***The maximum allowable interest rate permissible for April 1996 is therefore 12%.*** Compilations of the average coupon equivalent yields from past auctions of 26-week treasury bills, and past maximum interest rates of the past 10 years appear on page 72 of the June 1995 *Bar News*.

Washington Courts Online

Washington courts are now online at: http://www.wa.gov/courts/.

A Word 6 for Windows version of a memorandum listing more than 250 law-related websites is available by e-mail request or visit the home page to copy the text file and HTML versions at: http://www.wolfenet.com/~dhillis/index.htm9

Submitted by Bradley J. Hillis, OAC Legal Analyst

Notice of Deadline for Filing WSBA Resolutions

Pursuant to WSBA Bylaw Article VII, Section F — "Resolutions", any ten (10) active members of the Washington State Bar Association may present a written resolution to the Board of Governors for consideration at the WSBA's Annual Business Meeting, which will be held this year on Friday, September 6, 1996, beginning at 2 p.m. at the Seattle Hilton.

Resolutions must be filed with the WSBA Executive Director at least ninety (90) days before the Annual Meeting (by 5:00 p.m. on Friday, June 7, 1996) and must be accompanied by a written report explaining the resolution. The resolution and explanatory report together shall not exceed a total of one thousand (1,000) words. The Executive Director's office is at 500 Westin Building, 2001 Sixth Avenue, Seattle, WA 98121-2599.

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

The Resolutions Committee will hold a public hearing to consider the views of the proponents and opponents of resolutions on Thursday, August 29, 1996, beginning at 1:30 p.m. at the offices of the WSBA (500 Westin Building, 2001 Sixth Avenue, Seattle). Proponents and opponents of resolutions are urged to attend the hearing or to present their views in written form for consideration by the Resolutions Committee.

Proposed resolutions will be published in the July 1996 issue of *Bar News*.

Members of the WSBA Resolutions Committee are: Gary D. Gayton, chair; Ted Zylstra, Jill Kurtz, John Schultz, John M. Riley, William Fleck, Stacey Smythe, Lee Kraft, and John Caldbrick.

Formal Opinion 137 Withdrawn

On February 9, 1996, on the recommendation of the Rules of Professional Conduct Committee, the Board of Governors unanimously voted to withdraw Formal Opinion 137 (1968: "Dealing Directly With Adjuster.")

Online Access to DISCIS

Online access to the District and Municipal Court Information System (DISCIS) became available to JIS-Link subscribers on March 25. JIS-Link, introduced in 1990, eliminates the need for court visits by allowing the public to check case information on-line between 6:30 a.m. and midnight. It has more than 500 current subscribing organizations. The link also offers access to the Superior Court Management Information System (SCOMIS) and the Washington Legal Database. For subscription information, call (360) 357-2407.

Attorney General Opinions

Superior Courts - District Courts-Juvenile Courts - Public Records - Schools - Truancy - Confidentiality of Juvenile Court Records in Truancy Cases.

The records of a juvenile court in a truancy case are confidential and not available for public inspection and copying, with the limited exceptions listed in RCW 13.50.010 and 13.50.100.

Superior Court - Judges - Salary and Benefits - State Constitution - Social Security - Workers' Compensation - Legal Responsibility of State and Counties for Employer Contributions to Superior Court Judges' Salary-related Benefits.

In the absence of specific legislative direction to the contrary, the state and the counties are each legally responsible for one-half of the employer contributions required to be made to provide fringe benefits for superior court judges.

Department of Fish and Wildlife - Fish - Authority of the Director of Fish and Wildlife to Require that Fish Guards Be Installed, Maintained and Replaced.

1. The director of the Department of Fish and Wildlife has a generalized duty to enforce the laws requiring fish guards in lakes, river and streams, but has discretion in a particular case to decide whether to institute civil action against a violator, and to decide which remedy to seek.

2. The director of the Department of Fish and Wildlife has authority to close a diversion device if its owner fails to equip it with an approved fish guard within 30 days after the director gives the owner proper notice.

3. The director of the Department of Fish and Wildlife does not have explicit authority to compel the owner of a diversion device to equip it with a fish guard where the guard is required by RCW 75.20.040, but has authority to take other actions designed to achieve the same result.

4. Diversion devices in place prior to the effective date of RCW 75.20.040 1 (1949) are still subject to its requirements.

5. The director of the Department of Fish and Wildlife may periodically change requirements for fish guards to ensure that the guards are efficient and durable, but the revised requirements apply only to fish guards installed or replaced after the revisions.

6. Hydroelectric projects licensed by the Federal Energy Regulatory Commission are not subject to the fish guard requirements of RCW 75.20.040.

7. Since RCW 75.20.040 imposes fish guard requirements for all waters containing food fish, RCW 77.16.220 applies only to waters containing exclusively game fish; the two sets of requirements are similar, except for a "grandfather" clause in RCW 77.16.20 exempting waters diverted before 1947, and a provision in RCW 75.20.040 entitling the Department of Fish and Wildlife to recover the costs of closing a diversion device.

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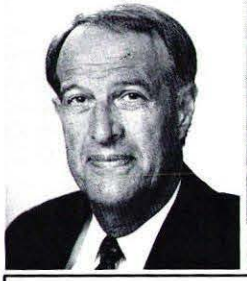

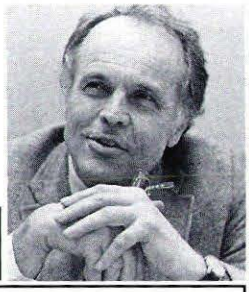

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April

3, 10 & 17 **Construction Laws 96**
Everett (3), Fife (10), Bellevue (17)
By Pac. Leg. Sem. (206) 623-1900
7 CLE credits

5 **Negotiation & Settlement Advocacy**
Seattle
By WSBA CLE (206) 727-8202
7 CLE credits

5 **Challenging Allegations of Child Sexual Abuse**
Seattle
By WACDL (206) 623-1302
6.75 CLE credits

5 & 19 **Trial by the Masters**
Bellingham (5) Wenatchee (19)
By WSTLA (206) 464-1011
6 CLE credits

5 **Clemency, Commutation**
Seattle
By WACDL (206) 623-1302
2 CLE credits

10 **Dialog with US Attorney**
Seattle
By WACDL (206) 623-1302
1 CLE credit

11 **Cutting Edge Developments & Strategies for Protecting Intellectual Property**
Seattle
By WSBA CLE (206) 727-8202
6 CLE credits

12 **Estate Planning, #6**
Seattle
By UW CLE (206) 543-0059
4 CLE credits

12 **2nd Ann'l Civil Litigation Inst.**
Seattle
By WSBA CLE (206) 727-8202
6.75 CLE credits

12 **Auto Cases: DeNovo Challenges**
Seattle
By WSTLA (206) 464-1011
6.25 CLE credits (.5 ethics)

12 **Search & Seizure, Forfeiture**
Yakima
By WACDL (206) 623-1302
1 CLE credit

12 **Master & Ms Tery (mediation)**
Bellevue
By Leadership Inst. (206) 635-1187
4 CLE credits

12 **Rule 35 Exams**
Tacoma
By Tacoma-Pierce Co. Bar Assn. Young Lawyers (206) 627-3883
2.75 CLE credits pending

16 **Negotiation & Settlement**
Seattle
By WSBA CLE (206) 543-0059
7 CLE credits

16 & 18 **ERISA Fundamentals in WA**
Spokane (16) & Seattle (18)
By NBI (715) 835-8525
6.5 CLE credits

17 **Technology in the Courtroom**
Spokane
By WA Paralegal Assn. (509) 456-5713
3 CLE Credits

18 **Doing Business on Indian Reservations**
Seattle
By WSBA CLE (206) 727-8202
6.75 CLE credits

18 **Rainmaking for Women Attorneys**
Seattle
By KCBA (206) 624-9365
7 CLE credits

18 **Informed Consent**
Seattle
By Seattle Forensic Institute of WA Inc. (206) 624-6454
CLE credits pending

18 **Conflicts of Interest**
Seattle
By KCBA (206) 624-9365
4 CLE credits (4 ethics)

18-19 **Real Estate Purchases and Sales**
Seattle
By Law Seminars International (206) 621-1938
14 CLE Credits

19 **Workers Comp in WA**
Seattle
By Lorman (715) 833-3940
6.5 CLE credits

19 **Personal Issues in Law Office Management**
Tacoma
By TPCBA (206) 272-8871
3 CLE credits

19 **Evaluation of Brain/Head Injuries**
Seattle
By WA Def. Trial Lwyrs (206) 233-2930
4.75 CLE credits

19-20 **9th Ann'l NW Bankruptcy Inst.**
Portland
By WSBA & OSB Creditor/Debtor sections
(503) 684-7407
10 CLE credits

23 **Claims Laws 96**
Bellevue
By Pac. Leg. Sem. (206) 623-1900
4 CLE credits

25 **Pros. Physical Abuse Cases**
Everett
By Sno. Co. Pros. (206) 388-3671
1.5 CLE credits

25 **Risk Management**
SeaTac
By WA Health Care Risk Mgmt (206) 552-1107
4.5 CLE credits

27 **Chemical Exposure & Disease**
Seattle
By WA Toxics Coalition & NW Ctr. for Occupation Safety & Health at UW (206) 632-1545
6.5 CLE credits

25 **Arch./Eng. Malpractice**
Seattle
By Lorman (715) 833-3940
6.5 CLE credits

25 **Damages Seminar**
Seattle
By WSTLA (206) 464-1011
5.25 CLE credits pending

26 **Estate Planning #7**
Seattle
By UW CLE (206) 543-0059
4 CLE credits pending

26 **Landlord Tenant**
Seattle
By KCBA (206) 624-9365
1.25 CLE credits

26-28 **Basic Mediation**
Seattle
By UW CLE (206) 543-0059
CLE credits pending

26-27 **Family Law Skills Institute**
Seattle
By WSBA CLE (206) 727-8202
10.5 CLE credits pending

26-27 **SEA & CLE Tax Institute**
Spokane
By Gonzaga Univ. School of Law (509) 328-4220
11 CLE credits pending

27 **Chemical Exposure & Disease**
Seattle
By WA Toxics Coalition & NW Ctr for Occ. Safety & Health (206) 632-1545/(206 857-6202
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30 **Limited Liability Companies**
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THE WASHINGTON STATE BAR NEWS

FAX POLL

What is your opinion regarding "jury nullification"? This concept would allow a jury to acquit otherwise "guilty" individuals if jurors thought that the law in question was itself unjust. Supporters argue that such power would enable juries to disregard unconscionable laws, such as slavery. Opponents counter that providing such power to juries would vitiate democratically enacted laws and eliminate consistency in jury verdicts.

Please check the statement which most reflects your opinion, along with any comments or qualifications which you may have, and fax (or mail) this entire page to the number/address below. No cover sheet is necessary. Only members of the Washington State Bar Association may vote. Please, only one vote per attorney.

1. ____ I strongly oppose jury nullification.

2. ____ I somewhat oppose jury nullification.

3. ____ I strongly support jury nullification.

4. ____ I somewhat support jury nullification.

Comments:_____

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Name and city of faxing attorney (required): _____
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THE WASHINGTON STATE BAR NEWS

FAX POLL

In last month's *Bar News*, we asked your opinion regarding the departments of this magazine. We asked you to rank the departments in the following fashion:

1=Excellent 2=Good 3=Fair 4=Poor 5=Replace

The averaged results:

Fax Poll	1.30
Letters	1.40
Allegedly Humorous	1.88
Lawyer's Assistance Program	1.89
Ethics & The Law	1.89
Briefly Noted	1.94
The Board's Work	2.00
Calendar	2.11
Computers & The Law	2.22
Book Reviews	2.50
Around the State	2.56
FYI	2.80

Overall, 11 valid responses were received, far lower than our record total of 104 responses last month. Nevertheless, it may be significant that the highest departments were those which allowed input and discourse between the *Bar News* and WSBA members. For our readers' information, "FYI" — inaugurated in May,1995 — is unique among *Bar News* departments in that it is a mandatory department edited by the WSBA.

The editor solicits feedback regarding the continuation of "Around the State;" particularly whether organizations or counties with their own newsletters warrant space in such a department.

Your Comments:

"The Calendar needs to be more extended — I need to know what CLEs are available (and where) 2-3 months from now, not last week or tomorrow."
Chris Meserve, Olympia

"Overall — content good to excellent!"
Pat Williams, Spokane

"My biggest gripe is that the Calendar info is often outdated by the time I receive my *Bar News* via the 'slow boat' from Seattle to Tacoma!"
Diane McGaha, Tacoma

"Any journal that inserts the warning 'Harmful if swallowed' into its editorial information can't be all bad."* *Mark Holady, Wilsonville, Oregon*

**This refers to the inside joke we insert somewhere on the information page each month. - Ed.*

Although these statistics accurately reflect the viewpoints of the individuals who responded, they do not necessarily reflect the overall opinion of the WSBA membership.

The Death of Discourse

Ronald K.L. Collins and David M. Skover, 216 pp., hardcover, $49.95, softcover $16.95. WestviewPress [5500 Central Avenue, Boulder CO 80301-2877, ph. (800) 386-5656], 1996.

reviewed by **Robert C. Cumbow**

The free speech pendulum may be about to reverse its swing.

Media Law Reporter recently cited New York University law professor Burt Neuborne as remarking that the permissiveness of recent years has resulted in "lots of speech we don't like" and that, as a result, "we are right on the cusp of a movement where people are going to take a look at free speech, and fine tune the machine."

And George Will, writing on the O.J. Simpson case, asked "whether it is good for society to treat the criminal justice system as a source of entertainment," and answered:

> It simply will not do to chant the mantra about 'the public's right to know.' The impulse often behind that is just voyeurism tarted up in rights talk. The public's 'right' to whatever entertains it is not sovereign over considerations of the moral standing and proper functioning of the criminal justice system.

With impeccable timing, now comes *The Death of Discourse* by professors Ronald Collins and David Skover *[a law professor at Seattle Univ. - Ed.]*, which offers a provocative view of our cherished notion of free speech. By turns cantankerous, stimulating, infuriating, and eye-opening, the book denies the argument implicit in its own title: it's both discursive *and* eminently entertaining—and full of such apparent contradictions.

The authors' argument is based on what their pioneering writings over the past decade identify as the "Paratroopers' Paradox," borrowing Marshall McLuhan's metaphor for a new way of crossing the Rubicon. The paradox is that, to save itself, the traditional First Amendment must destroy itself. The authors illuminate the paradox by reference to two great cautionary works of the mid-Twentieth Century, George Orwell's *1984* and Aldous Huxley's *Brave New World*. In the former, repressive government imposes speech restrictions so pervasive as to not only silence dissent but to make language itself meaningless. In the latter, permissive government institutionalizes personal pleasure to the extent that dissent silences *itself* in the pursuit of trivial amusement. Applied to contemporary discourse, too much governmental control causes First Amendment protection to collapse into tyranny; too much permissiveness, in a culture dominated by commercial amusement, causes First Amendment liberty to collapse into triviality. Either way, discourse — the reasoned debate about significant public issues that uplifts and advances our culture — is nowhere to be found.

The authors' work is Machiavellian in at least one way: It claims to be descriptive rather than prescriptive, presenting the contemporary First Amendment as it is, not as it ought to be. But from the very beginning they promise an outcome that may be surprising. These are law professors, after all, past masters at hiding the ball, and it is no secret that their agenda differs from what their lines of argument first suggest.

Much of the book's argument hinges upon a distinction between discourse and trivia: "Unlike trivial talk, discourse resonates with reason, with method, with purpose." Early in the book, the authors make clear that their paradigm of "trivial talk" is the commercial entertainment culture of contemporary America — epitomized in television. However, the authors never satisfactorily answer the entirely valid objection that discourse and triviality can and do coexist, and in fact have always done so. Arguably, discourse has never been a *mass* phenomenon, and it is unfair to expect it to be so now.

More curiously, the authors abjure television's role in limiting discourse without ever demonstrating that it actually does. Collins and Skover argue that "images displace ideas." But in every culture images have played a role different from (and arguably symbiotic with) that of ideas. The very technology and aesthetics of television are antithetical to the sustained discursive reasoning one routinely encounters — and expects — in print. That is because ideas are the children of language. The real challenge is not the quixotic task of making television more discursive, but the herculean (but not yet sisyphean) task of keeping it from displacing print in our culture. Just as we need both the rational and the irrational, we also need both image-driven visual media and idea-driven print media.

The authors bemoan the fact that, when a New York television station had to choose between a game show and Dan Rather's "Evening News," the game show won. But that is as it should be: Dan Rather's news show is no more discursive (in the authors' sense of the term) than a game show, but is all the more dangerous for *pretending* to be. Commercial entertainment does not (as the authors suggest) *drive out* discourse except when it pretends *to be* discourse. It is *not* television advertising, game shows, sitcoms, and action series that we need less of; it is television news and talk shows masquerading as discursive programming.

Like Oliver Stone in *Natural Born Killers*, the authors do not shrink from indulging the very style they decry. Their text is often broken by what can only be characterized as "thought bites," and each major section ends with a talk show between the authors and other legal and social thinkers in dialogues assembled by excerpting comments from previously published articles, then responding to them—a technique that slyly suggests the opposite of what the authors first contend, that television's quick-edited "sound bite" technology may not be so inconducive to discourse after all.

The book abounds in deceptive dichotomies. Not only do the authors assume irreconcilable differences between pleasure and thought, when in fact the two often coincide (in their own book, for example), but they also formalistically divide the rational from the irrational; self-realization from self-gratification; and deliberative discourse from "image-driven onanism;" as if, in each case, the one had nothing to do with the other. But here again, the authors are up to more than meets the eye.

In Book II, "Commerce and Communication," the authors argue that commercial speech (chiefly television advertising) trivializes public discourse — again without ever demonstrating that it does. They shrug off two alternate possibili-

ties: that commercial speech may in fact coexist with discourse either harmlessly, or even productively. The authors are kept from countenancing these alternatives by an anti-commercial bias that pervades their work. They speak derisively of "captains of commerce," as if the profits of corporate America still went into the pockets of a few Nineteenth Century fat cats, instead of supporting the mutual funds, IRAs, pension funds, and arts & education underwriting of an entire nation. They write of "the consumptive thrust of unchecked capitalism" as if law books were not filled to groaning with statutes and regulations that check business at every turn. They suggest that much of what is wrong with television is the fact that it is so decisively a *commercial* medium, ignoring the fact that, even though those who pay the piper have always called the tune, much of today's "political correctness" derives from the way television commercials, sitcoms, and dramas helped break down racial and sexual barriers. (Come to think of it, though, that may be why today's political correctness is so simple-minded.)

The authors scorn "speech in the service of selling" without acknowledging that *all* speech is selling something. They never explain why commercial speech that seeks to influence purchasing decisions for the sake of profit should be less deserving of protection than political speech that seeks to influence voting decisions for the sake of power. Of course in this respect the authors are in good company: The United States Supreme Court has never explained this either. And to their credit, Collins and Skover, unlike the Court, recognize the anomaly. And to be fair, the authors never claim that forms of speech they consider trivial should be denied protection — only that we, the people, should be honest about what we identify as the basis for that protection.

In Book III, "Discourse and Intercourse," they explore the arguments for and against protection of another "low-tier" class of speech: pornography. They argue that the United States is fast becoming "Pornutopia," a world like Huxley's brave new one, in which all is permitted, and self-gratification seduces a populace into inactivity and insignificance. Nevertheless, they provide pages of examples of pornography as political comment, arguing that, until today's technology, pornography served a useful discursive function ("redeeming social value"?). It is likely, however, that their examples of culturally valuable pornography were, in their own day, merely the tip of a pornographic iceberg of substantially less value, which has not survived precisely because it did no more than titillate the suppressed sensibilities of an earlier day. In any event, contemporary pornography of whatever variety is often justified as an arguably healthy questioning of — and rebellion against — civilized humankind's willful neglect of its dark side, its animal nature. The notion that pornography once had value and no longer does is disingenuous; and Collins and Skover, mavericks that they are, know it full well.

The authors' viewpoint seems distinctly Manichaean. *["A dualistic and ascetic religion developed by Manes and his followers from Zoroastrian, Mandean, and other elements." Never let it be said that we don't use big words in the* Bar News. *- Ed.]* They assume that the life of the mind is "higher" or more important than the life of the body, and that self-gratification — whether the conspicuous consumption of a commercial culture or the pleasure pursuits of a Pornutopia — are at war with the aims of discourse. This uniquely Anglo-American bias, arising from the Puritan tradition, is so fundamental that the authors never defend it. But it needs defending, otherwise the opposing view is just as likely: that the mind and the body are not at war at all, and the irrational impulses of consumerism and self-gratification work hand-in-hand with the rational methods of discourse, both playing important roles in the self-realization of individuals and their culture.

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The Manichaean bias, of course, is inherent in traditional First Amendment jurisprudence; that is why the authors adopt it (or seem to); commercial speech and pornography actually *are* more regulated than other kinds of speech. Collins and Skover, however, do not dwell on the difference between such "low-tier protection" and the higher protection afforded political and religious speech; they are more interested in the *justification* for it: The reliance on the Madisonian ideal of public discourse as the standard against which we measure our free speech values.

In the book's Conclusion, First Amendment jurisprudence is found wanting, not because of its conclusions but because of its pretensions. The pretense is that, in protecting speech of virtually any description, we protect the foundations of our own democracy, because we promote and safeguard the Madisonian ideal of a civilized people, engaging in public discourse, participating in spirited debate, informing and equipping ourselves to make the best possible political and social decisions. This is, for Collins and Skover, the Big Lie.

Is this the logical extension of our democracy, they ask, to have become so opposed to oppression that we permit everything for fear of the implications of suppressing anything at all? If it is, let us admit it, and not persist in the hypocritical self-congratulatory illusion that we serve the Madisonian ideal of public discourse. Let us rather acknowledge that we refuse to suppress or limit certain kinds of speech (such as image advertising and pornography) because, as a people, we see commercial or cultural advantages in tolerating, even promoting such speech. Or, to put it a simpler way, we just aren't sufficiently *bothered* by such speech to go to the trouble of controlling it.

One of the frustrations of the book is the authors' decision not to explore what free speech jurisprudence under this new "cultural approach" might look like. Federal judges serving in the First Amendment front lines will hardly throw out two centuries of *stare decisis*; much less begin deciding cases based on what is appropriate to our culture rather than what serves the values traditionally assumed to underlie the First Amendment. But this is why *The Death of Discourse* is a dangerous book, and one whose invitation to danger should be welcomed if we are to keep our Revolution in the constant state of renewal that Jefferson counseled.

And of course the authors are not interested so much in changing the law as in changing *people*. (*The Death of Discourse* is not just for lawyers.) In asking us to reject the hypocritical invocation of the Madisonian ideal, and face responsibility for whatever speech we the people will and won't tolerate, Collins and Skover suggest that the First Amendment pendulum's swing is a welcome thing; given a surfeit of trivial entertainment, of commercial and pornographic speech, the appetite may sicken and so die.

This is an important book, and an epitome of what its authors call "discourse." Even when you agree, you want to argue, discuss, comment — and they wouldn't have it any other way. It's a rare book that engages and challenges the reader's fundamental beliefs in this way. *The Death of Discourse* may be the opening salvo in a new First Amendment battle that will be waged not in courts but in public (dare I say it?) discourse over the coming years. As the great American film maker Samuel Fuller (a prophet without honor in his own country) wrote at the finale to one of his greatest films (*Run of the Arrow*, which was also about the survival of American democracy): "The end of this story can only be written by you."

✣ ✣ ✣

Robert Cumbow is an attorney with Perkins Coie in Seattle; he chairs the WSBA Editorial Advisory Board.

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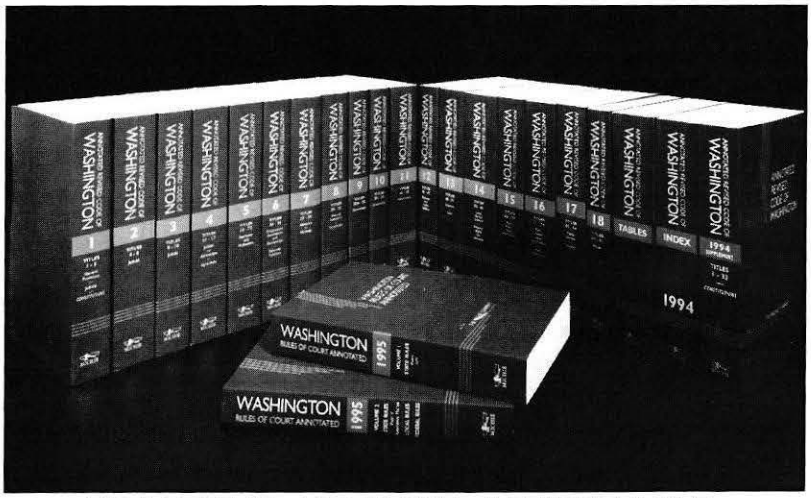

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ASIAN BAR ASSOCIATION

Officers of the Asian Bar Association of Washington for 1996 are **Jeffrey M. Sakoi**, president; **Susan Hacker**, president-elect; **Chun Ng**, vice president; **Kathy Kim,** secretary; and **Net Sato**, treasurer. Other members of the board include the Honorable **Ron Mamiya**, **Young Lee**, **Russ Aoki**, **Yvonne Ward**, **Julie Farber**, **Gary Maehara**, **John Myung** and **Randy Aoyama**.

WASHINGTON ADMINISTRATIVE LAW JUDGES ASSOCIATION

The Washington Administrative Law Judges Association (WALJA) is a professional affiliation for "persons employed by governmental agencies within the State of Washington, who are empowered to preside over statutory fact-finding hearings or appellate proceedings arising within, among or before public agencies or who are empowered to prepare decisions for a higher tribunal." WALJA provides representation for its members at the monthly WSBA Board of Governors meetings, as well as a forum for shared interests, concerns and issues in administrative law. In addition, WALJA sponsors an annual convention with a CLE seminar — this year in Leavenworth, May 23-24. WALJA is actively soliciting new members. Dues are only $20 per year. For membership and or convention information, contact **Ted Armbruster**, president [in Spokane at (509) 533-2470], **Cynthia Minter**, vice president [in Everett at (206) 339-1921], or **Miriam Kasperson**, secretary/treasurer [in Seattle at (206) 464-7095].

CLARK COUNTY REPORT

by **TERRY LEE**

Robert "Peter Pan" **Russell**'s photo was recently in the local fishwrap, a.k.a. newspaper. His dazzling performance as a flag football player showed "Twinkletoes" muddied but unbowed. Seems that his flags are business cards — and who would want to take a business card from a lawyer — hence he is quite the high scorer.

Curt Wyrick recently appeared in court. It was such a phenomenon that CLE credit is rumored to be available. **Darryl Lee** is rumored to have closed his office a couple of years ago, but he can be found Friday mornings with **Ernie Nicholson** at their joint office in Judge **Edwin Poyfair**'s courtroom. Come one, come all, and watch them go!

Krista Fletcher, the sports car-driving attorney in the Foley & Hagenson firm, is rumored to have spent a week at Disneyland. It supposedly helps her understand her BIG partners.

Speaking of which, **Gus Klatt** and **Lee Dane** are no longer the "biggest partnership" in town. Gus's recent weight loss has moved **Tom Foley** and **John Hagenson** into the coveted position of "The Biggest Partnership."

KING COUNTY

Reed McClure announces the addition of **Anamaria Gil** to its insurance defense practice and litigation team and that **William R. Hickman**, a shareholder in the firm, has been named "Official of the Year" by the Pacific Northwest Track and Field Officials Association. Hickman has been actively involved in track and field events in the Northwest since founding the Seattle Track Club in 1976. He is a nationally certified master level track and field official and a member of the Pacific Northwest Track & Field Association.

Brad Marten and **Rod Brown**, from the international law firm Morrison & Foerster, are spinning off to form Marten & Brown, a new environmental litigation law firm with roots in the Northwest.

Katie Smith Matison, **Raymond S. Weber** and **Charles W. Riley, Jr.** have been elected partners at Lane Powell Spears Lubersky, Seattle.

Henry E. Farber and **Alan S. Middleton** have been named partners at Davis Wright Tremaine, Seattle.

Frederick L. Noland has been named managing director of the law firm of MacDonald Hoague & Bayless.

Former King County Senior Deputy Prosecutor **Joel Paisner** has become "of counsel" to the Seattle office of Ater Wynne Hewitt Dodson & Skerritt.

Kevin J. Canning has become a partner with Seed and Berry LLP, a Seattle intellectual-property law firm.

John E. Poffenbarger has been named a partner at the Seattle office of Stoel Rives LLP.

Julie M. Azevedo, **Thomas M. Hansen**, **Celeste A. McDonell**, and **Allison G. Pettit** have joined the law firm of Betts, Patterson & Mines, PS, in Seattle.

The Seattle firm Helsell Fetterman Martin Todd and Hokanson is shortening its name to Helsell Fetterman. The firm's address, phone and fax numbers remain the same.

Watson B. Blair has joined the Trusts and Estates Practice Group of Seattle's Bogle & Gates PLLC.

Foster Pepper & Shefelman named **Bruce Coffey**, **Scott Galloway**, **Alan Koslow** and **Rebecca Dean** partners and elected **Jack Cullen** managing partner.

James E. Pruitt III has been named partner at David Wright Tremaine.

Sheryl J. Willert has been named managing partner of Williams, Kastner & Gibbs LLP.

Timothy M.B. Farrell, formerly of David Teske and Associates, has established a Seattle practice focusing on criminal defense and maritime personal-injury and wage claims.

Mary K. Fleck, formerly with New York City's Hughes Hubbard & Reed and Ithica, New York's Barney, Grossman, Roth & Dubow, has joined the Law Offices of James S. Rogers as an associate.

PIERCE COUNTY REPORT

by **TONI FROEHLING**

February's Lincoln Day Banquet was, as usual, a great success. Despite the fact that it was held on a day more fitting for Noah than Lincoln, nearly 200 folks showed up. The Hon. **Thomas Swayze** received a well-deserved award commemorating his many years of dedicated service to the judiciary and the citizens of Pierce County. **Felicia Malsby** gave a follow up to her speech of a couple years ago and again was very entertaining. King County prosecutor and gubernatorial candidate **Norm Maleng** also spoke and outlined the reasons why the Seahawks should stay. There was enough passion in his words that I saw several old arms limbering up in the hallway, waiting for the elevator. Speaking of the elevator, we did manage not to strand anyone this year, although we were prepared. **Peter Sterbick** was waiting with appropriate advice on how to recover from the emotional trauma resulting from unwanted confinement in such small space. You may recall that he was successful last year

in such a claim after being stuck for more than an hour with several other luminaries.

The law firm of Davies Pearson, P.C., has advised that **Mark Roberts** and **Susan McNally** have become shareholders in the firm. Congratulations are in order, and the firm is lucky to have them.

All Pierce County Lawyers have had a perfect month, so there is no Bubba award for April.

WASHINGTON DEFENSE TRIAL LAWYERS REPORT

by **BETH A. JENSEN**

You may have noticed some of your defense bar colleagues look a little more rested, maybe even tanned. We all just returned from our third annual Sun Break Seminar in Scottsdale, AZ. The long-weekend seminar focused on case evaluation and negotiation skills (oh, okay, golf and the Mariners, too!). Cochairs **Roy Umlauf** and **Steven Jaeger** made sure the interactive small-group format was challenging and helpful to everyone. It was a great success.

At this writing, the State Legislature was expected to adjourn its session this year on March 7. **Joel Summer,** WDTL's Legislative Committee chair, worked with the Liability Reform Coalition and its lobbyist, **Cliff Webster,** regarding tort reform. The LRC has been focusing its efforts this year on increasing public awareness of the issues and expects tort reform to be a major debate issue in the 1996 political-campaign season.

WDTL was invited by Chief Justice **Barbara Durham** to participate in a committee to study the potential impact of reducing the size of the Supreme Court. Amicus Committee Chair **Russell Love** and Association Secretary **Laurie Kohli** will represent WDTL. They will provide us with information regarding proposals and would appreciate input regarding this important issue.

WDTL will present its "Defending Head Injury Cases" Seminar on Friday, April 19, 1996, at the Washington Athletic Club. **Roy Umlauf** and **Steven Jaeger** have planned presentations regarding neurology, neuropsychology, vocational rehabilitation, posttraumatic stress syndrome and economics. This seminar should be really helpful in a rather complex area of medicine.

WASHINGTON WOMEN LAWYERS STATE BOARD REPORT

by **TIFFANIE KILMER**

The WWL Leadership Development Conference will be held Friday, May 17, at the Seattle University campus. Register with **Tiffanie Kilmer**, executive director, at (206) 622-5585.

Share your story on the history videotape: contact **Patricia Kaiser** at (206) 323-9112. Women of color and women outside the greater Seattle area are encouraged to participate to ensure a rich diversity. The 25th Anniversary video is available for purchase at the WWL office. Also contact the WWL office to obtain a complimentary copy of the WWL 1996 speaker's list or for membership information.

Mark your calendars now for the WWL Annual Dinner to be held Tuesday, October 1, 1996, at the Westin Hotel in Seattle, featuring keynote speaker **Ada Shen-Jaffe** of Evergreen Legal Services, a 1995 recipient of the ABA's Margaret Brent Women of Achievement Award.

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and

KINNON W. WILLIAMS

has been named Local Government Committee Chair of the Washington State Bar Administrative Law Section.

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former adjunct professor of law at UPS and former in-house counsel for North Pacific Insurance Co., is available for consultation, association or referral in matters involving all types of insurance coverage, as well as arbitration and mediation in civil, tort and contract litigation.

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Wanted: associate for well-established practice in Columbia River Gorge. Income would be based on percentage of fees generated and received. Must be motivated, ethical and committed. Reply to Box 488, WSBA.

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Anthony Schneider of Seattle, Washington, died 12/12/95. Anyone with knowledge of a will executed by Anthony Schneider, contact attorney Bruce R. Bell at (206) 258-6261.

Henry Leland O'Keefe: Searching for will of Henry Leland O'Keefe, dob 11-02-1921. Please contact Dorothy J. Morey, attorney at law, (541) 344-6484.

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Italy - Tuscany/Umbria - 19th C. farmhouse, three bedrooms, sleeps six. Beautifully updated and furnished, 10 miles from Orvieto, about one hour from Rome (frequent trains or car), weekly rental about $600-$800. For photos: Law Office of Ken Lawson, UBI 600427905, fax (206) 632-1086 (Seattle).

New State Court's Internet Homepage

The new Washington State Court homepage is enjoying a great deal of popularity on the world wide web. Over 2,000 people accessed the homepage during February, and access is expected to increase since the site is now listed by all of the major Web search services. Maintained by the Office of the Administrator for the Courts, you can find information including how to subscribe to JIS-Link, domestic relations information, recent press releases, newly published reports and the Washington State Court directory. Look for an added feature soon: Court of Appeals opinions on-line. The homepage can be accessed at the following address: http://www.wa.gov/courts/

The Walsh Commission

As we go to press, the Walsh Commission, the 24-member commission formed to review all aspects of judicial selection, presented its final report at a Seattle press conference. The commission was formed last year by State Supreme Court Chief Justice Barbara Durham and Gov. Mike Lowry. For a copy of the report's executive summary, call Wendy Killian, Office of the Administrator for the Courts, at (360) 705-5331, or visit the Washington State Court homepage on the world wide web at http://www.wa.gov/courts/

FEMA & YLD join in pro bono efforts

When the President of the United States declares a "disaster" in any part of the country, the Federal Emergency Management Agency (FEMA) takes charge. The Young Lawyers Division (YLD) of the American Bar Association has entered into an agreement with FEMA to provice pro bono legal services following major disasters. The WSBA's Young Lawyers Division has agreed to provide legal guidance to qualified individual victims in the state of Washington. Services to be provided include legal advice, counseling and representation in non-fee-generating cases. Fee generating cases will be referred to lawyers through the various lawyer referral services, etc.

WYLD is looking for volunteers who would be prepared to offer legal assistance. Some training will be provided. To sign up for this important pro bono effort, contact Henry K. Hamilton, District Representative to the ABA/YLD, at (206) 667-8214.

Robert D. Kaplan wins ABA National Public Service Award

Robert D. Kaplan was awarded the National Public Service Award by the ABA's Pro Bono Committee of the Business Law Section at the Section's spring meeting in Nashville last week.

Kaplan is a business lawyer in Seattle who has spent the past 25 years making significant pro bono contributions to organizations that serve Washington's poor. He began his career in 1969 as a VISTA volunteer stationed in Chicago with Community Legal Services, where he worked on health and welfare issues. His current pro bono work includes the Northwest Justice Project, one of two new entities rising from the ashes of the Legal Services Corporation funding cutbacks which replaced Evergreen, Puget Sound and Spokane legal services centers. For the past three years he has been general counsel to Legal Aid for Washington (LAW) Fund, and for four years has been general counsel to Artist Trust, which provides assistance and grants to individual artists. He has also done significant pro bono for more than a dozen other organizations, including the Coalition for Charitable Choice, Arts United of Puget Sound, University District Food Bank, Temple Beth Am, Country Doctor Clinic, and the Carolyn Downs Family Medical Center. He also currently serves on the boards of the Pacific Medical Center and Arts United of Puget Sound.

"Bob Kaplan made a conscious choice many years ago to be a 'community lawyer,'" wrote U.S. Attorney Katrina Pflaumer in her nominating letter. "Bob Kaplan has found time to devote an extraordinary number of hours to the pro bono work described above. He is self-effacing and modest about it, but those who work near him appreciate the untold hours and diligence this pro bono work requires."

Patrick McIntyre, Executive Director of Northwest Justice Project, wrote, "Bob Kaplan has literally made it a career-long habit to give others the shirt off his back. And, what is more, he gives the highest quality of shirt in an extremely professional manner — with no expectation whatever of receiving, nor any effort to prompt, formal recognition of any kind."

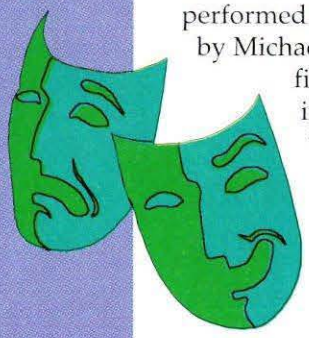
Congratulations to WSBA President-elect Tom Chambers, who was chosen 1996 Trial Lawyer of the Year by the American Board of Trial Advocates.

State Legislature Approves Supplemental Funding for Legal Services

On March 7, 1996, the House and Senate Fiscal Committees approved the 1996 Supplemental Operating Budget, which contains $1 million in supplemental funding for legal services in Washington State. The budget commentary reads, "Federal reductions to the Legal Services Corporation will reduce funding for legal services available to low-income citizens. To help maintain access to legal services, funding is provided to partially offset the federal reductions." This funding cannot be expended, however, until an alternative dispute resolution agreement is signed by Columbia Legal Services, the Washington Growers' League, and the Northwest Justice Project.

Buying Time (and Lawyers)

by John Phillips and Todd True



The Seattle Repertory Theater recently performed the world premiere of *Buying Time* by Michael Weller, a play about lawyers, law firms, pro bono work, conflicts of interest and the thorny question of "issue conflicts." If this sounds to you like an unlikely subject for an engaging drama, you would be wrong (of course, the play also contains the requisite amount of sex, money, greed and intrigue).

The play is based, roughly, on a true story about a southwestern law firm that started small, but grew large and prosperous in the '80s while remaining committed to its founding tenet of public service and pro bono work. The firm assumes representation of an environmental group (LivEarth Coalition) in Endangered Species Act litigation (the Moorhawk), challenging a company's right to harvest timber in a nearby national forest. After the firm takes the case and obtains some initial successes both in the Court and in the press, the firm's biggest client (a mining company that is not involved in the case) puts pressure on the firm management to drop the case.

The prosecution of the case, the internecine firm warfare regarding the case (particularly between the business and litigation departments), the emerging scrap between the firm and its largest client, and the personal conflict several of the main characters feel between "doing good and doing well," provide the significant tensions in the play.

After a recent matinee production, four local lawyers, Todd True of the Sierra Club Legal Defense Fund, Karen Jones of Graham & James/Riddell Williams, Marcella Fleming of The Boeing Corporation, and John Phillips of Heller, Ehrman, White & McAuliffe, fielded questions from the audience with the assistance and able moderation of Judge Terrence Carroll, with the Judicial Arbitration and Mediation Service. While lawyers in the audience may have been more taken by the subtleties of the relationship between the Business and the Litigation departments or resonated to the conundrum of "issue" conflicts, the audience seemed more concerned with understanding pro bono legal service. The local lawyers explained that what distinguishes lawyers as a profession is our obligation to support and uphold a system of justice — and make a living. That system can only work if we undertake pro bono legal services without expectation of compensation from those who cannot afford it.

Some members of the audience seemed surprised that pro bono work is not required of lawyers and suggested that it should be required to fill the void in legal services caused by retrenchment in public funding for these services. Others expressed concern for those who may not be poor, but who simply are unable to afford the normal cost of legal services. Others asked questions about how law firms address pro bono work. Mr. True, on behalf of SCLDF, described the public interest nature of his law firm's work and said that his firm performs only legal work that it believes is in the public interest. Ms. Fleming described how Boeing lawyers are encouraged to participate in charitable boards and other nonprofit activities. Ms. Jones and Mr. Phillips described various law firm institutional means of encouraging pro bono work by the firm. The ABA, for example, has established a Pro Bono Challenge Project for participating law firms to increase pro bono participation to five percent of total hours billed by all lawyers. Some firms credit pro bono hours as part of the "billable" expectation or devise other methods to encourage pro bono work.

What seemed clear from the exchange between lawyers and the audience is that with federal and state cutbacks (e.g., the recent downsizing and reconfiguration of Evergreen Legal Services) the need for more lawyers to perform more work in the public service without the expectation of compensation is and will continue to be high. In *Buying Time*, firm management drops the Moorhawk case, the big client then drops the firm, the law firm appears the fool and the legal profession's commitment to pro bono legal services seems, at best, equivocal. The audience, it would appear, would prefer a different ending. ◆

The First Annual "Speak Up For Children" 5K Run/Walk on May 25, 1996, in Seattle's Seward Park will benefit CASA (Court Appointed Special Advocate). The Alpha Lambda Chapter of the Kappa Alpha Theta Fraternity at the University of Washington is sponsoring the event to raise funding and awareness of CASA, which supports advocacy for the best interests of abused and neglected children involved in the court system.

"Speak Up For Children" is looking for runners/walkers and donors to help support the event. Entry forms are available at Super Jock 'n Jill, Fast Lady Sports, and in Northwest Runner magazine. Cost in advance is $15, or $22 on the day of the race. Donations may be sent to: Speak Up For Children, 4756 University Village Pl. NE #422, Seattle, WA 98105. Donation deadline is April 12. For more information, call Monica Edenholm or Mégan Jellinek at (206) 525-6832.

Johnnie Cochran speaks at Edmonds Community College

"Our (legal) system is second to none in the world, but it's not perfect. It has flaws. The flaws are racism," began prominent lawyer Johnnie L. Cochran Jr. before on audience of 350 people on March 15 at Edmonds Community College. As a lawyer, Cochran believes he is "an advocate for society, the poor, and the disenfranchised."

Cochran's speech was presented by ECC's Student Programs Major Events, Law Association, and Black Student Association. His speech was titled "Injustice Anywhere is a Threat to Justice Everywhere."

"The problem we are facing is the mindset that we are all different from each other. There is more that unites us than divides us." He proposed two solutions for the justice system's problems: Everyone should get out and "vote for someone with the same vision of America that you have," and to accept jury service when called. "I believe in juries," he said.

Later that evening Cochran was asked if he believed in jury nullification, a recent hot topic in the WSBA's *Bar News* magazine. He immediately reponded with "I would never do that. No lawyer worth his salt would." He defined jury nullification for the audience as, "Where a lawyer says 'my client is guilty but I want you to find him not guilty for some other reason.'...Jury nullification is not the way to solve our problems. The thing that makes the system great is that a jury doesn't have to do what's popular." ◆

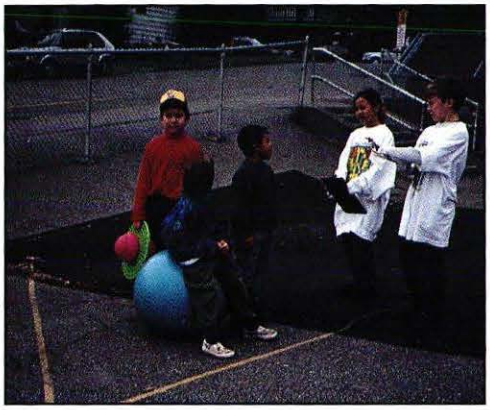
ADR Section's School Mediation Committee: Resolving Kids' Conflicts, *by Faith Hanna, ADR Committee Chair*

Fourth- and fifth-grade students in "Conflict Manager" t-shirts roam the school playground at recess. Their teachers have trained them to prevent student disagreements from escalating into fights on the playground.

High school students sent to the principal's office for disrupting class with their arguments are presented with an alternative to discipline: they can choose a mediation session with two student mediators. With no teachers in the room, the student co-mediators set the ground rules, listen to the disputants' description of the problems, and facilitate problem-solving to reach a resolution of the conflict.

These scenes are currently happening in schools around the state. The successes of current mediation programs are stimulating a growing interest in mediation among the school community.

When the Washington Superintendent of Public Instruction recently surveyed the state's K-12 schools, almost all the schools responding said they were interested in developing a conflict mediation/resolution program for their students. With over half of the state's schools responding to this questionnaire, the survey shows a substantial interest in school ADR. Over a third of the responding schools reported some conflict mediation/dispute resolution programs in place. The student mediator programs, however, represented only part of these conflict resolution programs. Some schools are teaching communications skills and conflict management as part of the curriculum or as part of a drug and alcohol intervention program.



Student conflict managers at Seattle's Latona Elementary School

Washington lawyers have also demonstrated a growing interest in school conflict resolution programs. The Washington Attorney General has joined with the WSBA to develop a cadre of lawyers to train students in peer mediation. In this project, known as LASER (Lawyers and Students Engaged in Resolution), a group of lawyers has become involved in training and mentoring of peer mediators at two Seattle high schools. The LASER project is now planning to expand its training to schools in other areas of the state.

In addition, the ADR Section has created an ad hoc committee on school mediation to support K-12 mediation programs and to link ADR professionals with school mediation. In the 1994-95 school year, the committee funded development of a conflict manager program at Latona Elementary in the Seattle School District. Committee members Sandy Macdonald and Laura White also produced two seminars at the 1995 ADR Conference at the University of Washington Law School. In these seminars, students from Latona Elementary, Rainier Beach High School, and the Highline School District presented mock mediations based on their school experiences.

The ADR Section has also provided seed money for at least two regional student mediation conferences this year so school staff can connect with ADR professionals. An all-day conference for middle school students will be in Spokane, and a high school student conference will be in western Washington. Both will provide advanced training for student mediators and networking opportunities for the adult coordinators. For further information, contact conference coordinator Laura White, (206) 364-9221.

Several schools with ongoing peer mediation programs have reported that their student mediators are very interested in meeting professional mediators or lawyers who use mediation in their practice. ADR professionals could help maintain and extend student enthusiasm for mediation by discussing the applications of ADR and by trading practice tips with student mediators. If you are interested in occasional meetings with student mediators during or after school, write to School Mediation Committee Chair Faith Hanna, 33434 8th Ave. S., Federal Way, WA 98136. ◆

2 Upcoming WSBA CLEs Focus on Litigation, Technology

Second Annual Civil Litigation Institute Features Nationally-known Jury Consultant

This year's Civil Litigation Institute on April 12 focuses on cutting edge advice every litigator needs. Howard Varinsky headlines the morning sessions with a two-hour presentation on *Preparing Your Witness to Maximize Credibility*. His remarks will focus on the importance of nonverbal communication, gaining juror respect and other strategies in witness preparation. Mr. Varinsky is a widely-known and respected jury and trial consultant nationally recognized for his work in the formulation of pretrial strategy, jury selection and witness preparation. Among the many highly-publicized civil and criminal cases which Howard Varinsky Associates has consulted are: *Imelda Marcos Litigation; MGM/Ted Turner Film Library Suite; Intel v. AMD; State of New York v. Bernhard Goetz; and State of Arizona v. Evan Meacham.*

Additional sessions address discovery tactics for debunking experts, the use of computer animation at trial, ex-parte discovery of electronic evidence, a view from the bench regarding the discrediting of experts at trial, controlling the scope of electronic discovery, and a "how to" approach for preserving issues for appeal. As an added attraction, all registrants receive admission to a special exhibit area. For further information and to request a brochure, please call Program Coordinator Michele Kramer at (206) 727-8258. ◆

Technology to Save You Time and Make You a Better Lawyer

Make a technological leap and improve your delivery of legal services — *Technology for Improving Your Law Practice* on May 9 explores and explains the technology and applications you can use for automating your law office, maximizing your electronic law office connections, researching information on the Internet, managing more effectively the elements of your practice, harnessing technology for better client communication, and taking advantage of emerging technology — like voice recognition software and integrated law practice software. This outstanding seminar draws upon the talents of speakers recruited from around the country and Pacific Northwest. You'll get answers to your questions about Internet connectivity and tips on where to start researching information, practical advice about hardware and software considerations, plus how available technology can improve the way you communicate — with clients, within the firm, and with other attorneys. Learn how to use personal information managers to help manage your cases and improve your use of office files. And since seeing is believing, you'll watch demonstrations of software that can make a difference in how you practice law. For further information and to request a program brochure, call the WSBA CLE Department at (206) 727-8202. ◆

Now Playing at a Location Near You: Moderated Group Video Replays

Imagine this — it's winter in Washington. Snow closes the mountain passes and the airport shuts down. Or how about this — you've had a long week filled with depositions and trials and you dread that four-hour drive, but you've maxed out on A/V CLE credits and you need live CLE credits. The WSBA Continuing Legal Education department has the answer — Moderated Group Video Replays.

Of the 60+ seminars produced annually by the WSBA CLE department, about 20 percent are video or audio taped. The audio tapes are purchased by individuals and count as A/V credit. (Attorneys can claim up to one-third of their required MCLE credits as A/V.) The videos can be licensed for individual viewing and can also be used in group replays — hosted and moderated by an attorney or law office interested in sharing the information with attorneys in their area. They are often **held at the host's law office or at a nearby hotel**. Moderated Group Video Replays aid you in obtaining **live CLE credits** when distance, weather or scheduling conflicts make traveling difficult. With a **reduced tuition**, registrants receive the same materials as if they attended in person. Preferred passes can be used as registration payment.

Scheduled Moderated Group Video Replays are published monthly in the *Bar News* (WSBA CLE ad and the CLE calendar). Interested in hosting or moderating a group video replay? Call the CLE department, (206) 727-8202. ◆

ABA Survey Finds Young Lawyers More Likely to Find Time for Hearth and Home in Small Firms or as Solo Practitioners

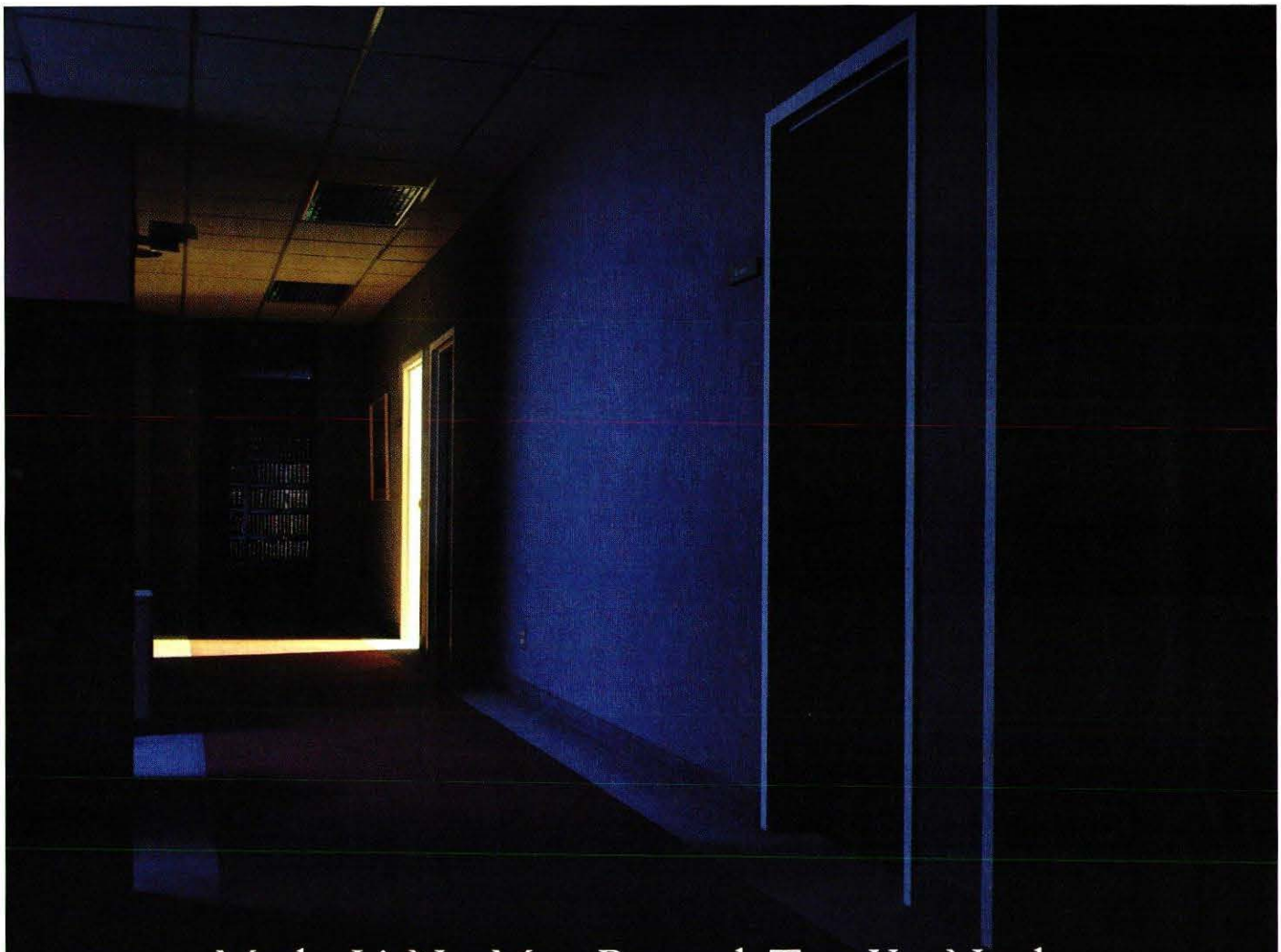
Small firm lawyers and solo practitioners are more likely to find sufficient time for hearth and home, according to an American Bar Association survey of 2,000 Young Lawyers Division members, than are their large firm counterparts.

In the survey, a majority of respondents working in small firms (59 percent) report that they experience a lower level of job tension/pressure and that the balance between time spent on work and family responsibilities is satisfactory.

Only 11 percent of the respondents from large firms (26 lawyers or more) said they would not consider leaving their current position, compared to 48 percent of the respondents from small firms (25 lawyers or less) who said they would not leave their current position.

According to the survey, private practitioners in larger firms are more likely than those in smaller firms to indicate that a desire for more personal time and the pressure to bill hours are important factors in a decision to leave their present position.

The survey also reports that 60 percent of young lawyers spend time on pro bono activity; and 75 percent of survey respondents reported that they feel that through their law career they have been able to contribute to social good.



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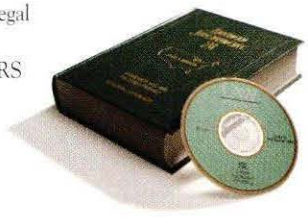

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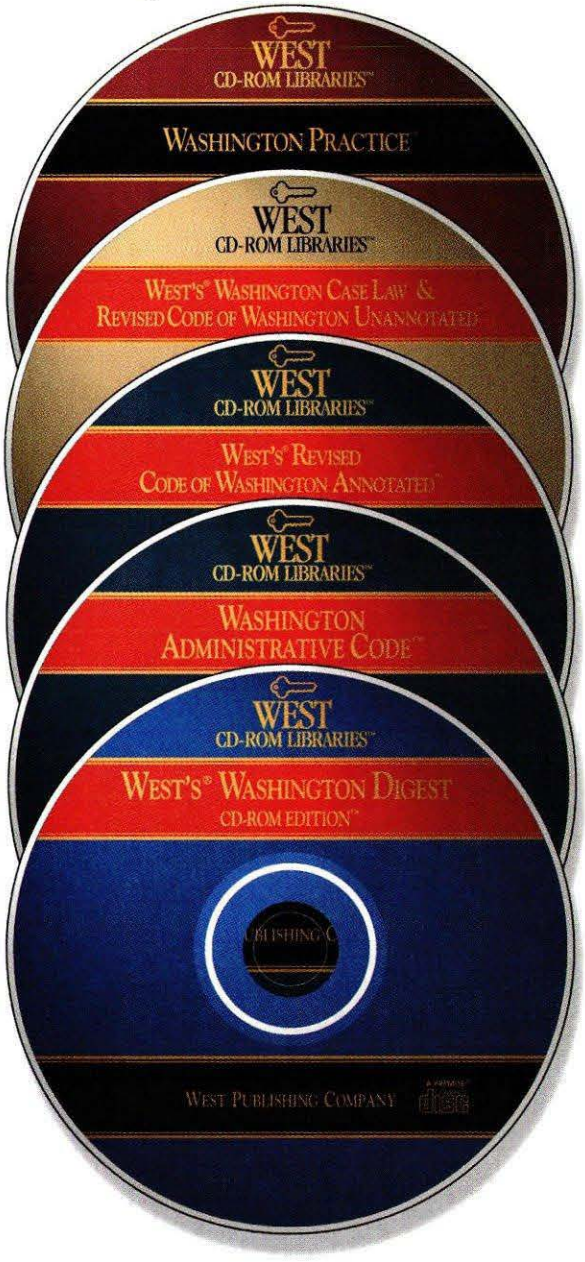

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