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Vol. 50 No. 9, September 1996

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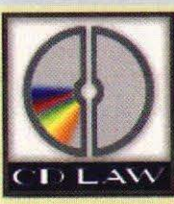

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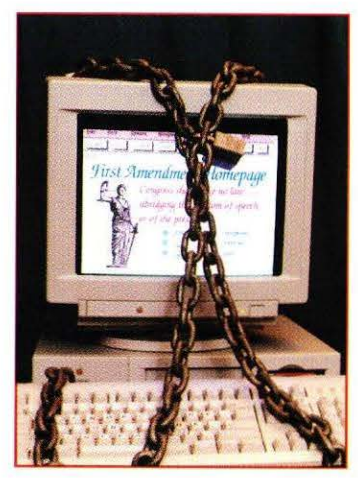

"Internet Censorship" by Jennifer Klamm, Bar News *Staff*

BAR NEWS

HAL WHITE
Editor, (713) 667-9399

JENNIFER KLAMM
Managing Editor, (206) 727-8215
jennifer_klamm@dBug.org

JACK YOUNG
Advertising Manager, (206) 727-8260

DOREE ARMSTRONG
Editorial Assistant, (206) 727-8214

CARRIE HARDIE
Communications Coordinator, (206) 727-8213

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Washington State **Bar News**

Vol. 50 No. 9 September 1996

The official publication of the Washington State Bar

ARTICLES

Indecency and the Internet: Where Does the First Amendment Fit In? 19
by Joseph S. Faber

A Freshman's View of the Supreme Court 29
by the Honorable Richard B. Sanders

REASN Comes to the Real Estate Brokerage 32
by Douglas S. Tingvall

The Supreme Court Candidates Speak Out 40
Position 1: Barbara Durham, Mark Mestel, Kathryn Ross
Position 3: Charles W. Johnson, Barnett Kalikow, Douglas J. Smith

COLUMNS

The President's Corner 15
One Year — Many Memories, *by Edward F. Shea*

Exec's Report 17
"Were Moving!" *by Dennis P. Harwick*

DEPARTMENTS

Letters 7

The Board's Work 37

Ethics & the Law 39

Briefly Noted 44

Fax Poll Questionnaire & Results 47
Rating Judicial Candidates & Physician-assisted Suicide

Calendar 49

Announcements, Professionals & Classifieds 50

FYI 57

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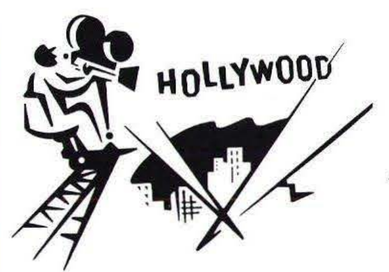

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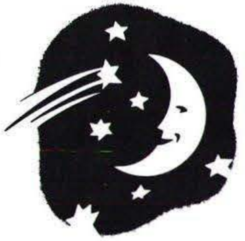

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. . . a Magazine by its Cover

Editor:

Instead of making cutesy jokes ridiculing lawyers, Americans everywhere should consider the cover of the June issue of the *Bar News*, Greenwood's painting of *The Trial — Homage to Sharanski*. The scene which is portrayed, that of a defendant being denounced by an unseen accuser, happens elsewhere in the world, but not here. It must be terrifying to live in a society where lawyers are not able to protect the freedoms which we all take for granted. That striking depiction brought it all home to me in an instant.

MADISON R. JONES
Seattle

Insensitivity

Editor:

Words absolutely fail me. The *Bar News* mouths (prints) words about the need to improve the public's perception of the legal profession and then prints "A Family Affair" (FYI, 7/96 issue) and calls it "funny yet touching"?

Doesn't *anybody* at the *News* have any sensitivity to the way the "career moment" comes over? Like the worst of the stories of lawyers who profit from the sale of the little old lady's home — except that in this case the complaint seems to be that there was no profit.

DOROTHY SANDE
Racine, Wisconsin

Boyfriend Wanted

Editor:

"Boyfriend Wanted" — That was a joke, right? Trying to see if people are reading the *Bar News* you put in that tacky, tasteless advertisement in the July issue — please tell me that was the case. I think all of us can get enough of the social ads in every newspaper, tabloid and sleazy exposé without having to see it in a professional newsletter. If this wasn't a joke, could your editorial board reconsider publishing this type of advertisement.

JUDY FOSTER
Spokane

Editor:

I was skimming through the July 1996 *Bar News* and was surprised to find, on page 48, an ad under "Miscellaneous" that started "Boyfriend wanted: DWF searching for intelligent, . . ." I first thought that this ad was a joke which I did not understand, but a call to the Bar office revealed that the ad was legitimate. The response was "I understand your position, but we can't keep an ad like this out of the *Bar News*."

Why not? I understand that *The Seattle Times* rejects certain ads, such as advertisements for porno movies. Perhaps those ads will be appearing in next month's *Bar News*

Who knows, with time, the *Bar News* may become as popular as the *Seattle Weekly*, and we can let the advertising revenue take the place of our annual dues.

JOHN R. PRAEGER
Seattle

Editor:

The editor's decision to publish a personal ad in favor of increased revenues lacks professionalism and class. What's next? Ads for used cars? And this from a body charged with maintaining the standards of our profession. Shame on you.

TONI CASTANEDA HALEY
Seattle

Advertising decisions are not the prerogative of the editor. However, any journalist worth his salt is always on the lookout for an interesting story. Consequently, I spoke with the individual who placed this ad (which appears on page 56). I'll call her Mary.

Rather than the gold digger that some may have inferred, Mary is a financially secure professional with a graduate degree. She seeks the companionship of a professional whom she can view as an equal. She has had two enjoyable long-term relationships with attorneys (go figure) and appreciates the way their minds work. "I like the way lawyers think," she explained. To date, Mary has had several individuals respond to her ad, some merely to voice support, others to take her up on

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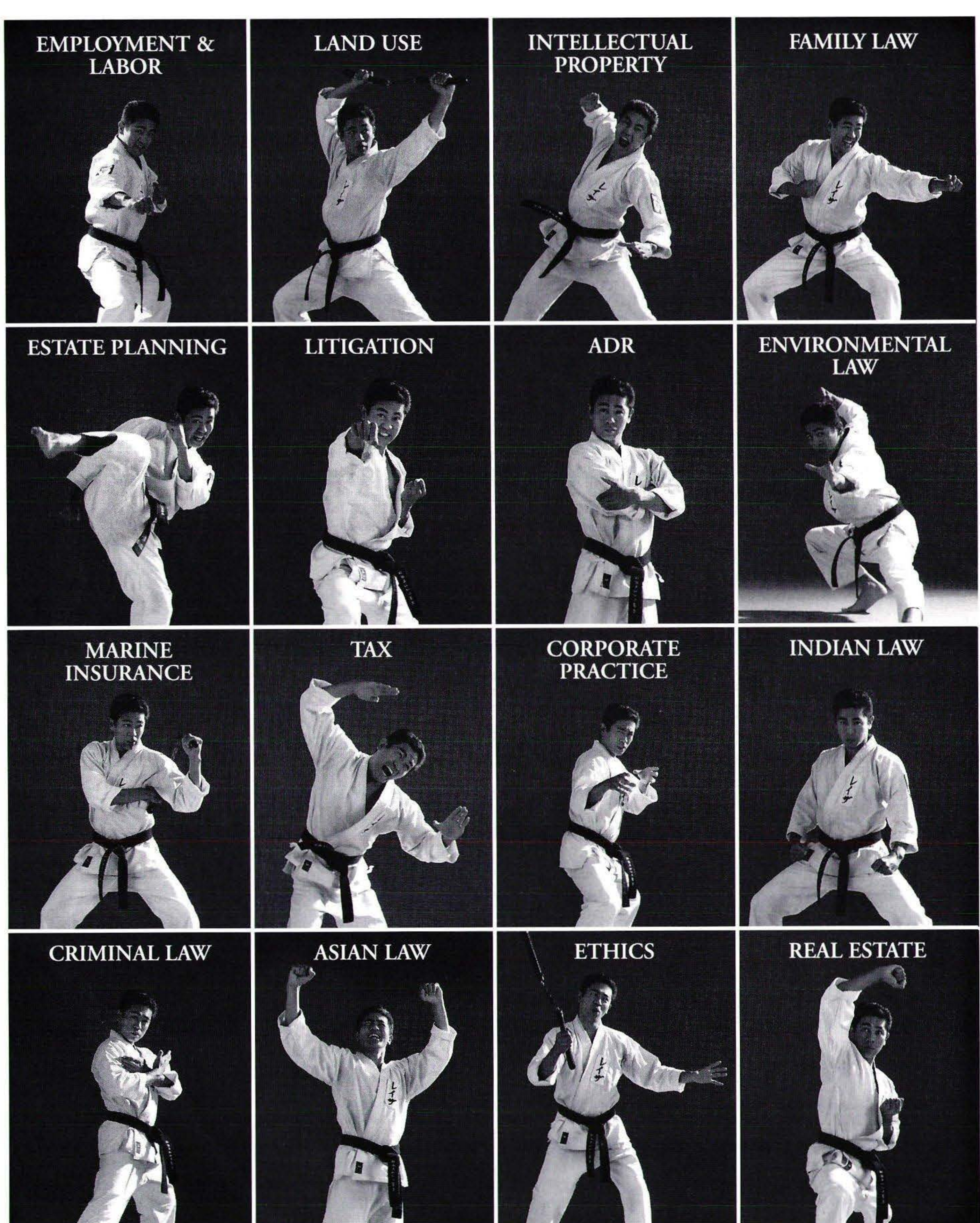
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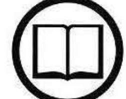

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her offer of a date. And yes, one person claiming to be George Costanza did leave a message. Mary said the caller was actually quite witty.

I fail to understand the objections of those who think that such classified ads are inappropriate. I say this for two reasons. The first reason is that the Bar News *needs every bit of revenue that it can obtain. I therefore assume that any attorney who objects to such ads will support a licensing fee increase so that we can maintain more dignified classified ads; selling used law books, for example. Secondly, I find it ironic that some of the same attorneys who would applaud an article on how to obtain a more favorable dissolution for their clients would object to helping a fellow attorney find a happy marriage.—Ed.*

Courthouse Security

Editor:

I, too, am a government attorney involved in child support enforcement who has been threatened with death; but I take issue with the reference by Sherry Wilson *et al.* in the July 1996 "Letters" column to "groups [that] tend to attract the McVeys and Kaczynskis of this world," for two reasons. Currently, these individuals have not been convicted, and are entitled to the presumption of innocence. Blaming courthouse violence on "a different philosophy of government" distracts attention from the real problem, which is emotions getting out of control. This can happen to anyone, and after presiding over thousands of support hearings, I conclude there is no reliable way to predict this danger and the only practical solution is to make sure no weapons are brought into emotionally charged legal settings. Let protest groups exercise all the free speech they want, but if frisking everyone at the door keeps us all safe, I'm in favor of it.

DON WITTENBERGER
Administrative Law Judge

More on Affirmative Action

Editor:

There they go again! This is in response to the letter written by Mr. Morovan (July 1996). I am outraged by Mr. Morovan's attempt to cowardly invoke the name of White children to spread his own brand of racism and venom. If he is a fellow member of the bar, I am almost ashamed to share the title of attorney with him.

What he decries as a racist program is a program to increase minority participation, and to allow minority attorneys a chance to access avenues traditionally closed to them. Let us not forget that attorneys of color, although the numbers are slowly increasing, still comprise a small percentage of the attorneys in this state. The road to making it as an attorney is not an easy road for all, and especially for minorities. Just in the past couple of years, we have seen African-American law students the subject of racially based threat letters. This happened in one of our state's own law schools. Can anyone recall incidents that White law students received threat letters because they are White? Attorneys of color have to pass through roads filled with barriers to get to where they are now, do they have to continue to navigate through roadblocks and detours throughout their professional lives?

Of course, everything seems like such a crime when you are cowardly hiding behind the names of children. What about the children of color? Mr. Morovan doesn't seem to mind that greater percentage of children of color will grow up in poverty and end up on the other side of the law. Why must we continue to create the myth that we have reached the promised land of color blindness? The very letter Mr. Morovan wrote shows we are not there. Furthermore, every child of color eventually will grow up to find that we are nowhere near a color-blind society.

Yes, Mr. Morovan is correct, racism reduces something in all of us, but you know, a letter like his really hurt. After almost 30 years of civil rights, minorities are still attacked because of their color. Efforts to gain inroads are summarily declared racist. We just need to turn on the evening news to see that. Why we loudly profess in letters that we have reached the land of no discrimination, when we see African American churches being burned to the ground and the basic rights of immigrants being stripped away. The roads to success for people of color only opened a little bit before being closed on all fronts. Not only does it remind us that the fight continues, the fight happens even within our ranks. I encourage people who hold the same view with Mr. Morovan to examine: When was the last time you truly judged someone just on their merits without considering race? When was the last time you taught your children that everyone is equal? When was the last time you actively sought the friendship and counsel of a person of color? When was the last time you tried to walk in the shoes of a minority? When was the last time you reached out to your colleagues of color and gave them the opportunity they really deserved?

Yes, children are being hurt. Children of all colors will suffer so long as there is inequality, and they are likely to pass it on to their children and so on. Why can't we work to improve the conditions for all of our children? Why don't we start by supporting efforts to eliminate the barriers that still exist, and work to ensure all children can have bright futures, equal opportunities and hope?

Many minorities echo the same words Mr. Morovan used: "I guess that . . . they

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just don't get it yet," and "how long must we wait?" How long must we wait until they get it?

BERNARD P. WANG
Seattle

Whither "Around the State"?

Editor:

Having just read the above-referenced publication, I am somewhat disappointed with a certain exclusion.

One of my favorite sections in the *Bar News* has always been the columns from local bar associations. The July issue, of course, did not include such section. I would be interested in knowing why, and I urge you to reinstate this department.

Thank you for your kind attention.

ROBERT MARSDEN
Tacoma

Both the April and May issues of the Bar News *carried brief notices informing readers that we were considering dropping this department and requesting member input. Other than your correspondence, we have received* no *letters or phone calls. The rationale for the deletion was three-fold. One, a low finish in the March Fax Poll on* Bar News *departments (which admittedly had a low turnout; hence the subsequent requests for input); two, a significant need for additional space in the* Bar News; *and three, the realization that, frankly, a Seattle attorney probably doesn't care whether an individual in Yakima made partner (or vice-versa). Moreover, very few other state bar publications have such departments, and such information is probably more within the purview of local or specialty bar publications than a statewide magazine.*

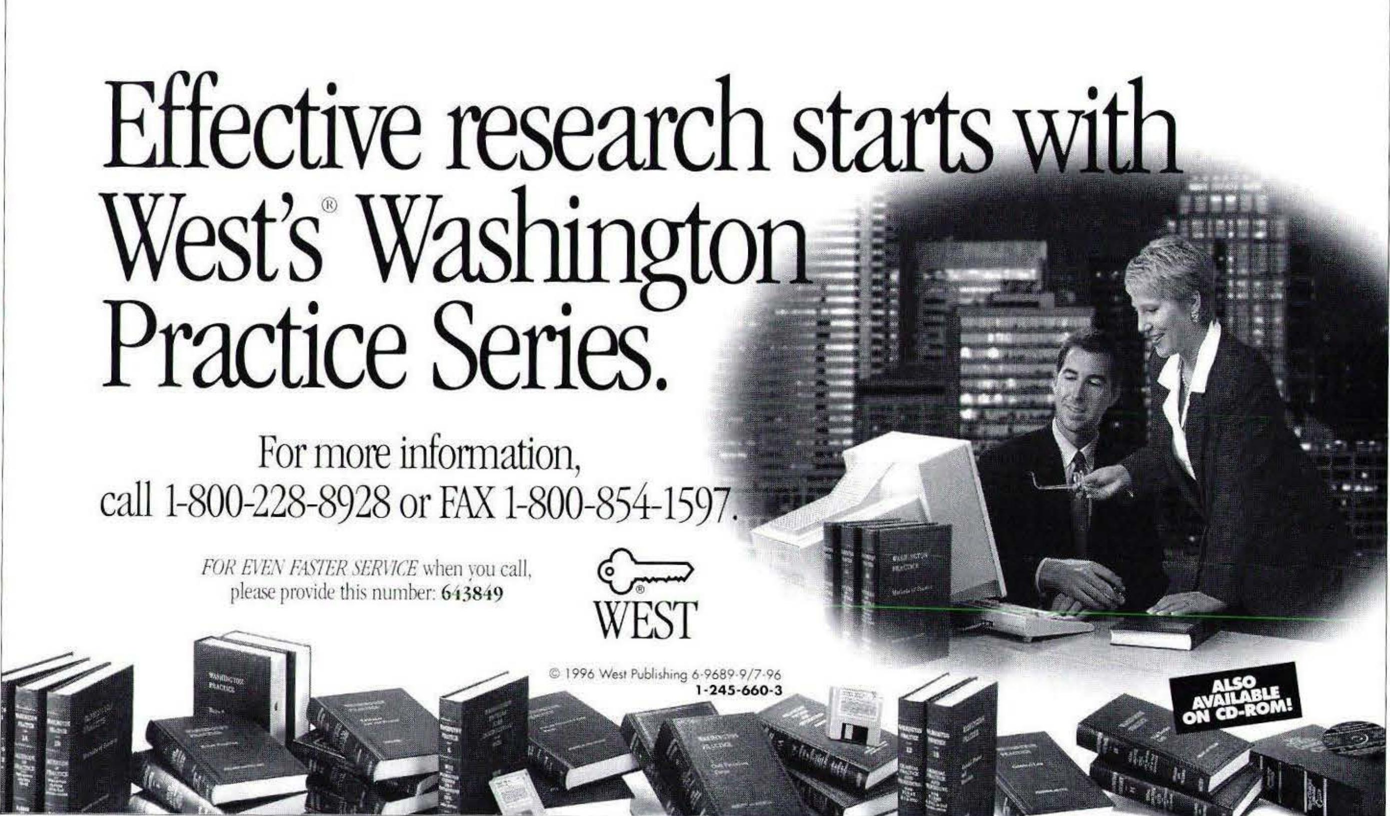
Of course, there are some entries that will always find a spot in the Bar News; *Clark County's "Beagle Awards," for example, will simply be moved to "Allegedly Humorous." (Emphasis on the "Allegedly.") I have no desire to discontinue an institution. Other items would be moved to "Briefly Noted," or "FYI," as appropriate.*

Having said all that, it's our job to give readers what they want. If enough members want "Around the State," we'll bring it back.—Ed.

WSBA Disciplinary Decision

The WSBA Disciplinary Board should reconsider the censure it issued against Attorney Randall L. Stewart of Vancouver. The July *Bar News* reports the facts in Stewart's case as follows:

The hearing officer found that Stewart represented himself and his former law partners in defense of an action for negligence brought by a corporation that had been a client of one of Stewart's former partners. Following an arbitrator's decision in 1991 finding that Stewart had no liability, Stewart wrote letters directly to the president and to the treasurer of the plaintiff corporation stating that if an appeal was taken from the arbitrator's decision a separate legal action would be commenced against both of them as individuals. Although Stewart knew that these individuals were the managing and speaking agents of the corporation and was aware that the Corporation was then represented in the matter by lawyer Woodrow W. Pollack, Jr., Stewart did not obtain Pollack's permission before writing the letters. The hearing officer concluded that Stewart violated Rule of Professional Conduct (RPC) 4.2 by knowingly writing to Pollack's clients regarding the subject of Pollock's representation without Pollack's permission. [The Disciplinary Board's opinion adds: . . . the communication was made openly, with a copy going



to the opposing party's attorney.]

The text of RPC 4.2 is as follows:

> In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

What bothers me is that the written decisions of the hearing officer and the Disciplinary Board fail to discuss how the clause "In representing a client . . ." applies to Mr. Stewart, a defendant in the action who was representing himself.

It could be argued that the clause applies because Mr. Stewart was also representing other defendants when he wrote the offending letter. However, the letter, which uses the word "I," rather than "we," expressed only Mr. Stewart's personal distress in his capacity as defendant and his personal intentions with respect to a further suit. Its tenor is conveyed by the following excerpt:

> As you can well imagine, I do not like being made the target defendant of a legal action which appears hardly meritorious on its face . . . I have no intention of permitting my financial resources to be drained further in this matter without returning the compliment to each of you individually . . . My purpose in sending this letter to you as individuals is to give you notice that I propose to assert a claim to damages against you as individuals . . .

It could also be argued that the phrase "In representing a client . . ." applies to Mr. Stewart because Mr. Stewart, representing himself, was his own client. However, a definition of the word "client" that permits this construction leads to absurd results in the context of other disciplinary rules. Obviously, one would not expect Mr. Stewart to keep all of his "client's" funds in an IOLTA account, as required by RPC 1.14.

The closing phrase of RPC 4.2 is also problematic in Mr. Stewart's case. It permits a lawyer to communicate directly when he:

> . . . has the consent of the other lawyer or is authorized by law to do so."

The Official ABA comments to RPC 4.2 describe various situations in which communication by a lawyer, without consent of opposing counsel, is "authorized by law." The relevant portion states:

> .. parties to a matter may communicate directly with each other and a lawyer having independent justification for communicating with the other party is permitted to do so.

Arguably, Mr. Stewart, as a defendant, was authorized by these comments to communicate directly with the other parties in the litigation. If status as a defendant is not "independent justification," then what is? Should Mr. Stewart forfeit a right belonging to all other defendants because he happens to be a lawyer?

The Board found an aggravating circumstance in that Mr. Stewart acted from a "selfish motive." But did he really? The Board's written opinion fails to explain the difference between a "selfish motive," as that term is used in the ABA rules, versus the pursuit of normal self-interest. Are lawyers now deemed "selfish" when they seek to defend themselves?

It seems unfair to impose discipline in an ambiguous case of first impression such as this.

EDWARD V. HISKES
Pasco

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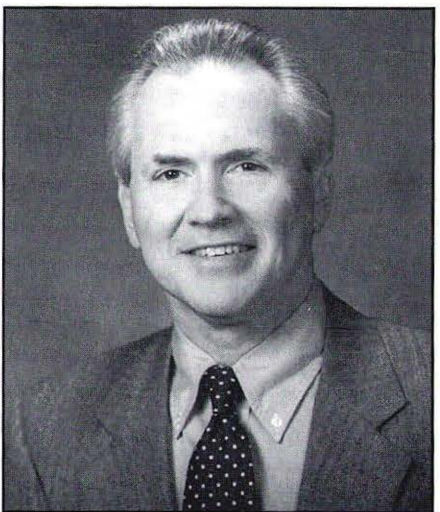
One Year — Many Memories

by **Edward F. Shea,** *WSBA President*



Edward F. Shea

I am grateful to have served as your president for the 1996 Bar year.

The Board of Governors selected me as president-elect on Presidents' Weekend in February in 1995, in Tacoma, where I began my legal career as a law clerk to Judge Harold J. Petrie on the Court of Appeals, Division II. I took that as a portent of good things to come, and I have not been disappointed.

It has been my good fortune to share the long hours of travel and meetings and the turbulent process of deciding complex issues with men and women of intelligence, humor and commitment to their profession —the Board of Governors. It is with no small sacrifice to family and firm that the 12 of us joined together to improve our profession and our association during our year together. With the help of many of you, I believe we have succeeded. I acknowledge the contributions of the boards and presidents who preceded us and whose work enabled us to begin our journey together — a unified Bar.

I am indebted for the service of many who aided us in our tasks this year. Former Governors Jan Eric Peterson and Wayne Blair were resolute in attending several of our meetings during which we were revising the disciplinary system. Their contributions cannot be overstated.

Much significant work of the Association is done by the committees of the Bar. Many of those committees were very active in carrying out their responsibilities, and we are indebted to all of them for their contributions. Space limitations prevent me from reciting all of the fine work of our committees but I would like to acknowledge those who were frequently before the Board reporting on critical matters.

Based on the efforts of the Court Rules Committee chaired by Walt Krueger of Bellevue, we were able to recommend to the Court some significant changes in a variety of court rules which will aid all of us in representing our clients, whether public or private, before the courts of this state. The dedication of the members of the Legislative Committee is a tradition. Whatever the composition, the contributions are particularly important. That committee, chaired by Pat Aylward of Wenatchee, helped all of us by analyzing legislation that would drastically affect the way we represent our clients and the way we practice. This year was no exception. The Legal Aid Committee, chaired by Yvette War Bonnet of Everett, provided leadership in increasing volunteer legal services to the poor and in coordinating its efforts with our Access to Justice Board. The Rules of Professional Conduct Committee, chaired by Blaine Gibson of Yakima, devoted a considerable portion of its time to analyzing federal restrictions on funds from the Legal Services Corporation. Its opinions enabled the state's legal-service organizations to deal with the ethical consequences of those federal restrictions.

The Board of Governors adopted a recommendation of the RPC committee to permit solo practitioners to sell their law practice within certain limitations governing such a sale. Many of our members had urged that change.

No single issue was of more importance than securing the financial future of the Association so that it could continue to serve its members and carry out its responsibilities under GR 12. The Board of Governors is grateful to Tim Jenkins of Auburn, Dean Ingemansen, Marcella Fleming and Rosemary Daszkiewicz, all of Seattle, for joining members of the Budget and Audit Committee and WSBA staff in analyzing our finances. Sound financial planning is the foundation on which all of our programmatic activity is built. The immediate future is secure with the license fee increase in place.

Meeting as we did every six weeks, the agendas were always a challenge. I was impressed with the willingness of so many organizations to send representatives to the Board meetings. Their insights on a variety of issues were often of great value in the Board debate.

As president, I had the good fortune to travel throughout the state and meet a number of you at bar luncheons, bar dinners and other events. I am grateful to you for your hospitality. I am also grateful to those of you who have taken the time to write comments about policies or decisions of the board and the columns that I have written in past *Bar News* issues. It was very gratifying to learn that many of you had reinvigorated your Law Day programs in an effort to celebrate who we are, what we do and what we stand for. In the years ahead I urge you to continue to expand your Law Day programs to accomplish even more.

As Justice Frankfurter said so long ago,

> One does not have to inhale the self-adulatory bombast of after-dinner speeches to affirm that all the interests of man that are comprised under the constitutional guarantees given to 'life, liberty and property' are in the professional keeping of lawyers.

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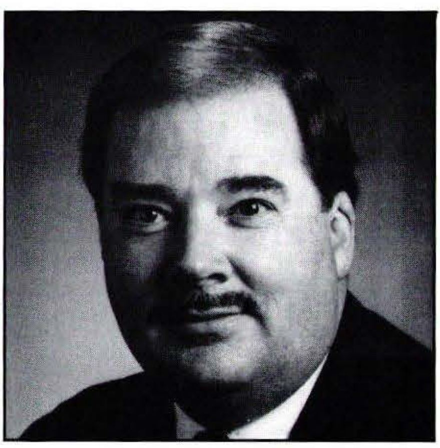
"We're Moving!"

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



Dennis P. Harwick

Yes, the WSBA office is moving in a couple of months — but not far. On approximately November 1, 1996, we're moving from the Westin Building at 2001 Sixth Avenue (6th and Virginia on the north end of downtown Seattle) to the Fourth & Blanchard Building at 2101 Fourth Avenue — approximately one block northwest of our current location. The Fourth & Blanchard Building is better known locally as the "Darth Vader" building — not for the personality of its tenants, but for its distinctive black, angular profile!

Our new address will be:
Washington State Bar Association
2101 Fourth Avenue — Fourth Floor
Seattle, WA 98121-2330.

Most of our phone numbers will stay the same — including our general number (206) 727-8200! We will occupy all of the fourth floor and approximately half of the third floor of the building. And we will have a single reception area on the fourth floor adjacent to our new conference center.

Why are we moving?

1) Our ten-year lease at the Westin Building is up in November.

2) We need more space to accommodate the staff for lawyer discipline and the other new staff required to keep pace with the ongoing growth of the WSBA membership.

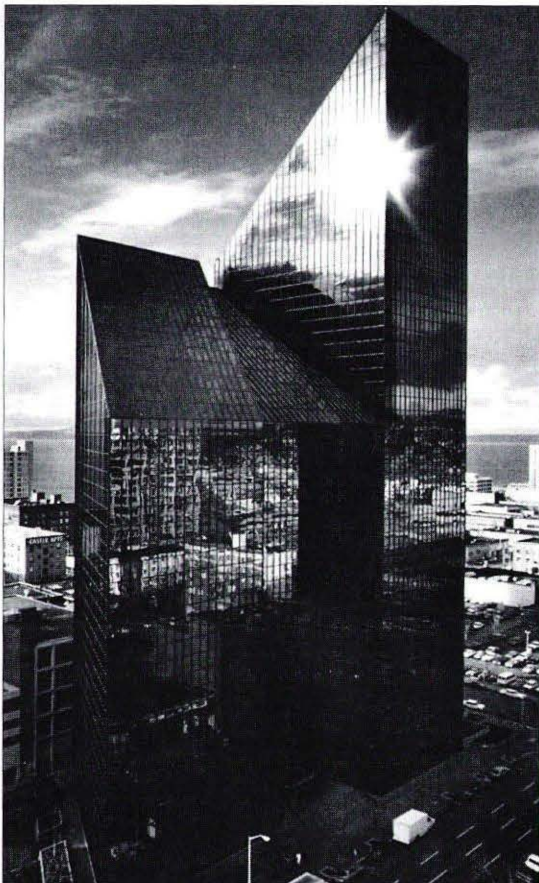
3) We need more efficient and flexible space for both utilization of our staff and for the WSBA meeting requirements.

Why didn't we move to Waterville?

I have been advised by my central-Washington friends that Waterville has the cheapest rents in Washington. There's a reason why that I don't need to expand on here. The trick for the WSBA was to find a location that serves the needs of its members at the most reasonable cost. The primary decision was between a location in or immediately accessible to downtown Seattle versus a location on the outskirts of Seattle. Surprisingly enough, even most members outside of downtown Seattle seemed to prefer a downtown location. Go figure!

Is this going to cost us an arm and a leg?

Depends on your perspective. To a country boy like me, all Seattle rents seem high. We actually started looking for office locations late in 1994 when it was a buyer's market in downtown Seattle. Then the referendum was filed. We couldn't, in good conscience, commit to space when we didn't even know what the WSBA was going to look like in a couple of years. Once the referendum to shrink the WSBA was soundly defeated, we jumped back into the marker. Unfortunately, however, the market was turning from a buyer's market to a seller's market. We are confident, however, that we obtained a very competitive rate for our ten-year lease with two five-year renewal options.



What were the important factors in picking and designing the space?

Location, footprint, security, and flexibility. We wanted to be someplace where members and staff have good access. We needed space with an adequate "footprint" — floor size — to organize the WSBA staff. The Fourth and Blanchard Building allowed us to keep the WSBA staff on two floors (we're using only about half of the third floor during the initial period of our tenancy). In addition, we inherited an internal staircase from the previous tenant, which makes it easy for staff to move between floors. We needed greater security for the staff — a single reception area and restricted access to staff areas. We also wanted more flexibility in arranging our staff — something we lack in our current space. Finally, we wanted a flexible conference center space where we could have either a series of smaller meetings or one large meeting space. Our new quarters will have a four-room conference center that can be completely opened up to accommodate an occasional event for 150-200 people.

Other questions?

I'd be happy to respond. You can call me: (206) 727-8244; write me (until November 1 at 500 Westin Bldg., 2001 Sixth Ave., Seattle 98121-2559; after November 1 at 2101 Fourth Avenue — Fourth Floor, Seattle 98121-2330); or e-mail me at barchief1@aol.com.

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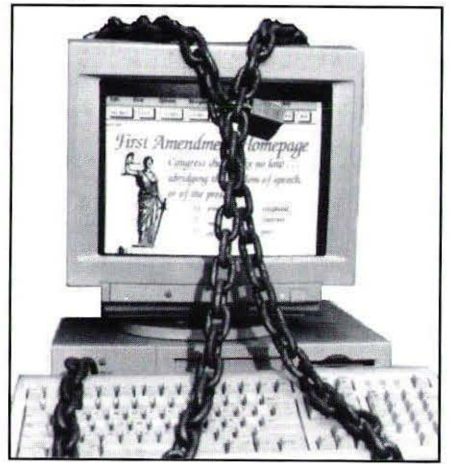
"Indecency" and the Internet:



Where Does the First Amendment Fit In?

by **Joseph S. Faber**

The recent public uproar over legislative efforts to regulate the Internet has centered around the transmission of "indecent" material across computer networks. Late last year, Compuserve pulled the plug on sexually explicit Internet sites, allegedly due to the threat of criminal prosecution overseas but (in the eyes of many) more likely due to political overtones in this country. The state of New York passed a bill that would make online service providers liable for the content of material containing nudity or sexual conduct sent across their services. And, in the most far-reaching act yet, in February Congress included in its telecommunications reform bill a statute which criminalizes the electronic transmission of "indecent" or "patently offensive" communications.

All of these events call into question the role of the First Amendment in the use of on-line communications and the Internet. They go not only to the issue of what is meant by the term "indecent," but also to the more significant question of the type of control that the government ought to be exercising over discourse through the electronic media. These are both legal questions and policy questions. Moreover, they are emotional issues, couched most often in terms of the protection of minors. Regardless of the outcome, however — and that outcome is not likely to be determined for some time — the result plainly will be to chill the open discussion of issues in the on-line environment.

While there is no doubt that the government has a strong interest in protecting minors from sexually explicit material, the recent passage of the Communications Decency Act ("CDA") takes the regulation of "indecent" material to a new level. The CDA, a small portion of the nation's recently reformed telecommunications and cable television laws, is found in Section 502 of the Telecommunications Act of 1996.[1] The statute is entitled "Obscene or Harassing Use of Telecommunications Facilities under the Communications Act of 1934." It is important to note, however, that the term "indecent" does not appear in the title. There appears to have been a concerted effort by the Congress to equate in the public's mind the words "obscene" and "indecent," though they plainly mean different things in terms of traditional First Amendment law.[2]

The CDA contains three separate prohibitions that raise troubling constitutional questions. First, it criminalizes the transmission across computer networks of

> any comment, request, suggestion, proposal, image, or other communication which is obscene, lewd, lascivious, filthy, or indecent, with intent to annoy, abuse, threaten, or harass another person.

Second, it criminalizes the transmission across computer networks of

> any comment, request, suggestion, proposal, image, or other communication which is obscene or indecent

if the party transmitting knows the recipient is under the age of 18. Third, it criminalizes the transmission of

> any comment, request, suggestion, proposal, image, or other communication that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs

> in such a manner that the communication is available to anyone under the age of 18.[3]

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These are broad prohibitions, creating criminal liability simply for publishing over the Internet sexual or other material that might somewhere be deemed to be "indecent or patently offensive." In certain cases, it requires that undefined steps be taken to keep such material from minors. Indeed, it requires, with respect to sexual material, that such procedures be "effective," a term as vague as one might imagine, since the gaining of access by a single minor might cause the procedure to be deemed ineffective. Yet the CDA was passed with overwhelming support in both houses of Congress.

Not surprisingly, legal challenges to this statute have already been made. Within minutes of the President's signing the bill, a lawsuit was filed in the United States District Court for the Eastern District of Pennsylvania challenging the constitutionality of the CDA.[4] The suit, filed by the American Civil Liberties Union and the Electronic Privacy Information Center, along with 18 other organizations, challenges both the "indecency" and "patently offensive" portions of the statute on First Amendment grounds.

On February 15, a temporary restraining order was granted by U.S. District Judge Ronald L. Buckwalter against the "indecency" portion of the statute, though he denied an injunction with respect to the "patently offensive" portion of the law. In his order granting the TRO, Judge Buckwalter stated:

> Where I do feel that the plaintiffs have raised serious, substantial, difficult and doubtful questions is in their argument that the CDA is unconstitutionally vague in the use of the undefined term, "indecent." . . . This strikes me as being serious because the undefined word "indecent," standing alone, would leave reasonable people perplexed in evaluating what is or is not prohibited by the statute. It is a substantial question because this word alone is the basis for a criminal felony prosecution. It is a difficult question, I think, because any laws affecting freedoms such as the ones here in question have spawned opinions which arguably support both sides. Finally, it is a doubtful question because it is simply not clear, contrary to what the government suggests, that the word "indecent" has ever been defined by the Supreme Court.[5]

The constitutional questions raised by this law were significant enough, in fact, that Congress provided for immediate review by a three-judge panel, with direct appeal from there to the Supreme Court.

On June 11, 1996, Judge Buckwalter's TRO was expanded into a preliminary injunction by the three-judge panel.[6] They found the indecency provisions of the CDA unconstitutional on grounds much more broad than the single judge had previously ruled. The court's order contains a broad, sweeping declaration that the Internet, as a medium of communications that offers extraordinary freedom and opportunities for the communication of diverse viewpoints by all Americans, is entitled to the most stringent First Amendment protection. It concludes that the plaintiffs had demonstrated a likelihood of showing that the CDA, due to its vagueness, could not be fairly enforced and thus was unconstitutional on its face. The court's statement regarding the vagueness of the statute is enlightening in understanding the reasons for its decision:

> [T]he Supreme Court has explained that the relevant community is the one where the information is accessed and where the local jury sits. However, the Conference Report with regard to the CDA states that the Act is "intended to establish a uniform national standard of content regulation." This conflict inevitably leaves the reader of the CDA unable to discern the relevant "community standard" and will undoubtedly cause Internet users to "steer far wider of the unlawful zone" than if the community standard to be applied were clearly defined. The chilling effect on the Internet users' exercise of free speech is obvious. This is precisely the vice of vagueness. [Citations omitted.]

The three-judge court, in making its judgment, had to determine whether it was proper for Congress to have passed so broad a ban on the transmission of "indecent" material. Certainly the answer turns in part on what is meant by the term "indecent." The Supreme Court has struggled with this issue on a number of

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occasions. For example, in *FCC v. Pacifica Foundation*,[7] the Supreme Court upheld an FCC prohibition on a radio broadcast of "indecent" material (the so-called "seven dirty words" monologue of comedian George Carlin) during those hours of the day when children were most likely to be listening. Yet this was a narrow case, focusing on extremely specific language deliberately designed to shock in a vulgar manner — and disseminated over a more accessible broadcast medium — and held only that the First Amendment was not violated if such speech was limited to certain hours of the day.[8] The Communication Decency Act contains neither of these characteristics; it broadly prohibits the transmission of "indecent" and "patently offensive" speech on a medium that has not yet been subject to First Amendment scrutiny.

By way of contrast, in *Sable Communications v. FCC*,[9] the Court struck down a statute aimed at the "dial-a-porn" industry because it banned the transmission of all "indecent" commercial communications across interstate telephone lines. The Court found that Congress, in attempting to limit access by minors to "dial-a-porn," had not used the least restrictive means to protect minors from such communications, stating:

> [T]he congressional record contains no legislative findings that would justify us in concluding that there is no constitutionally acceptable less restrictive means, short of a total ban, to achieve the Government's interest in protecting minors.[10]

The Communications Decency Act seems more akin to the statute struck down in *Sable*, because in several ways it makes no apparent effort to use least restrictive means to restrict access to minors. Like the *Sable* statute, the CDA could also lead to a world in which communications would be unavailable to adults as well as minors.

In striking down the CDA, the three-judge panel considered these and related cases. But in doing so, the most significant aspect of their decision, which was rendered via three separate opinions, was the extraordinarily high level of scrutiny applied to the indecency provisions of the CDA by at least one member of the panel:

> Cutting through the acronyms and argot that littered the hearing testimony, the Internet may fairly be regarded as a never-ending worldwide conversation. The Government may not, through the CDA, interrupt that conversation. As the most participatory form of mass speech yet developed, the Internet deserves the highest protection from governmental intrusion.

Based on this view of the function of the Internet, and the manner in which it fits within traditional First Amendment models, the holding of unconstitutionality was inevitable.

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In his separate opinion, Judge Buckwalter reaffirmed his earlier opinion that the term "indecent" was too vague to be upheld, but he also reached the same conclusion with respect to the phrase "patently offensive." Moreover, Chief Judge Dolores Sloviter, also writing separately, concluded:

> The CDA is patently a government-imposed content-based restriction on speech, and the speech at issue, whether denominated "indecent" or "patently offensive" is entitled to constitutional protection. As such, the regulation is subject to strict scrutiny, and will only be upheld if it is justified by a compelling government interest and if it is narrowly tailored to effectuate that interest.

Indeed, she reached this conclusion without even determining if there was any difference between the terms "indecent" and "patently offensive."[11]

The views of the judges on the function and value of the Internet are tremendously helpful. For example, Judge Dalzell noted that the Internet is a broad-ranging medium of communication, without any government regulation, in his conclusion which held that the CDA must be struck down:

> True it is that many find some of the speech on the Internet to be offensive, and amid the din of cyberspace many hear discordant voices that they regard as indecent. The absence of governmental regulation of Internet content has unquestionably produced a kind of chaos, but as one of plaintiffs' experts put it with such resonance at the hearing: 'What achieved success was the very chaos that the Internet is.' The strength of the Internet is that chaos. Just as the strength of the Internet is chaos, so the strength of our liberty depends upon the chaos and cacophony of the unfettered speech the First Amendment protects. For these reasons, I without hesitation hold that the CDA is unconstitutional on its face.

This is a far-reaching view of the First Amendment, but it will be tested further because the government has appealed the decision to the Supreme Court. To appreciate the potential outcome requires an analysis of the Supreme Court's most recent First Amendment decision, where the issue of regulating "indecency" has been addressed in the context of cable television.[12] The case arose from a 1995 decision of the D.C. Circuit Court of Appeals, which examined the government's regulation of "indecency" through a different device. The Court of Appeals, in *Alliance for Community Media v. FCC*,[13] considered FCC regulations which authorized cable operators to refuse to carry "indecent programming" proposed by private parties using leased access. The regulations were issued under a federal law allowing cable operators the discretion to refuse to carry leased access programming that was "patently offensive" under contemporary community standards.[14] Although the court upheld the constitutionality of the regulations on the ground that they did not constitute state action, it nevertheless expressly addressed the "indecency" issue with respect to government regulation:

> While the government may restrict the showing of indecent programs, it may do so only in a manner consistent with the First Amendment. If decisions of cable operators not to carry indecent programs on leased or PEG access channels . . . were treated as decisions of the government, the Commission and the United States would be hard put to defend the constitutionality of these actions.[15]

Alliance for Community Media separately considered a further part of the FCC's regulations, which stated that a cable operator who chose to carry "indecent" programming must put it on a single channel, block the programming, and then make it available within 30 days to any subscriber who made a written request to receive it.[16] Here the court addressed government regulation of such material in a manner quite relevant to the constitutionality (or not) of the CDA:

> First, the constitutionality of indecency regulation in a given medium turns, in part, on the medium's characteristics. Second, in fashioning such regulation, the government must strive to accommodate at least two competing interests: the interest in limiting children's exposure to indecency and the interest of adults in

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having access to such material.[17]

The court then upheld the regulation, determining that it was the "least restrictive means" of controlling such material over cable television.

On June 28, 1996, in *Denver Area Consortium*, the Supreme Court, in a complicated and deeply divided decision, reversed the D.C. Circuit and found most of the cable regulations at issue to be unconstitutional.[18] The Court split in a number of different ways, with changing majorities reaching different conclusions as to the validity of various sections of the cable law. At heart, however, the Court decided by a 6-3 vote that the requirement that "patently offensive" cable programming on leased access channels be scrambled was unconstitutional because it was not narrowly tailored to protect the interests of children, the ostensible beneficiaries of this law. The Court specifically referred to technical capabilities on cable boxes and the so-called "v-chip" as alternative methods of protecting children from this programming. It did so, however, without explicitly applying a strict scrutiny test.

Unfortunately, the fractured decision — in which several justices would have upheld all of the provisions of the cable law and several would have struck them all down — far from resolves the applicability of the First Amendment to different types of media, nor does it give further definition to the term "indecency." The Court seemed to recognize this; Justice Stephen Breyer, writing for a plurality, stated:

> Aware as we are of the changes taking place in the law, the technology, and the industrial structure related to telecommunications, we believe it unwise and unnecessary definitively to pick one analogy or one specific set of words now.

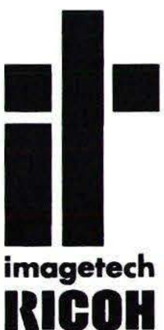
Yet Justices Ruth Bader Ginsburg and Anthony Kennedy, in a separate opinion by Kennedy, felt that the Court did not go far enough, stating:

> If the plurality is concerned about technology's direction, it ought to begin by allowing speech, not suppressing it.[19]

So what does this tell us about efforts to regulate "indecency" on the Internet? First, as noted above, "indecent" material probably can never be fully defined. It is not enough to equate it with "obscenity"; indeed, the law expressly prohibits the transmission of material that is "obscene." By using a vague, undefined term like "indecency" to criminalize conduct, moreover, the CDA inevitably reaches the transmission of material that is and ought to be protected by the First Amendment. As is apparent from the decision of the three-judge panel and from the Supreme Court's decision in *Denver Area Consortium*, the courts are highly skeptical of the term "indecency" and the legislature's ability to define it.

Second, it must be recognized that the Internet is a unique medium. It is not like television, broadcast, cable or radio. To the extent the issue has been addressed, the telephone has been found to be the best analogy:

> In any event, the evidence and our Findings of Fact based thereon show that Internet communication, while unique, is more akin to telephone communication, at issue in *Sable*, than to broadcasting, at issue in



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Pacifica, because, as with the telephone, an Internet user must act affirmatively and deliberately to retrieve specific information on-line. Even if a broad search will, on occasion, retrieve unwanted materials, the user virtually always receives some warning of its content, significantly reducing the element of surprise or "assault" involved in broadcasting. Therefore, it is highly unlikely that a very young child will be randomly "surfing" the Web and come across "indecent" or "patently offensive" material.

Unlike most forms of broadcast media, there is no "oversight" of the Internet; rather, it is a "network of networks," offering a wide-ranging opportunity for the sharing of information, ideas, and issues. The government no more controls the Internet than it controls private discussions between individuals in the privacy of their homes. In part this is due to the uncontrollable nature of the medium itself, with no single point of control and no means of preventing particular material from being circulated. In part it is due to the fact that the Internet is not national but global. Information found on the World Wide Web is posted from every part of the world; efforts to block material from being posted in this country will simply result in the material being posted elsewhere.[20]

In any event, one has to wonder why the government feels compelled to so broadly control the Internet, as attempted by the CDA, when there are less restrictive means of controlling the access of minors to obscene materials. There are numerous laws on the books today, all of them perfectly constitutional, that make it illegal to distribute obscene material to minors. And the growth of the Internet has brought with it growth in technological tools to protect minors, including software that parents can use to block certain kinds of information from being accessible. This is the very type of technological protection seemingly favored by the Supreme Court in *Denver Area Consortium*. Those supporting the broad restrictions of the CDA have not explained why any of these less restrictive means would not be sufficient to achieve the valid ends sought by the CDA.[21]

Finally, the result of such regulation is likely to be a broad self-censorship of the type of discourse for which the Internet has become so valued. Unsure of what may be termed "indecent," and by whose standards such determinations might be judged, individuals will restrict the issues they might discuss.[22] And, of course, laws like the CDA give the government practically unbridled discretion to decide what type of speech might be considered "indecent" in a particular community — and therefore criminal — without ever meeting the "patently offensive" test of the CDA. Indeed, as Judge Buckwalter stated in granting the TRO in *ACLU v. Reno*:

> Depending on who is making the judgment, indecent could include a whole range of conduct not encompassed by "patently offensive."

One need only consider the attempt to control the speech of the American Nazi Party in Skokie, Illinois, that was held unconstitutional in *Collin v. Smith*,[23] to understand the implications of such government control.

These are difficult and emotionally-charged questions. No one wants harm to come to our children in any way, so proponents of laws like the CDA cater to those highly personal concerns in defending their efforts to regulate free speech. But emotional appeals do not justify unconstitutional laws. The First Amendment must be carefully considered in circumstances such as these, lest our rights be trampled in the name of some more transient goal.

Endnotes:

[1] S. 652, § 502 (Feb. 8, 1996), amending 47 U.S.C. § 223.

[2] Indeed, in both of the first two provisions of the CDA discussed below, the statute itself uses both the word "obscene" and the word "indecent," applying separate meanings to them.

[3] This third category does contain an exception: a transmitting party is not liable if she "has taken, in good faith, reasonable, effective, and appropriate actions under the circumstances to restrict or prevent access by minors" or "has restricted access to such communication by requiring use of a verified credit card, debit account, adult access code, or adult personal identification number." This is often called a "safe harbor," although many question the efficacy or

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feasibility of the kind of screening apparently contemplated.

[4] *ACLU v. Reno*, No. 96963 (E.D. Pa., February 8, 1996). In addition, on February 9, Senators Patrick Leahy (D-VT) and Russell Feingold (D-WI) introduced S. 1567, a bill that would repeal the CDA. It is now pending in the Senate.

[5] Memorandum Order, February 15, 1996.

[6] The order was issued after an extraordinary set of hearings, covering five days of court time, in which the courtroom was outfitted with computers, monitors and Internet connections, and the three judges were given a crash course in the world of on-line communications.

[7] 438 U.S. 726 (1978).

[8] Interestingly, the Supreme Court appended to its decision in *Pacifica Foundation* the full text of the "seven dirty words" monologue found to be properly restricted by the FCC. In response to the passage of the CDA, First Amendment advocates have begun publishing on the Internet the Supreme Court's decision in that case, along with the appendix. *See, e.g.*, World Wide Web site of American Civil Liberties Union, *http://www.aclu.org/court/pacifica.html#append*. The private news media has also become involved. *See, e.g.*, World Wide Web site of *Casper* (Wyoming) *Star Tribune*, *http://w3.trib.com/FACT/1st.net.free.fccVpac.html*.

[9] 492 U.S. 115 (1989).

[10] *Id.* at 129. Following *Sable*, the Congress passed new "dial-a-porn" laws that have been upheld by federal courts because they are narrowly tailored, through very specific access, scrambling and blocking requirements, so as to protect minors. See *Dial Information Services v. Thornburgh*, 938 F.2d 1535 (2d Cir. 1991); *Information Providers v. FCC*, 928 F.2d 866 (9th Cir. 1991).

[11] In discussing the level of scrutiny, Judge Sloviter did note that the government had largely conceded that a very high standard applies:

> The government's position on the applicable standard has been less than pellucid but, despite some references to a somewhat lesser burden employed in broadcasting cases, it now appears to have conceded that it has the burden of proof to show both a compelling interest and that the statute regulates least restrictively.

The implications of this government concession for review of the CDA remain to be seen.

[12] *Denver Area Consortium v. Federal Communications Commission*, No. 95-124 (June 28, 1996).

[13] 56 F.3d 105 (D.C.Cir. 1995) (*en banc*), *cert. granted*, 64 U.S.L.W. 3347 (U.S. Nov. 13, 1995) (No. 95124).

[14] Section 10(a) and 10(c), Cable Television Consumer Protection and Competition Act of 1992, 47 U.S.C. §§ 531, 532(h).

[15] 56 F.3d at 113. The dissenters in the Court of Appeals noted the Supreme Court's failure to address the constitutionality of the term "indecency"; an issue also raised by Judge Buckwalter in his order granting a TRO against enforcement of a portion of the CDA:

> We note that the Supreme Court has never actually passed on the FCC's broad definition of 'indecency.' See

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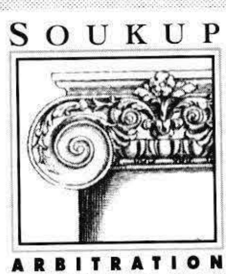

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Action for Children's Television v. FCC (acknowledging that in *FCC v. Pacifica Foundation* the Supreme Court never specifically addressed whether the FCC's generic definition of indecency was unconstitutionally vague, but arguing that because the Court "implicitly" approved the definition by relying on it, lower courts are barred from addressing the vagueness issue on the merits)." *Id.* at 130, n. 2 (citations omitted) (Wald and Tatel, JJ., dissenting).

[16] Section 10(b), Cable Television Consumer Protection and Competition Act of 1992, 47 U.S.C. § 532(j).

[17] 56 F.3d at 124.

[18] The case of *Alliance for Community Media* was consolidated with the *Denver Area Consortium* case.

[19] By way of contrast, Chief Justice William Rehnquist and Justices Joseph Scalia and Clarence Thomas concluded that the government had a reasonable interest in the cable regulations:

> Our precedents establish that government may support parental authority to direct the moral upbringing of their children.

[20] In that regard, it is valuable to note recent efforts that have been made by Chinese government officials to create a so-called "Intranet," where the government allows access to issues within the country's borders but bans most information coming from outside of China. This kind of broad government control over speech and communications is precisely what the First Amendment was designed to prohibit.

[21] Of course, the future development of technological protections cannot be used to justify a current criminal statute like the CDA. As Judge Sloviter so eloquently stated:

> The government . . . argues that blocking technology needed for effective parental control is not yet widespread but that it 'will imminently be in place.' It then states that if we uphold the CDA, it 'will likely unleash the 'creative genius' of the Internet community to find a myriad of possible solutions.' I can imagine few arguments less likely to persuade a court to uphold a criminal statute than one that depends on future technology to cabin the reach of the statute within constitutional bounds.

[22] In that regard, it is important to recognize that the CDA regulates almost all forms of speech and discussion, not just the pornographic images upon which its proponents focus most of their attention.

[23] 578 F.2d 1197 (7th Cir.), *cert. denied*; *Smith v. Collin*, 439 U.S. 916 (1978).

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An earlier version of this article appeared in Davis Wright Tremaine's Winter 1996 First Amendment Law Letter. ***Joseph S. Faber*** *is a partner in that firm, and wishes to express his appreciation to Cam Devore, Dan Waggoner and Greg Kopta for their comments and suggestions for this article.*

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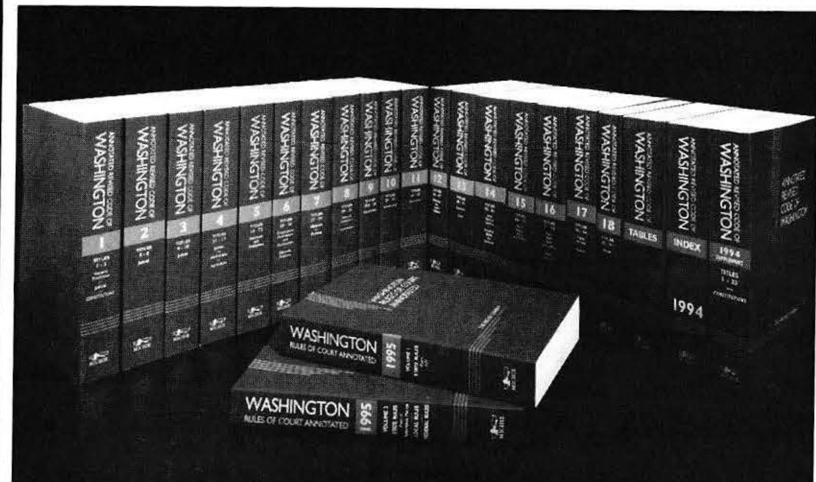

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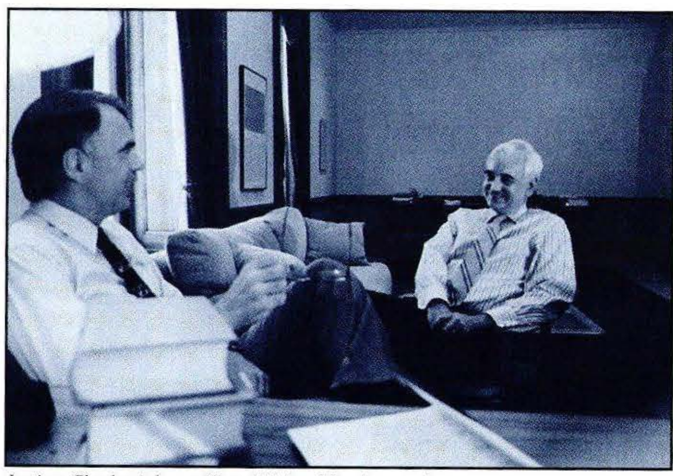
A Freshman's View of the Supreme Court



Justices Charles Johnson (l) and Richard Sanders confer.

by the Honorable **Richard B. Sanders**

Before last year's election to the Washington State Supreme Court, I practiced for 26 years — often before appellate courts — and wistfully wondered what it would be like if I were wearing the black robe rather than someone else.

But despite many arguments before that Court I never ventured beyond the podium. A year after oral argument, a written opinion would mysteriously materialize. There was never a misspelled word, an incomplete sentence, nor a citation to an overruled case. However, aside from seeing Justice Robert Brachtenbach at a trial lawyer reception, Justice Robert Utter at the beach, and Chief Justice Barbara Durham at a ferry terminal, I had never even met a Supreme Court justice.

When I arrived that first day as the newest member of the Court, Justice Charles Johnson was standing near the parking lot in a sweater and slacks to say "welcome aboard" and show me around. Chief Justice Durham was not far behind. From that day forward I felt a special affinity for Justice Johnson because both of us came to the court the hard way: in contested elections from private practice.

The nine justices are men and women of diverse background and strong will, but generally light of heart. This mix makes for plenty of disagreement, but never a voice raised in anger. Justice Richard Guy often says this is the greatest job in the world. I believe it.

Although I was initially randomly assigned five different cases to prepare for the winter term, I did not appreciate the volume of court business until I began to participate in the monthly department and *en banc* conferences, where petitions for review and numerous other matters are considered. Typically, petitions for review are granted or denied by a department of the Court, not the entire Court — provided that the department acts unanimously. I am on Department II along with Justices Johnson, Gerry Alexander, Chrles Smith and Chief Justice Durham (who sits on both departments).

Because of the necessity to act by acclamation (as opposed to continuing the matter in the *en banc* conference for consideration by all nine justices), the importance of each individual justice at the department conference is magnified. The typical department conference takes less than two hours but considers 25 petitions for review and half-again as many other matters. Each judge takes his or her turn reporting on each petition. It is up to the department to decide whether or not discretionary review will be granted. The Court's determination is aided by a short memorandum from the Commissioner's Office on each case.

Sometimes I wonder if the commissioner is like the movie critic who never saw a movie he liked. Ninety percent of the recommendations are "deny" while most of the rest are "no recommendation." Supporting these memoranda are briefs filed by the parties. This paperwork amounts to a three-ring binder plus a stack of briefs four or five inches high. And all of this is just to set the court's agenda, not to decide anything on the merits. It adds up.

The arrival of a similar stack of paperwork precedes each week of oral argument (four arguments per day, three days per week). The assignment judge prepares an extensively detailed prehearing memorandum which is circulated with a stack of briefs about two weeks before oral argument. After each morning or afternoon's oral arguments, the Court convenes a conference to tentatively decide each case by straw vote. Typically, the assignment judge is responsible for writing the majority opinion. Each justice gets about one assignment per week of oral arguments. Additional writing assignments for dissenting and concurring opinions typically go to the first justice to voice an opposing point of view. This custom quickly adds to the work load of those who have trouble keeping their mouths shut.

Nevertheless I, and most other members of the court, frequently cannot pass up the chance to disagree, and almost every case presents opportunities for very legitimate disagreement. If these were not doubtful and important cases, they would not be here. Disagreement and dissent are healthy. If disagreement is

how we lawyers earn our keep, it's no wonder people have a tough time liking us.

Supreme Court chambers function independently from one another. Fortunately, I have a great staff to assist me. My administrative assistant, Sylvia Campbell, was a first-round draft of my predecessor, and an excellent choice. My law clerks, by coincidence, come from the East Coast: Paul Crowley (now retired to take the Alaska bar) came from Maine; Matt Baltay is from Connecticut, and William Maurer hails from New York and Rhode Island. I've never lived further east than Bellevue.

Opinions issued by the Court make it seem as if the question at hand has only one possible correct answer. Perhaps that is the mark of a good opinion. In reality, the margin between victory and defeat is often narrow and disputed, not only in terms of counting noses, but also in the form of genuine doubt in the mind of each jurist — or at least in my mind. Sometimes I would like to comfort the losing lawyers, to tell them that they did a fine job for their client, and that they shouldn't be too hard on themselves because they did not get five votes.

My admiration for the attorneys who practice before the Supreme Court is immense. Although justices must always put forth their best effort, the real stress and anxiety are on the shoulders of the practicing attorneys, not on the Court.

> ***"This makes me more tolerant of the mistakes of others, having made so many mistakes myself."***

Consequently, since joining the Court I have been able to relinquish the sleeping habits of a lifetime as a trial lawyer: I often woke at 4 am., staring at my bedroom ceiling agonizing about my cases. I hope those years of tossing and turning make me a better judge. I do know I came to the bench capable of understanding much more about the system because I had gone through a lot of time on the other side. I think this makes me more tolerant of the mistakes of others, having made so many mistakes myself.

Despite the work load, the telephones at the Supreme Court do not ring incessantly, and this relative quiet allows time for that reflection and study which I could rarely afford as a private practitioner. Every time I read a biography I discover a hero: Hugo Black, William O. Douglas, George Sutherland, Robert Bork. As King County Prosecutor Norm Maleng said at his Lincoln Day address to the Pierce County Bar Association, we all need heroes.

The Supreme Court also gives one the opportunity to advance and apply the blessings of liberty we have inherited from our forefathers. I take this responsibility most seriously and try to be generous with our inheritance because I believe that is what our forefathers would have wanted. Perhaps half of our cases are criminal. Unlike Perry Mason's clientele, who were usually rich and innocent, these defendants are often poor and guilty. Nevertheless, they are rich in legal rights, and it is the job of the lawyer and the judge to keep it that way.

I agonize when I see the paltry awards of attorney fees granted by this Court to lawyers for indigent clients who have established a legal right to representation at public expense. If I could make it so, these attorneys would be awarded the market value of their services, not the $40 or $50 per hour which seems to be typical. The lack of reasonable payment for legal services is not only unfair to the litigant and the lawyer, but also strikes a crippling blow to those civil liberties for which the lawyer is responsible to advocate. Such sacrifices are not imposed upon lawyers who represent the government, and this imbalance, like the force of gravity, will ultimately bring down the tallest of lawyers, while undermining rights worthy of protection.

During my time on the Court I have also had the opportunity to tour various state institutions, including the Shelton penitentiary and Western State Hospital. While the staff appears to be doing the best they can with what they have to work with, I think the government is letting them down. Shelton is overcrowded. Its auto shop program was eliminated because of budget cuts. The mattresses at Western State's criminally insane unit are a disgrace. Perhaps the government is trying to do too many things at the sacrifice of properly performing its essential functions. Before joining the Court I was critical of what the government did. Now I have a more balanced approach: I don't like what it doesn't do, either.

A representative of the Pierce County prosecutor's office, Caroline Williamson, as well as this year's Goldmark Award winner, Patricia Arthur, accompanied me on the tour of Western State. I appreciated their ability to help me understand what was going on. A new term was added to my vocabulary: "chemical restraint." Apparently, mind-numbing medication is applied to disruptive patients in lieu of

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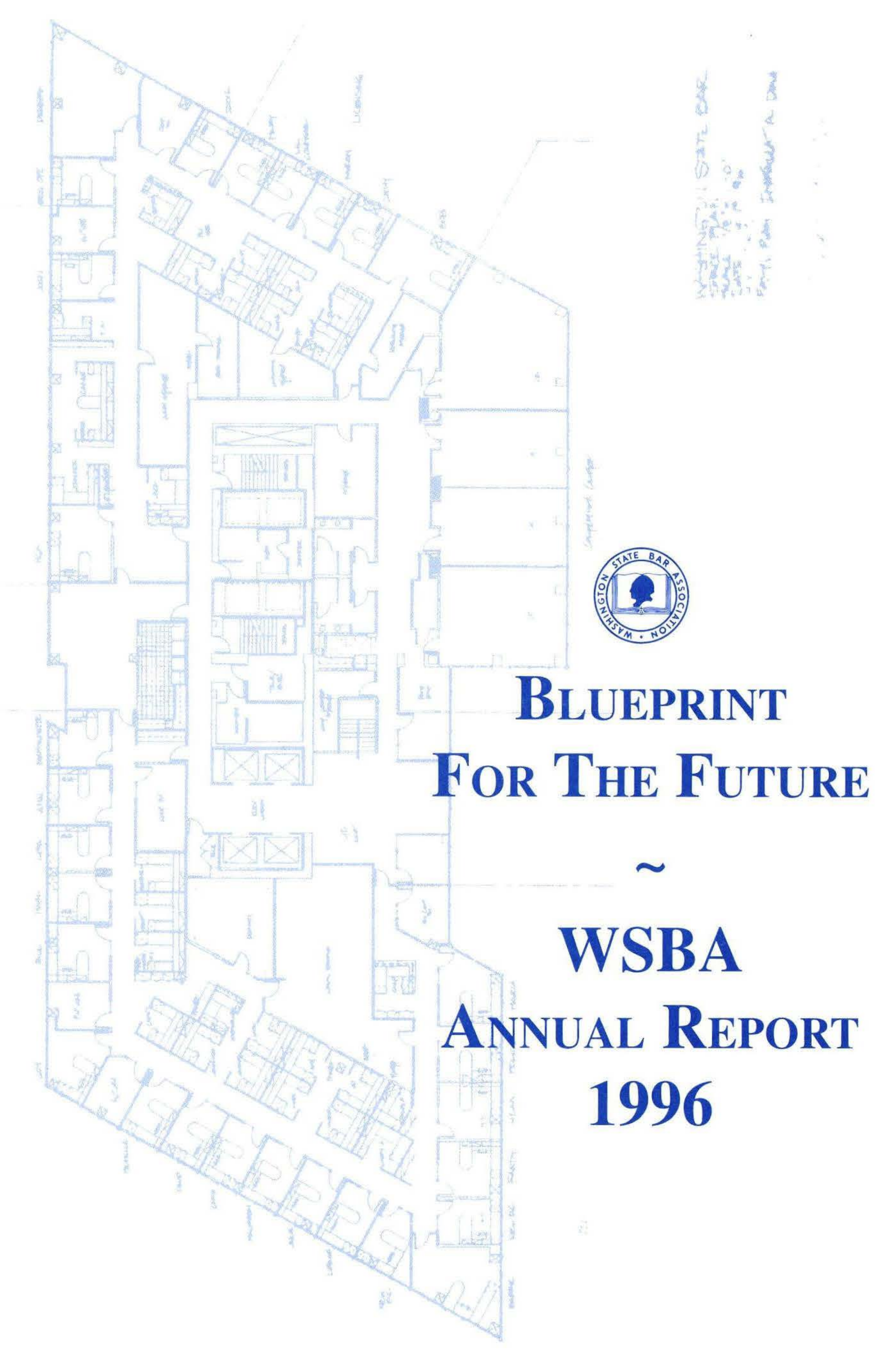


Blueprint For The Future

~

WSBA Annual Report 1996

1995-96 WSBA Board of Governors

President
Edward F. Shea
1816 N. 20th Ave., PO Box 2368
Pasco, WA 99302
(509) 545-8531
(509) 545-3019 (fax)

President-elect
Thomas Chambers
1400 Broadway
Seattle, WA 98122
(206) 328-5561

First District
Peter S. Ehrlichman
1111 Third Ave., Suite 3400
Seattle, WA 98101
(206) 447-4400
(206) 447-9700 (fax)

Second District
Patrick R. McMullen
PO Box 152, 609 Murdock
Sedro Woolley, WA 98284
(360) 855-1045
(360) 855-0432 (fax)

Third District
Mary E. Fairhurst
PO Box 40116
Olympia, WA 98504-0116
(360) 586-1445
(360) 586-1319 (fax)

Fourth District
Steve Crossland
PO Box 19, 139 S. Worthen
Wenatchee, WA 98807-0019
(509) 663-0031
(509) 663-6003 (fax)

Fifth District
Patricia C. Williams
1900 Seafirst Financial Center
Spokane, WA 99201-0695
(509) 838-6131
(509) 838-1416 (fax)

Sixth District
Daniel L. Hannula
715 Tacoma Ave. S.
Tacoma, WA 98402
(206) 383-5388
(206) 272-5105 (fax)

Seventh District
Lish Whitson
1500 Puget Sound Plaza
1325 Fourth Ave.
Seattle, WA 98101-2509
(206) 292-1144
(206) 340-0902 (fax)

Eighth District
Steven G. Toole
1380 - 112th Ave. NE, Suite 300
Bellevue, WA 98004
(206) 455-1570
(206) 455-9697 (fax)

Ninth District
Dennis J. LaPorte
524 Tacoma Ave. S.
Tacoma, WA 98402-5416
(206) 383-4704
(206) 383-8053 (fax)

King County at large
Linda J. Dunn
One Union Square, Suite 2900
600 University St.
Seattle, WA 98101-4156
(206) 624-8844
(206) 624-2912 (fax)

King County at large
Ron Perey
Market Place Tower, Suite 350
2025 First Ave.
Seattle, WA 98121-2100
(206) 443-7600
(206) 443-4785 (fax)

Executive Director & CEO
Dennis P. Harwick
500 Westin Bldg.
2001 Sixth Avenue
Seattle, WA 98121-2599
(206) 727-8244
(206) 727-8320 (fax)

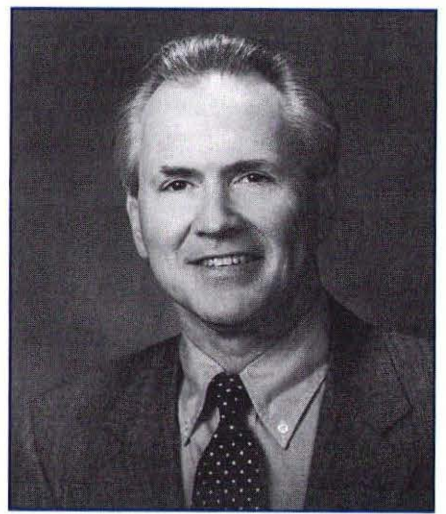
Table of Contents

President's Report ---------- page 3
Executive Director's Report ---------- page 6
Section Chairs, WYLD President, Committee Chairs ---------- page 8
Independent Auditor's Report ---------- page 9
Statements of Financial Position ---------- page 10
Statements of Activities ---------- page 11
Statements of Changes in Net Assets ---------- page 12
Statements of Cash Flows ---------- page 12
Notes to Financial Statements ---------- page 13
Supplementary Information ---------- page 16

PRESIDENT'S REPORT

by
Edward F. Shea

Dear Colleagues:



As your president, it has been my privilege to have served with a distinguished group of 11 lawyers — your Board of Governors. This report reflects the dedication of those Governors. Both the Board and I are indebted to our respective predecessors who were able to accomplish so much during their time in office. We are also indebted to the Executive Director, the department directors, and the members of the staff of the Washington State Bar Association for their able assistance throughout the year.

We began this year with the momentum of a successful campaign against the referendum to disunify the Bar Association. However, with that success came the daunting challenge of analyzing our future as a unified Bar.

In my initial analysis of the projects in progress and of the finances of the Association, I determined that the Association would shortly face a revenue crisis. We needed to critically analyze the finances of the Association and to find a solution that would avoid that crisis.

Revenues

As President-elect and then as President, I served on the Budget & Audit committee of the Washington State Bar Association. I was alarmed by the prospect that revenues in the years immediately ahead would be inadequate to meet foreseeable increases in expenses. This would jeopardize the reserves which we had so painstakingly increased over the preceding three years. I asked (and the Board approved) the addition of three members to the Budget & Audit Committee. Those three members brought the perspectives of a government lawyer, a lawyer in a small private practice, and a corporate lawyer who was also active in minority bar affairs. We are indebted to them for their insight and dedication in shaping a solution to the funding crisis that was looming.

In the course of the deliberations on that committee, we carefully examined the history of all revenues, both license fee and non-license fee revenues such as those from CLE programs and admissions. More than 50% of each year's revenue is produced by non-license fee revenues. We also reviewed the recommendation of our auditors that we maintain an absolute minimum reserve of no less than 10% of our annual revenues. We were fortunate to have a reserve of approximately 15% as we began the year, but it became apparent that beginning in 1996 and in the following years, inadequate annual revenues would cause a dramatic erosion of that reserve.

Four options were presented to the Board of Governors at its May meeting. The Board deferred its decision until June in order to allow members to comment and to carefully examine the four options. At the June meeting, with my encouragement and support, your Board of Governors adopted a four-year plan to increase license fees. We took this action in order to meet the recommendation of our auditors that we maintain a minimum reserve of 10% of our annual revenue while simultaneously revising the disciplinary system at con-

siderable expense. It was also necessary to counter the corrosive effects of inflation which threatened to make a sham of our duty to deliver quality services to you. Additionally, the Supreme Court gave every indication that if the Bar Association did not adequately fund the long overdue changes in the disciplinary system in order to accelerate the review of complaints, the court would take over the system and impose mandatory assessments for the funding of it. This four-year revenue plan will bring financial stability to the affairs of the Association. It will provide all members with a predictable increase over the next four years so that the Association and its members will have a firm financial footing to step into the 21st century.

Discipline

It was a priority for this Board to consider the Report of the Joint Task Force on Lawyer Discipline and to carefully estimate the cost of its recommendations. Through the prodigious efforts of several present and past Board members and the staff of the Office of Disciplinary Counsel, the Board reached a full understanding of the proposed revisions and their cost. The Board adopted a complete overhaul of the disciplinary process. Members of the Board and staff will meet with the Supreme Court Rules Committee and make a presentation on recommendations. We are confident that our revised disciplinary program, while costly, will become the model for the rest of the country.

Governance Task Force

After receiving comments from members and hearing oral presentations, the Board adopted the recommendation of this Task Force that the Board continue to elect the president, that the presidency continue to be rotated geographically each year, and that the President-elect serve a full year. Based on member comment, the Board rejected the recommendation of a House of Delegates model and of an expanded Board of Governors model. The Board did vote to enfranchise out-of-state members who now can select a district from which to cast their vote for a governor. That will insure greater representation of their opinions and interests on the Board of Governors. The question of whether or not the Board of Governors would refer issues related to governance to the membership for a vote was deferred for one year and will return to the agenda of the Board of Governors in the late spring of 1997.

Committees

The committee appointment process is long and arduous for the President-elect and Governors who seek to include as many lawyers as possible. I had the responsibility of making the unfunded appointments. That meant dealing with the rising concerns of the chairs of several committees that unlimited unfunded appointments were causing procedural and financial burdens which had to be alleviated. As a result, it was generally agreed that the several committees would have limited unfunded membership. The power to appoint unfunded members remains with the President-elect upon recommendation of the Governors. Funded members are appointed by the Governors.

In the last year, more than 600 lawyers were appointed to committees. In addition, several task forces were appointed during the course of the year, such as the MCLE task force and the task force on the Law Clerk program.

The members of these committees and task forces who have worked vigorously throughout the year deserve our thanks and our gratitude for their efforts. Without them, much of the progress on a broad range of matters facing the profession would not have occurred.

The Bar Leaders Conference

This conference has been evolving over a period of several years. The Association supports but does not subsidize the conference. The conference is attended by various local, minority, and specialty bar leaders from around the state at their own expense. Several of your governors and officers of your Bar Association also attend at their own expense. The Bar Association financially supports the conference by arranging and paying for telephone conference on planning, staff support at the meeting, and the distribution of materials as well as the indirect cost associated with the time and effort of a

couple of members of the staff of the Bar Association. The Bar Leaders Conference has been a remarkable success and is a wonderful opportunity for bar leaders to reach consensus on issues facing our profession and their solutions. I commend this conference to you and hope that as you become officers of a local, minority, or specialty Bar Association you will find the time to participate and deliberate with your fellow Bar leaders. Our profession and our Association will be the beneficiaries of such participation.

New Headquarters for the Bar Association

We are moving! But not far! Our new address will be *2101 Fourth Avenue — Fourth Floor, Seattle, WA 98121-2330* (known locally as the "Darth Vader" building). That is about a block further into the Belltown section of Seattle. The rent will increase, however, we had no alternative. Increases in the staff due to the revisions of the disciplinary program as well as the simple demands of our membership which increases by approximately 1,000 every year had made our present space unlivable and unworkable. This move will enable us to better meet the needs of our members in the new location with greater space availability.

Legal Services Issues

I traveled with others to Washington, D.C., on three occasions to lobby the congressional delegation to support full funding for legal services, but it was not to be. Congress cut 1/3 of federal funding for the Legal Services Corporation, which had a proportionate reduction in legal services programs here. This was followed closely by a Herculean struggle in Olympia to maintain state funding for some parts of the legal service program. The results were that the various legal service organizations and the volunteer programs in various counties suffered severe reductions in staff. The Access to Justice Board of the Washington State Bar Association was instrumental in assisting the three legal service programs to completely reorganize. That reorganization, which was the model for the rest of the country, resulted in two programs: Columbia Legal Services, which has offices around the state and receives funding from the state and private sources; and Northwest Justice Project, which receives federal money from the Legal Services Corporation. The federal funds come with more than a dozen restrictions on the type of services that can be delivered. The philosophical differences between those who believe that federal funding for legal services to the poor should be completely eliminated and those who do not will continue to be debated in future congressional sessions and are likely to become a part of the debate in Olympia. Continued vigilance by the Bar is essential.

Your Board is working with others to find a solution to the financial crisis facing the providers of legal services to the poor and the powerless. It will not be easy, but it is a struggle that must continue. The Board of Governors is also seeking ways to increase the participation of the membership in providing free legal services to the poor. While there are several counties where participation is better than 70%, there are other areas where participation is considerably less. There will likely be many proposals brought to the Board, but the Board is firm in its commitment to continue to emphasize the voluntary nature of this obligation. There is a simple self-examination that we all must engage in and it is this: have I given 30 hours of free legal service to the poor this year? If your answer is yes, thank you; if your answer is no, you need to work shoulder to shoulder with the rest of us in assuming this voluntary professional obligation. Please help.

Thank you for the privilege of serving as your president for the past year. I shall warmly remember the many lawyers across this great state with whom I have talked about the issues facing our profession. You have my respect and admiration for your efforts in caring for your clients' needs, improving your profession, and insuring the independence of the legal system.

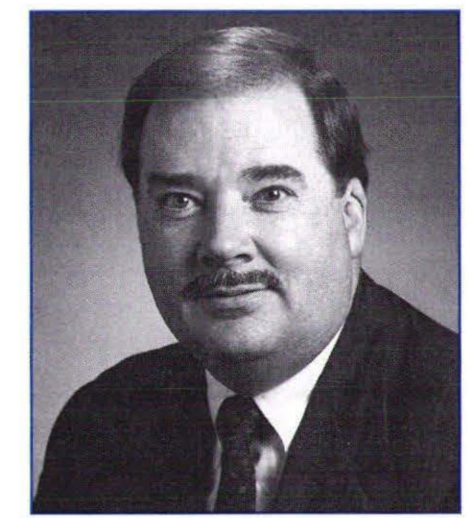
Sincerely,

Edward F. Shea

Ed Shea

EXECUTIVE DIRECTOR'S REPORT

by
Dennis P. Harwick



***Blueprint for the Future* — the 1996 WSBA Annual Report.** Planning the future is a theme that has run throughout the work of the WSBA this past year. In 1995, the WSBA squarely faced the issue of whether it should stay a "full service" unified bar association, or divest some activities to a voluntary state bar association while leaving the regulatory activities in a mandatory organization. The members of the WSBA rejected that option by an overwhelming vote of 72% to 28%. That vote set the stage for a year of looking forward, and a year of planning, a year of drawing the blueprint for the future.

Each year when I write this report, I pick a word to summarize the year — 1993 was a year of challenge; 1995 was a year of resolution. **Without a doubt, 1996 was a year of planning.** We have been planning for organizational change, for programmatic change, and for physical change.

The most visible planning effort has been review, consideration, and adoption by the Board of Governors of virtually all of the recommendations of the **Joint Task Force Report on Lawyer Discipline**. In addition to a significant expansion of our human resources devoted to the lawyer discipline function, the Board has adopted broad ranging rule, process, and procedural changes to improve and expedite the lawyer discipline process. Some of the changes are now in place; others require Supreme Court action to change the Rules for Lawyer Discipline.

The Board of Governors also considered the report of the **Task Force on WSBA Governance**. The Board adopted some of the recommendations (electing a president-elect a full year in advance and enfranchising out-of-state active members to vote in Board of Governors elections), rejected others (moving to a 115-person house of delegates governance model), and deferred others (expanding the Board of Governors).

The Board, with input from WSBA Sections, committees, staff, and outside constituent groups, continued to refine a formal **Mission Statement** with an accompanying list of goals and activities.

The Board looked the future in the face and concluded that the time had come to **increase the WSBA revenue base**. In recent years, the WSBA has expanded the percentage of user fees and non-dues revenues to fund programs and services. It surprises most people to learn that membership fees constitute less than half of WSBA revenues! But — as I cautioned in my report last year — "a dues increase is inevitable in the next couple of years if we are to keep our commitment to the lawyer discipline systems and other WSBA functions." After much research on alternative funding sources, the Board approved a four-step membership fee increase for WSBA members — the first in 10 years.

Finally, we've been looking at a lot of architectural drawings and space plans this past year. The WSBA's 10-year lease at the Westin Building expires in November of 1996, so we conducted an exhaustive search for the most efficient, accessible, and economic space to house the WSBA staff and facilities for the next 10

years. **We will be moving**, but not far. In November of 1996, we will move the WSBA office to the Fourth and Blanchard Building (known locally as the "Darth Vader" building) at 2101 Fourth Avenue, just one block northwest of our current location. In addition to providing more efficient office space, we will have a much improved conference center facility for WSBA meetings and programs.

Acknowledgments: None of this could have happened without thousands of hours of help — help from groups such as the Joint Task Force on Lawyer Discipline, the Task Force on WSBA Governance, the Board's Budget and Audit Committee (including a number of non-Board of Governors members), the Board's Long Range Planning Committee, and the Board's Discipline Committee. We relied on outside experts such as our strategic planning consultant Sandy Hughes, our lease broker Stanley Kravitz, and our space planners Steve Fleischmann and Candace Gaul. It couldn't have happened without the leadership of volunteer leaders such as Ed Shea, Tom Chambers, Wayne Blair, Paul Stritmatter, Jan Peterson, Mary Fairhurst, and members of the Board of Governors. And it couldn't have happened without thousands of hours of hard work by the management team and staff of the WSBA. In particular, I must single out Pat Dieken for her work on office relocation and fiscal projections, and Barrie Althoff and Randy Beitel for shepherding the proposed changes in the lawyer discipline system.

So the blueprint is prepared and the advance work is done. Now comes the hard work of implementation. Who knows? That may be the theme of next year's Annual Report!

Dennis P. Harwick

1995-96 Section Chairs & Young Lawyers Division President

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Gary Gayton

Rules of Professional Conduct
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INDEPENDENT AUDITORS' REPORT

To the Board of Governors
Washington State Bar Association
Seattle, Washington

We have audited the accompanying statement of financial position of the Washington State Bar Association as of September 30, 1995, and the related statements of activities, changes in net assets and cash flows for the year then ended. These financial statements are the responsibility of the Bar's management. Our responsibility is to express an opinion on these financial statements based on our audit. The financial statements of the Washington State Bar Association as of September 30, 1994 were audited by other auditors whose report dated December 7, 1994 expressed an unqualified opinion on those statements.

We conducted our audit in accordance with generally accepted auditing standards. Those standards require that we plan and perform the audit to obtain reasonable assurance about whether the financial statements are free of material misstatement. An audit includes examining, on a test basis, evidence supporting the amounts and disclosures in the financial statements. An audit also includes assessing the accounting principles used and significant estimates made by management, as well as evaluating the overall financial statement presentation. We believe that our audit provides a reasonable basis for our opinion.

In our opinion, the financial statements referred to above present fairly, in all material respects, the financial position of the Washington State Bar Association as of September 30, 1995, and the changes in its net assets and its cash flows for the year then ended in conformity with generally accepted accounting principles.

As discussed in Note 1 to the financial statements, in 1995 the organization changed its method of financial reporting and financial statement presentation, as required by the provisions of Statement of Financial Standards No. 117, *Financial Statements of Not-for-Profit Organizations*.

Our audit was made for the purpose of forming an opinion on the basic financial statements taken as a whole. The supplementary information on page 14 is presented for the purpose of additional analysis and is not a required part of the basic financial statements. Such information has been subjected to the auditing procedures applied in the audit of the basic financial statements and, in our opinion, is fairly stated in all material respects in relation to the basic financial statements taken as a whole.

Dodd Wing & Company, P.C.
Kirkland, Washington
December 1, 1995

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STATEMENTS OF FINANCIAL POSITION

	September 30, 1995	1994
ASSETS		
Cash and cash equivalents	$ 435,925	$ 493,559
Investments (Note 2)	2,485,613	2,180,000
Trust account deposits	574	9,159
Receivables	126,472	77,404
Supplies	34,196	44,665
Desk and course books	161,582	121,293
Deferred costs and prepaid expenses	214,368	243,821
Property and equipment (Note 3)	441,094	367,079
Total assets	$3,899,824	$3,536,980

LIABILITIES AND NET ASSETS

	1995	1994
Accounts payable	$ 321,254	$ 236,204
Accrued expenses	266,694	250,720
Trust account liability	574	9,159
Deferred compensation (Note 4)	267,848	275,902
Unearned seminar revenue	290,703	334,183
Deferred licensing fees	938,179	904,690
Other deferred revenue	47,133	44,193
Total liabilities	2,132,385	2,055,051
Commitments and contingencies (Notes 5 and 6)		
Unrestricted net assets		
General	1,241,801	1,163,594
Continuing legal education	252,550	165,536
Sections	273,088	152,799
Total unrestricted net assets	1,767,439	1,481,929
Total liabilities and net assets	$3,899,824	$3,536,980

See accompanying notes to financial statements.

STATEMENTS OF ACTIVITIES

	Year ended September 30, 1995			Year ended September 30, 1994		
	Revenues	Expenses	Revenues over (under) expenses	Revenues	Expenses	Revenues over (under) expenses
Licensing fees	$3,730,881	$ -	$ 3,730,881	$3,610,103	$ -	$3,610,103
Access to Justice	7,348	130,464	(123,116)	9,800	92,674	(82,874)
Administration	171,515	776,387	(604,872)	103,306	695,828	(592,522)
Bar examination and admissions	667,617	571,689	95,928	707,444	585,366	122,078
Audits (random and for cause)	682	93,263	(92,581)	2,128	114,864	(112,736)
Bar News	361,890	554,184	(192,294)	337,951	482,050	(144,099)
Lawyers' fund for client protection	259	44,511	(44,252)	223	109,826	(109,603)
Continuing Legal Education - publications	426,797	434,463	(7,666)	352,353	284,398	67,955
Continuing Legal Education - seminars	1,573,993	1,479,313	94,680	1,534,681	1,437,100	97,581
Communications	25,947	150,367	(124,420)	39,869	154,952	(115,083)
Court rules	-	16,015	(16,015)	-	15,786	(15,786)
Discipline	37,995	1,529,945	(1,491,950)	25,463	1,005,660	(980,197)
Fee arbitration	4,657	23,463	(18,806)	7,050	19,997	(12,947)
Computer bulletin board service	33,832	31,654	2,178	28,566	22,884	5,682
Lawyers assistance program	13,360	220,564	(207,204)	9,935	229,355	(219,420)
Leadership	3,045	241,465	(238,420)	2,159	266,513	(264,354)
Legislative	-	167,933	(167,933)	-	164,996	(164,996)
Local bar support	1,626	13,554	(11,928)	1,602	34,871	(33,269)
Mandatory Continuing Legal Education	103,382	169,518	(66,136)	110,089	106,056	4,033
Membership records	52,821	331,473	(278,652)	63,014	261,994	(198,980)
National MENTOR	-	-	-	6,412	6,605	(193)
Resources directory	121,134	48,876	72,258	88,599	43,428	45,171
Sections - Administration	85,715	96,240	(10,525)	86,045	80,227	5,818
Sections - Operations	420,858	300,569	120,289	412,458	259,659	152,799
Young Lawyers Division	45,760	138,409	(92,649)	48,242	121,966	(73,724)
Provision for deferred compensation	-	-	-	-	203,000	(203,000)
Other	-	41,285	(41,285)	-	30,319	(30,319)
	$7,891,114	$7,605,604	$ 285,510	$7,587,492	$6,830,374	$ 757,118

See accompanying notes to financial statements.

Statement of Changes in Net Assets

	Unrestricted			
	General	Continuing Legal Education	Sections	Total
Balance, at September 30, 1993	$ 724,811	$ -	$ -	$ 724,811
Board-designated allocation of revenues over expenses	438,783	165,536	152,799	757,118
Balance, at September 30, 1994	1,163,594	165,536	152,799	1,481,929
Board-designated allocation of revenues over expenses	78,207	87,014	120,289	285,510
Balance, at September 30, 1995	$1,241,801	$252,550	$273,088	$1,767,439

See accompanying notes to financial statements.

Statements of Cash Flows

	Year ended September 30,	
	1995	1994
Cash flows from operating activities		
Cash received from licensing fees and other activities	$ 7,698,971	$ 7,559,053
Cash paid to suppliers and employees	(7,231,674)	(6,363,556)
Interest received	136,023	75,386
Interest paid	-	(18,271)
Deferred compensation paid	(48,000)	(48,000)
Net cash provided by operating activities	555,320	1,204,612
Net cash from investing activities		
Proceeds from sales of investments	3,162,129	1,200,993
Purchases of investments	(3,467,742)	(1,900,000)
Proceeds from sale of property and equipment	11,800	-
Acquisitions of property and equipment	(319,141)	(119,811)
Net cash used in investing activities	(612,954)	(818,818)
Cash flows from financing activities		
Payments on capital leases	-	(189,787)
Net cash used in financing activities	-	(189,787)
Net (decrease) increase in cash and cash equivalents	(57,634)	196,007
Cash and cash equivalents, at beginning of year	493,559	297,552
Cash and cash equivalents, at end of year	$ 435,925	$ 493,559

	Year ended September 30, 1995	1994
Reconciliation of revenues over expenses to net cash provided by operating activities		
Excess of revenues over expenses	$285,510	$ 757,118
Adjustments to reconcile excess of revenues over expenses to net cash provided by operating activities:		
Depreciation and amortization	203,612	148,768
Loss on dispositions of property and equipment	29,714	29,455
(Increase) in receivables	(49,068)	(28,737)
(Increase) decrease in supplies and desk and course books	(29,820)	56,973
Decrease (increase) in deferred costs and prepaid expenses	29,453	(54,596)
Increase in accounts payable and accrued expenses	101,024	56,514
(Decrease) increase in deferred compensation	(8,054)	163,558
(Decrease) increase in unearned seminar revenue	(43,480)	74,372
Increase in deferred licensing fees	33,489	23,929
Increase (decrease) in other deferred revenue	2,940	(22,742)
Net cash provided by operating activities	$555,320	$1,204,612

See accompanying notes to financial statements.

NOTES TO FINANCIAL STATEMENTS

1. SUMMARY OF SIGNIFICANT ACCOUNTING POLICIES

Nature of operations

The Washington State Bar Association (WSBA) is a not-for-profit entity. Operations consist of regulating the practice of law in the state and providing various law-related services to the membership and the public. The WSBA members are primarily Washington state residents.

Cash equivalents

Investments with original maturities of three months or less are considered to be cash equivalents.

Investments

Investments consist of certificates of deposit and United States Treasury Bills.

Desk and course books

Inventory of desk and course books is stated at lower of cost or market on the first-in, first-out (FIFO) method.

Deferred costs

Deferred costs are primarily expenses associated with seminar planning and the production of materials. Recognition of these expenses is deferred until the related seminars are presented in the subsequent year.

Property, equipment and depreciation

Property and equipment are stated at cost. Depreciation is computed over the estimated useful lives of the assets, generally three to ten years, using the straight-line method.

Unearned seminar revenue

Seminar registration fees are recognized as revenue in the year in which the related seminars are held. Unearned seminar revenue relates to fees collected from seminars to be conducted in subsequent years.

Deferred licensing fees

Licensing fees are recognized ratably over the applicable calendar year membership period. Accordingly, fees collected

during the WSBA's fiscal year that relate to the fourth quarter of the calendar membership period are included as deferred revenue in the financial statements.

Income taxes

The WSBA is an organization exempt from federal income taxes.

Net assets

Beginning in fiscal 1994, the Board of Governors directed that portions of the WSBA's unrestricted net assets be designated for Sections and for Continuing Legal Education. The total of revenues over expenses for all 21 sections which represent specialized legal interests is included in the Sections designated balance. The difference between revenues and expenses for Continuing Legal Education publications and seminars is included in the Continuing Legal Education designated balance.

Adoption of Statement of Financial Accounting Standards No. 117

In 1995, the WSBA elected to adopt Statement of Financial Accounting Standards (SFAS) No. 117, *Financial Statements of Not-for-Profit Organizations.* Under SFAS No. 117, the WSBA is required to report information regarding its financial position and activities according to three classes of net assets: unrestricted net assets, temporarily restricted net assets, and permanently restricted net assets. As permitted by this new Statement, the WSBA has discontinued its use of fund accounting and has, accordingly, reclassified its financial statements to present the three classes of net assets required. This reclassification had no effect on the change in net assets for 1995 or 1994.

2. INVESTMENTS

At September 30, 1995 the amount of the WSBA's certificates of deposit in five institutions exceeded the federally insured limits for these institutions. The total amount of certificates of deposit that exceeded the federally insured limits was $500,000 at September 30, 1995.

3. PROPERTY AND EQUIPMENT

Property and equipment consists of the following:

	1995	1994
Furniture and equipment	$ 997,420	$853,279
Leasehold improvements	10,152	14,466
	1,007,572	867,745
Less accumulated depreciation and amortization	566,478	500,666
Property and equipment, net	$ 441,094	$367,079

4. DEFERRED COMPENSATION

Effective January 1978, the WSBA entered into an Employment and Deferred Compensation Agreement with its then Executive Director requiring monthly payments of $4,000 for life and the twelve months thereafter as a general obligation of the WSBA upon termination of employment. The Executive Director retired on December 31, 1981. The estimated balance due under the agreement and its amendments has been computed on a present value basis using actuarially determined life expectancy tables and interest rates and is reflected as a liability of the WSBA in the financial statements. During the year ended September 30, 1994, deferred compensation payable and deferred compensation expense was increased by $203,000 as a result of a revision in estimated life expectancy. The total amount to be paid to the former Executive Director will depend upon his actual life span.

5. LEASE COMMITMENTS

The WSBA is committed under various operating lease agreements for office space, certain equipment and an automobile.

Effective December 1, 1986, the WSBA entered into a 10-year noncancellable lease with two five-year renewal options for the use of office space in Seattle. The WSBA renewed a three-year lease for office space in Olympia, effective March 1, 1993.

The future net minimum rental payments required under operating leases with remaining lease terms of one year or more are as follows:

Year ending September 30,	
1996	$404,000
1997	49,000
1998	8,000
	$461,000

Rent expense was $455,042 and $339,776 for the years ended September 30, 1995 and 1994.

6. CONTINGENCIES

The WSBA and its Executive Director have been named as defendants in a lawsuit filed in King County Superior Court. The plaintiff seeks compensatory and punitive damages to be determined at trial. WSBA management believes the lawsuit is without merit and is vigorously defending its position. While the ultimate outcome of the litigation cannot presently be determined, WSBA management believes that the possibility of liability for WSBA is remote. Accordingly, no provision for liability has been made in the accompanying financial statements.

7. INDIRECT EXPENSES

WSBA programs, services and functions are assigned to functional categories for purposes of budgeting and reporting revenues and expenses. Each category includes direct revenues and expenses for activities within that category and an allocation of indirect expenses based on time records maintained by all WSBA staff.

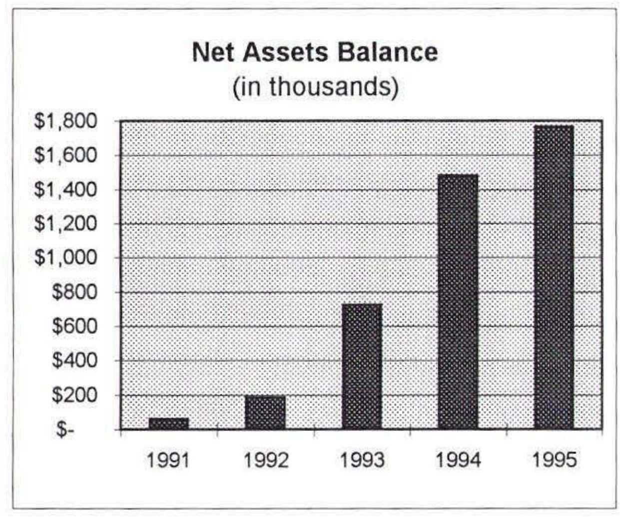
The composition of indirect expenses and total direct expenses is as follows:

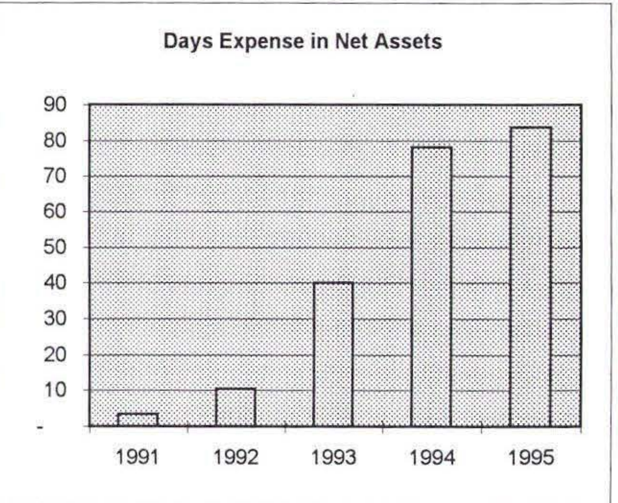
	1995	1994
Indirect expenses		
Salaries	$2,638,618	$2,156,996
Employee benefits and payroll taxes	732,175	669,029
Rent and improvements	339,070	335,689
Depreciation and amortization	203,612	145,188
Copying and production services	137,267	121,191
Supplies	186,807	78,959
Postage	60,349	54,812
Telephone	61,081	52,839
Professional fees	56,892	40,440
Equipment rent and maintenance	44,683	39,630
Loss on dispositions of property and equipment	29,714	29,331
Computer support	26,570	28,391
Insurance	25,446	28,092
Interest	-	18,271
Deferred compensation interest	23,851	8,558
Business taxes	11,566	11,036
Employment	27,686	7,621
Staff training	15,295	5,558
	4,620,682	3,831,631
Direct expenses	2,984,922	2,998,743
Total expenses	$7,605,604	$6,830,374

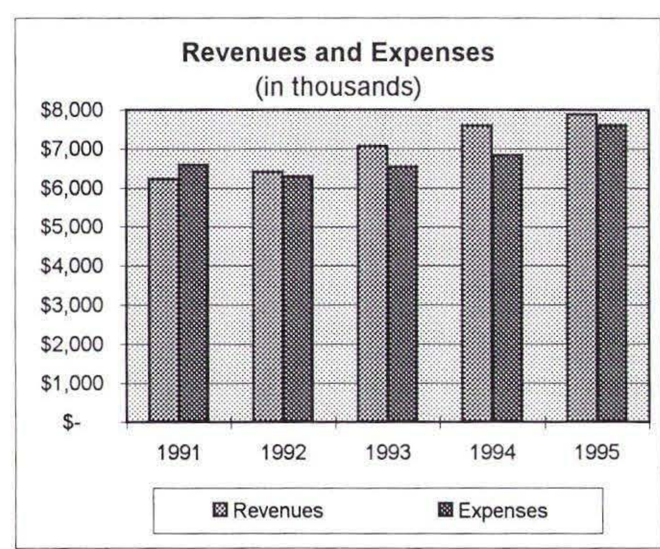
SUPPLEMENTARY INFORMATION

WASHINGTON STATE BAR ASSOCIATION
FINANCIAL HIGHLIGHTS

	Years Ended September 30, (in thousands)				
	1991	1992	1993	1994	1995
Net Assets Balance	$ 61	$ 183	$ 725	$ 1,482	$ 1,767
Days Expense in Net Assets	3	10	40	78	84
Revenues	$ 6,229	$ 6,406	$ 7,069	$ 7,587	$ 7,891
Expenses	$ 6,588	$ 6,284	$ 6,528	$ 6,830	$ 7,606







more physically restrictive confinement. The state has a unique obligation to maintain and appropriately manage its institutions. I would like to help in a constructive way if I can.

Many groups and organizations have also invited me to speak since my election. I accept every single invitation (except those from political parties) when time and geography permit, and I would favor changing the rule which forbids judges to speak to political organizations. Men and women who are active in partisan politics deserve to hear from a nonpartisan judge if that's what they want.

Some of my most rewarding appearances have been before Paula Fraser's 4th and 5th grade class at Stevenson Elementary in Bellevue and at Greg Gourley's citizenship classes. When elementary school children are learning about the Bill of Rights, there is much hope for the future. And if you want to know what it is like to be an American, ask somebody who is trying to become one. These folks do not take liberty and the rule of law for granted, and neither should we.

Perhaps the Walsh Commission and its successors would be more enthusiastic about protecting our right to popular election of the judiciary if judges addressed the community more often and gave people a reason to care about the importance of preserving an independent judiciary.

In the same vein, I have attempted to open my chambers to virtually anyone who would like to see the interior of the Supreme Court building. I have been a tour guide for delegations of lawyers, school children, people I have met on the street, and even my nine-year-old daughter's Brownie troop. This group was on its way to hear the *Seahawk* argument but arrived an hour early — in time to hear the case of a gentleman who had admitted to 55 rapes.

I was also privileged to greet a delegation of prosecutors from the Republic of China (Taiwan). I understand that representatives of the judiciary from the People's Republic of China (communist China) made a similar tour of the Temple last year. When representatives of the communist mainland were asked what kind of judicial robes they wore, I understand they replied they wore police uniforms. In contrast, the members of this year's ROC delegation asked for advice about whether they should adopt an American-style jury system. We should continue efforts to lead through example and encourage others, like the ROC, to keep up the good work.

By far the most important function of the State Supreme Court is to interpret and apply our state constitution. This is a wonderful document with which we have far too little familiarity. Our state constitution is a noble expression of complementary and interdependent principles designed to ensure and preserve our free society for generations to come. At my induction ceremony I was sworn to uphold that constitution, and if I do nothing else I want to do that.

*After practicing law for 26 years, Justice **Richard B. Sanders** won election to the Washington Supreme Court last fall.*

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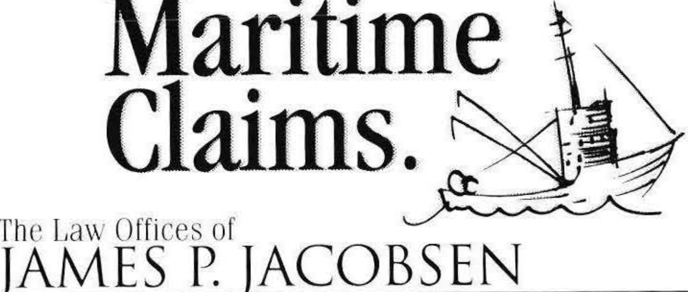

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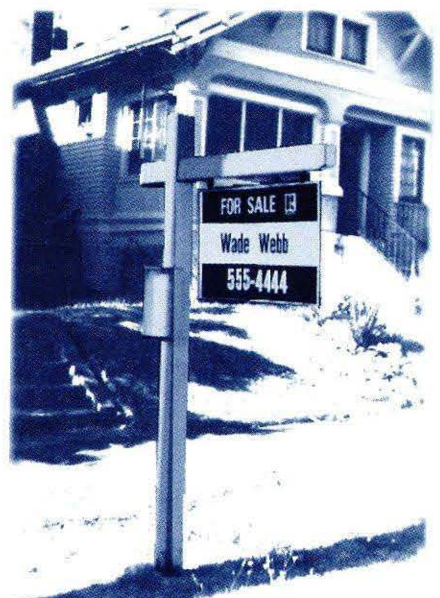


REASN Comes to Real Estate Brokerage

The most significant legislation affecting real estate brokerage ever enacted in Washington takes effect on January 1, 1997. It creates presumptions of agency relationships, replaces common-law fiduciary duties with statutory duties and abolishes vicarious liability.

by **Douglas S. Tingvall**

Introduction

House Bill 1659 was initiated by the Washington Association of Realtors® (W.A.R.) in the 1995 legislative session. The bill passed out of the House but did not get out of committee in the Senate, due largely to concerns raised by the Real Property Section of the Washington State Bar Association (WSBA) and the Washington State Trial Lawyers' Association (WSTLA). Between the 1995 and 1996 legislative sessions, representatives from the WSBA and WSTLA, along with representatives from the Consumer Protection Division of the Attorney General's Office and the Department of Licensing, worked with W.A.R. on changes to the bill resulting in Second Engrossed House Bill 1659, which gained the support of the WSBA, and was no longer opposed by WSTLA, the Attorney General's office or the Department of Licensing. 2EHB 1659 passed the House by a vote of 94 to 0 and the Senate by a vote of 48 to 0, and was signed into law by Governor Lowry on March 28, 1996.

The primary objectives of 2EHB 1659, dubbed "REASN" (Real Estate Agency Simplified Now) by the author, are to: (1) clarify and codify the common law of agency as applied to real estate brokers and salespersons; (2) create presumptions of agency relationships with consumers consistent with their natural expectations, while retaining flexibility for alternative relationships under appropriate circumstances; (3) reduce instances of dual agency; and (4) eliminate vicarious liability and imputed knowledge as to consumers.

Background

Most real estate transactions involve two brokers: a "listing agent" and a "selling agent" (or "cooperating broker"). In the past, multiple listing service ("MLS") rules provided that the listing broker was deemed to have made a blanket, unilateral offer of subagency to any other member of the MLS who sold property listed through the MLS. As a result, both agents represented the seller, and neither represented the buyer. Moreover, the selling agent owed to the seller the same stringent fiduciary duties which the listing agent owed to the seller, and both the seller and listing broker had potential vicarious liability for the selling agent's wrongful conduct.

This legal fiction of subagency did not comport with the natural expectations of either the buyer or the selling agent. The Federal Trade Commission published a report in 1983 indicating that 71% of homebuyers in transactions involving more than one broker believed that the selling agent represented them and was protecting and promoting their interests in the transaction. Many brokers and salespersons, too, were confused about who they represented. This confusion often resulted in the selling agent becoming an implied agent of the buyer and, thus, an undisclosed dual agent (the worst possible position for a broker!).

The initial response of the real estate industry to the legal relationship between the selling agent and the seller vs. the natural expectations of the selling agent and the buyer was disclosure. Over the past 10 years, most states have adopted by statute or regulation some form of agency disclosure requirement. In Washington, the Agency Disclosure rule, WAC 308-124D-040, took effect on April 1, 1987. However, the rule required mere *disclosure* of which party the selling agent represented; it did not change the substantive relationships of the parties. As such, it was a bandage fix, treating the symptoms rather than the cause of the problem. The rule turned many otherwise honest brokers into liars; they said one thing ("I *legally* represent the seller"), then did another (promoted the buyer's interests).

Consumer and industry dissatisfaction with the traditional approach of subagency led to the evolution of buyer brokerage services. But buyer representation was difficult and complicated in the context of the MLS. Buyer's agents faced many obstacles. They were scorned by their colleagues and by sellers, who often objected to paying the selling share of the commission to an agent representing the buyer (the enemy). They had to affirmatively and timely reject the offer of subagency to avoid becoming dual agents. They had to enter into cumbersome agreements and make convoluted disclosures to protect themselves. In addition, existing MLS rules, the Code of Ethics and preprinted forms were not set up to accommodate buyer brokerage.

The issue divided the real estate industry. Some said that buyer brokerage was just a passing fad that was best ignored. Others believed that the time had come to end the struggle with reality. Some wanted to abolish the concept of subagency altogether, while others believed that subagency was an essential element of professionalism and integrity in the real estate business. The leadership of the National Association of Realtors® (N.A.R.) was nearly equally divided on the issue. As a political compromise, N.A.R. re-

quired Realtor®-owned MLS's to make the offer of subagency *optional* with the listing broker — rather than mandatory — effective July 1, 1993. Unfortunately, the option to offer subagency merely created another trap for the unwary broker, who could be criticized for not adequately explaining the options to the seller.

Locally, several independent MLS's (i.e., not owned by the local board of Realtors® and not bound by N.A.R. guidelines) took a more sensible approach and replaced the offer of subagency with an offer of "cooperation and compensation." The Northwest Multiple Listing Service (formerly the Puget Sound Multiple Listing Association), serving King, Snohomish and Pierce Counties, implemented this change on January 1, 1994, and the Computer Multiple Listing Service, serving Kitsap County, did so on April 1, 1994.

The elimination of subagency simplified buyer brokerage, but did not go far enough. Changes in MLS rules could not create presumptions affecting the public, who are not members of the MLS and are not bound by its internal rules. *Frisell v. Newman*, 71 Wn.2d 520 (1967). The elimination of subagency resulted in a change in the "default position" of a selling broker from subagent of the seller to "non-agent facilitator" or "transaction broker." That is, a member of the MLS who sells another member's listing and who does not have a buyer brokerage agreement with the prospective purchaser represents neither party in the transaction. The role of a non-agent facilitator is to bring together a willing buyer and a willing seller and to assist the parties in negotiating a mutually acceptable and beneficial transaction. Some brokers welcomed the new role, arguing that it better described what brokers have been doing for years, and that the real estate brokerage business was never very well-suited to the common law of agency. Most brokers agreed that while some aspects of the common law of agency were undesirable (especially vicarious liability), the public generally wants and is best served by professional representation in real estate transactions.

Hence, W.A.R. formed a task force consisting of real estate brokers, attorneys, regulators and educators to propose a long-term solution to the agency dilemma. The result is REASN.

Relationships Between Licensees and the Public

REASN creates a statutory presumption that a licensee who performs real estate brokerage services for a buyer or tenant is the agent of that buyer or tenant, unless:

- the licensee is the listing agent or property manager;
- the licensee is acting as a subagent of the seller or landlord;
- the licensee has a written agency agreement with both parties;
- the licensee is the seller or landlord; or
- the parties agree otherwise in writing.

A licensee who has a written agency agreement only with the seller or landlord (i.e., listing agent or property manager) represents only the seller or landlord in the transaction, even if that licensee procures the buyer or tenant. A licensee can act as a subagent of the seller or landlord only where the seller or landlord has authorized the primary agent in writing to appoint subagents. Now that most multiple listing services in Washington have abolished the offer of subagency, subagency is likely to occur only where a licensee is "pinch hitting" for the listing agent (e.g., holding an open house or staffing a new construction site on behalf of the listing agent). A licensee who has a written agency agreement with both parties in the same transaction is a dual agent.

REASN also creates a statutory presumption of "split" or "assigned" agency for "in-house" transactions involving two different licensees affiliated with the same broker, with each licensee solely representing his or her client and the broker being a dual agent. A broker may opt for pure dual agency on in-house transactions, with the written consent of both parties, if the broker believes that confidentiality would be impractical under the split agency approach.

REASN retains and clarifies the rule that real estate agents are "special agents" whose authority and duties are limited to the specific transaction. After January 1, 1997, an agency relationship can only be created by statutory presumption under REASN or through written agreement between the principal and agent.

Duties of a Licensee Generally

Regardless of whether the licensee is acting as an agent, a licensee owes to all parties to whom the licensee renders real estate brokerage services the following duties, which may not be waived or modified:

- to exercise reasonable skill and care;
- to deal honestly and in good faith;
- to present all written offers, notices and other communications to and from either party in a timely manner;
- to disclose all existing material facts known by the licensee and not apparent or readily ascertainable to a party;
- to account in a timely manner for all money and property received from or on behalf of either party;
- to provide a pamphlet on the law of real estate agency in the form prescribed by REASN to all parties whom the licensee renders real estate brokerage services; and
- to disclose who the licensee represents (in writing) to all parties whom the licensee renders real estate brokerage services.

Under REASN, "material fact" means information that:

- substantially adversely affects the *value* of the property;
- substantially adversely affects a party's *ability to perform* its obligations in a real estate transaction; or
- operates to materially impair or defeat the *purpose* of the transaction.

However, it does *not* include an act, occurrence, or use not adversely affecting the *physical condition* of or *title* to the property. Thus, "psychological impacts" or "stigmas" are not material facts. Nevertheless, a licensee must respond truthfully if asked about such matters.

The agency pamphlet is an informational brochure designed to educate the public on the new law, and is not a disclosure of agency representation. The agency pamphlet must contain the entire text of sections 1 through 12 of REASN, as well as a cover page which summarizes the law and refers the reader to specific sections of REASN.

The agency pamphlet is required to be given to all parties with whom the licensee works, but is not specific to a transaction. That is, in multiple transactions

involving the same party, the pamphlet is required to be given to a party only once. Although there is no requirement for a written acknowledgment of receipt of a copy of the pamphlet, it would be prudent to include such an acknowledgment in listing, buyer brokerage, property management, purchase and sale, lease or rental agreement forms.

The agency disclosure required under REASN is specific to a transaction. Like the former agency disclosure rule, the disclosure must be made in writing in a separate paragraph in the purchase and sale or lease agreement. Unlike the former rule, the disclosure may be made after the agreement is prepared, provided that disclosure is made before the agreement is signed. Finally, REASN provides that, unless otherwise agreed, a licensee has no duty to:

- investigate matters that the licensee has not agreed to investigate;
- conduct an independent inspection of the property;
- conduct an independent investigation of either party's financial condition; or
- independently verify the accuracy or completeness of any statement made by either party or by any source reasonably believed by the licensee to be reliable.

However, licensees are still required to be alert for "red flags" (i.e., defects and discrepancies) and to exercise reasonable skill and care in handling the transaction.

Statutory Agency Duties

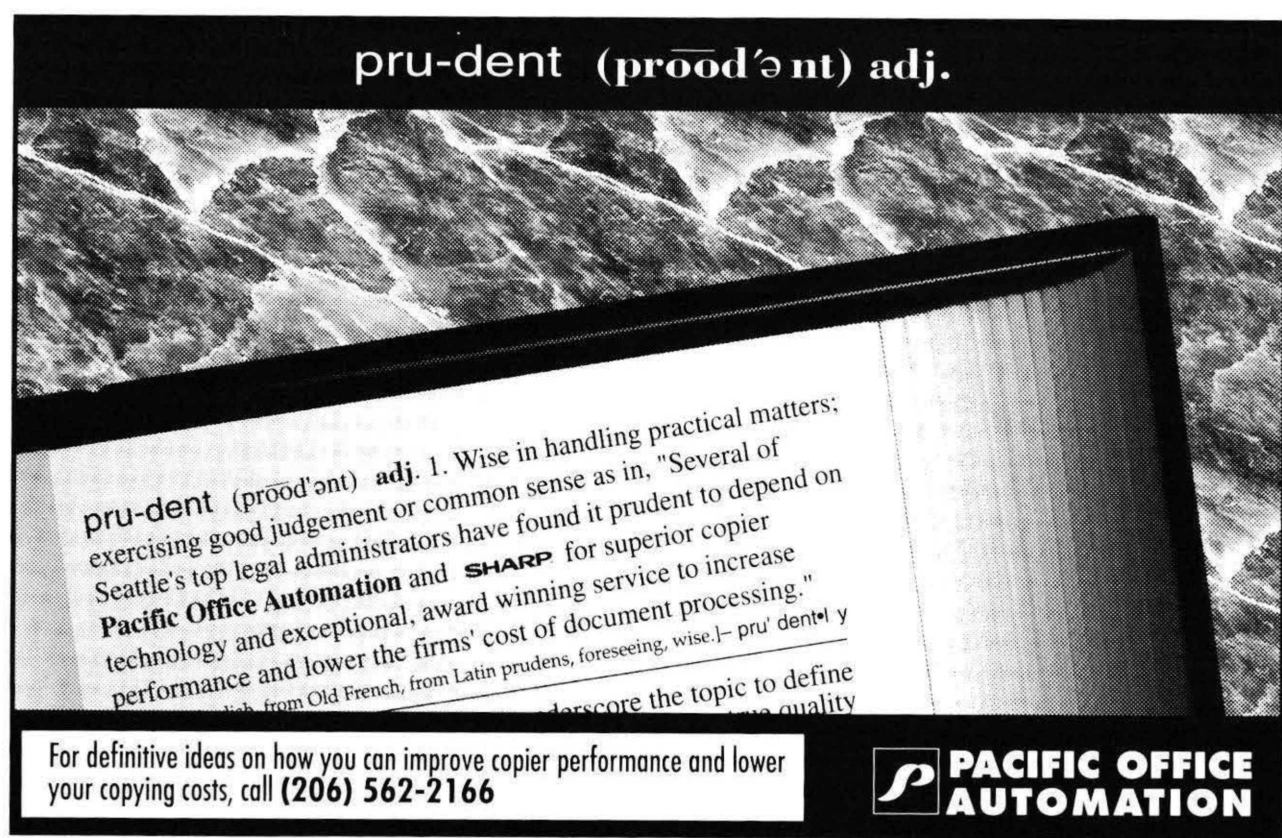
The duties of a seller's agent, buyer's agent, and dual agent are set forth in separate sections of REASN for clarity. Unless additional duties are agreed to in writing, the duties of an agent are limited to the general duties of a licensee and the following:

- to be loyal to the principal by taking no action that is adverse or detrimental to the principal's interest in a transaction;
- to timely disclose to the principal any conflicts of interest;
- to advise the principal to seek expert advice on matters relating to the transaction that are beyond the agent's expertise;
- not to disclose any confidential information from or about the principal; and
- to make a good faith and continuous effort to find a buyer or tenant for the property — or a property for the buyer or tenant — as applicable.

The statutory duties of an agent may not be waived by the principal, except that the duty to find a buyer or tenant for the property — or a property for the buyer or tenant — may be modified or waived by written agreement of the parties. The duties of accounting and confidentiality are the only duties that continue after the termination of an agency relationship.

REASN provides that a licensee may act as a dual agent only with the informed written consent of both parties, after giving the agency law pamphlet to each party and disclosing the terms of compensation. Such consent may be obtained in advance of a transaction as a part of the agency agreement itself (i.e., listing, property management or buyer brokerage agreement).

The statutory duties under REASN supersede the fiduciary duties under com-



mon law. The common law fiduciary duty of undivided loyalty is replaced by a limited duty of passive loyalty that arises once the principal is a party to a prospective transaction (i.e., when either party has signed a written offer). REASN also states that listing or showing competing properties does not breach the duty of loyalty to a seller or landlord, and showing property to competing buyers or tenants does not breach the duty of loyalty to a buyer or tenant. However, once a prospective buyer or tenant signs an offer, then a buyer's agent may not represent a competing buyer or tenant.

"Conflicts of interest" continue to be defined by common law. Under REASN, the duty of disclosure owed to a principal is no greater than that owed to a third party, and there is no longer a duty of obedience.

Vicarious Liability

REASN eliminates the vicarious liability of a principal based on the acts, errors or omissions of an agent or subagent, unless the agent or subagent is insolvent. REASN also eliminates the vicarious liability of a licensee based on the acts, errors or omissions of a subagent, other than the liability of the broker for the conduct of its affiliated licensees.

Imputed Knowledge and Notice

REASN eliminates the common law rule that knowledge of and notice to an agent or subagent is imputed to a principal. However, it may be desirable to provide for imputed notice with respect to offer and acceptance, and contractual notices given under a purchase & sale or lease agreement.

Remedies

The Department of Licensing has jurisdiction only over violations of the general duties of licensees under REASN, and not the agency duties. Private remedies for violations of REASN continue to be governed by common law (e.g., damages and forfeiture of commission). REASN contains no express declaration of public interest; therefore, a violation of REASN does not constitute a per se violation of the Consumer Protection Act.

Conclusion

REASN (1) represents a well-balanced approach to the duties owed by brokers and salespersons to the public; (2) clarifies many of the uncertainties that previously existed in the law; (3) creates presumptions that are better aligned with the normal expectations of consumers and licensees in the real estate marketplace; (4) limits dual agency only to those instances where the same licensee represents both parties in the same transaction, and requires the written, informed consent of both principals; (5) establishes "bright lines" for required disclosures, which should reduce misunderstandings and disputes; and (6) abolishes vicarious liability for consumers, except to the extent that the agent is insolvent.

REASN has finally prevailed!

Douglas S. Tingvall is Vice President and General Counsel for John L. Scott Real Estate in Bellevue. He was the principal drafter of REASN.

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

Gonzaga Racism. Governor Steve Toole provided an update on the Board's response to racist letters received by three Gonzaga law students. A letter from President Shea will be distributed to students at all three Washington law schools deploring the incident and reminding students of the consequences of such behavior.

The President-elect's Report. Tom Chambers outlined his plans to secure non-WSBA funding to combat a potential referendum to roll back the recently announced licensing fee increase. He has set up committees to contact members of local bars, minority and specialty bars and major law firms, as well as committees to publicize and disseminate information concerning the rationale for the increase.

Low Cost CLEs. At the recommendation of Ed Hiskes, the Board created a subcommittee which will explore the delivery of low-cost CLE materials to WSBA members.

The Executive Director's Report. Dennis Harwick reported to the Board on the creation of an updated WSBA employee handbook. The development of this handbook included meeting with all WSBA employees to solicit their input, and is currently being reviewed by outside counsel and the WSBA Personnel Committee. It should be completed sometime this month.

Harwick also announced the selection of Bonnie Kam to replace Mary Elizabeth Stritmatter as WSBA Communications Director. Ms. Kam is currently the Communications Director of the Erie County Bar Association in Buffalo, NY. She begins her duties this month.

Harwick also informed the Board that Terry Lee won the Board of Governors runoff election for the Third District.

Disenfranchisement of Out-of-state Members. At its last meeting the Governors permitted out-of-state members to vote in Board of Governor elections. At its July meeting, however, there was disagreement whether such members should be allowed to run for the position of governor (although bylaws do allow such members to run for president). The Board will consider this issue again at its September meeting. It was unclear why there was reluctance to allow voters this choice.

WSBA Budget. Governor and Board treasurer Mary Fairhurst presented the final draft of the 1997 WSBA budget. The budget reflects increased revenues to be generated by the 1997 licensing fee increase, and anticipates total revenues of $9,997,021. It was adopted unanimously by the Board. Copies can be obtained through the WSBA offices.

WSBA Mission Statement. With minor revisions, the new WSBA Mission Statement was also adopted by the Board. The Mission Statement reads: "The mission of the Washington State Bar Association is to promote justice, serve its members and the public." The statement then lists 11 "purposes" and 25 authorized and unauthorized "activities" of the Association.

Awards. The Board nominated the following individuals for the annual WSBA awards: "Award of Merit," David W. Soukup; "President's Award," Pat Aylward; "Award for Professionalism," Kathleen Taft; "Award for Lawyers in Public Service," Bill Williams; "Outstanding Judge Award," Tom Swayze and Alan Hancock; "Pro Bono Award," Suzanne Kendall; "Courageous Award," Roy Prosterman; "Affirmative Action Award," Rafael Stone; and "Lifetime Service Award," Don Curran.

Legislative Committee Expansion. Due to the work load of the WSBA Legislative Committee, the Board changed the composition of that committee to 33 "funded" positions (up from 22) and zero "unfunded" positions.

WSBA Credit Union. Mitch Lucas, attorney and volunteer-president of the WSBA Credit Union, provided an update of that organization's activities. The credit union was created in 1978 and currently has $2.7 million in assets. All WSBA members (or families and employees of members), law students, legal messengers and court employees are eligible for membership.

Pro Bono Discussion. Pat McIntyre and Yvette War Bonnet provided a brief review of Washington's volunteer legal activities as a backdrop to the Board's discussion of mandatory pro bono. Although a majority of the Board opposed the idea of mandatory service, some appeared less hostile to the concept of a mandatory contribution of funds. The Governors tabled any vote on this topic until its September meeting.

ABA Restructuring. According to a report by Governor Lish Whitson, the leadership of the American Bar Association recently cut 26 staff positions in order to save $4,000,000. The apparent motivation behind this decision was to devote the savings to initiatives which would increase ABA membership. Governor Whitson indicated that he believed this action was not done in accordance with the ABA constitution and/or its bylaws. The Governor asked the Board to forward a resolution to the ABA requesting that it comply with the applicable provisions of said documents. The Board acceded to this request.

Increased Member Services. In an effort to increase WSBA services to its members, the Board asked General Counsel Bob Welden to investigate the guidelines used by other states concerning bar admission reciprocity. The motivations behind investigating this topic include: enfranchising attorney representatives of the military, minimizing the need to associate with counsel in other states where Washington members frequently practice, accommodating WSBA practitioners who are reluctant to move to other states because of the bar exam, and allowing the WSBA to exercise disciplinary oversight over attorneys who practice in Washington but have not sat for the exam.

Judicial-election Recommendations. The Governors then considered a request by the Judicial Recommendation Committee. This committee evaluates attorneys for possible gubernatorial appointment (not contested elections) for appellate court positions, and forwards a list of candidates which it deems "well qualified" to the Governor for possible appointment when vacancies occur. The current guidelines prohibit candidates from using this rating if they choose to run in a contested election. The rationale for this restriction is four-fold: One, other candidates may be equally or more qualified, but they cannot state that they have also been rated "well-qualified" by the WSBA because they may not have at-

tempted to be placed on the gubernatorial appointment list; two, the knowledge that one candidate possesses such a rating may force other candidates to solicit the approval of the JRC, thus creating a *de facto* WSBA rating system; three, the WSBA has historically been loathe to rank candidates in contested elections because of the adverse consequences if a "disfavored" candidate wins; and four, because the WSBA is a mandatory bar, it has been reluctant to comment on elective candidates on behalf of all of its members. Nevertheless, the JRC asked the Board to allow candidates to publicize this rating. To some, this appeared to be an attempt to nudge the Board toward full judicial evaluations in contested elections. (Next year: "Now that you're letting us do it for some candidates, why not do it for all?"). However, due to the above concerns, the Governors declined to act on the JRC's request.

And the Presumptive President-elect is . . . Governor Mary Fairhurst, from the Third Congressional District, was the only individual to file for the position of 1997-98 WSBA president.

Kids Voting Washington. After a brief discussion the Board endorsed the "Kids Voting Washington" campaign. The Governors felt that endorsing an organization whose purpose is to heighten electoral awareness in children did not constitute a position on "political or social issues" unrelated to the practice of law, as prohibited by WSBA bylaws.

Washington Association of Legal Support Professionals. Diana Osborne, Arline Joyce and Linda Webb sought Board approval regarding the continuation of the ad hoc Joint Legal Education Committee. This committee works on joint programming between the WSBA, WALSP and other legal support professional organizations. The Board granted this request. The Governors were also asked to provide formal WSBA approval to WALSP educational programs. The Governors referred this request to the MCLE Task Force for its review.

Disciplinary Rule Changes. The Board approved proposed changes to RLD 2.3, 2.4, 2.6, 2.9 and 12.1. These changes deal predominantly with service upon the WSBA in disciplinary matters. Copies of these changes can be obtained through the WSBA offices.

The Nonlawyer practice of Law. Upon its review of the Task Force Report on the Nonlawyer Practice of Law, the Board adopted recommendations 1 and 3 of the minority report "in principle," and referred specific rewording of the recommendations to the drafters of the minority report together with a subcommittee of the Board.

The adopted portions of the recommendations state: "1. Law should be practiced only by licensed and admitted lawyers with the following exceptions: a. Paralegals who are employed and directly supervised by an admitted lawyer. . . . c. Real Estate Limited Practice Officers. 3. The Washington State Bar Association should seek legislation making the unlicensed practice of law a felony and give prosecutors the right to seek an injunction." The Board also voted to include language which made the unauthorized practice of law a *per se* violation of the state Consumer Protection Act.

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30-DAY MONEY BACK GUARANTEE

Nonrefundable Retainers and Advanced-fee Deposits

by **Anne I. Seidel**, *WSBA Disciplinary Counsel*

This is the first in a series of articles on lawyers' ethical duties regarding fees and billing practices. This article will discuss the difference between a nonrefundable retainer and an advanced-fee deposit, and will outline the ethical duties implicated by each of these fee arrangements.

Nonrefundable Retainers

A nonrefundable retainer is typically paid "to secure a lawyer's availability over a given period of time."[1] Relatively small nonrefundable retainers may also be used as a minimum fee to compensate the lawyer for start-up costs associated with a particular matter.[2]

There are several restraints on the use of nonrefundable retainers. First, the client must understand and agree that the retainer is nonrefundable. The simple fact that the client pays a flat fee for a particular service does not mean that the lawyer is entitled to treat the fee as nonrefundable, absent the client's knowing consent. Although not required by the Rules of Professional Conduct, the nonrefundable nature of a fee should be stated clearly and in writing. Having a written agreement helps assure that the client understands the arrangement, which in turn protects the lawyer from having a future dissatisfied client who may file a grievance or lawsuit against the lawyer, or simply not recommend the lawyer's services to others.

Second, the lawyer must treat the fee as nonrefundable. This means that the fee *cannot* be deposited in a trust account. If the fee is truly nonrefundable, by definition, it is earned upon receipt and therefore lawyer funds. Under RPC 1.14(a), lawyer funds cannot be deposited in a trust account.

Third, even if the client agrees that the fee will be nonrefundable, the lawyer may have to refund all or part of it under certain circumstances. One example of this occurs when the lawyer cannot fulfill the terms of his agreement. Thus, if the nonrefundable retainer is paid to secure the lawyer's future availability, the fee or a portion of it must be refunded if the lawyer will not be available. For instance, if the lawyer realizes a short time after receiving a nonrefundable retainer that he cannot represent the client due to a conflict of interest, the lawyer cannot keep the fee. Similarly, if the fee is paid to a law firm to retain a particular lawyer's services and that lawyer leaves the firm, the firm must refund the unused portion of the fee.

There may also be a duty to refund a nonrefundable retainer if the retainer is large, the client fires the lawyer (particularly for a good reason) and the lawyer has done little or no work on the client's behalf. Although there is no case law in Washington on this issue, other states have disciplined lawyers who did not make refunds under such circumstances. Such results are consistent with the rule in Washington that fee issues can subject a lawyer to discipline only if the fee is "unconscionable" or "clearly excessive."[3] For example, in a New York case, a lawyer was suspended for two years for three instances of requiring $10,000 and $15,000 minimum fee payments, after he was warned by the disciplinary authorities that using such nonrefundable retainers violated his ethical duties.[4] In an Oregon case, a lawyer was suspended for a year for accepting nonrefundable retainers and then neither completing the work nor refunding the fee.[5] The courts reason that by not refunding the unused portion of the retainer, the lawyer is depriving the client of his right to terminate the lawyer's services at any time, as contemplated by RPC 1.15(a).

Courts also view nonrefundable retainers as excessive fees, in violation of RPC 1.5(a), if the lawyer refuses to refund the unearned portion upon termination and little or no work has been done. While it is not clear if the Washington Supreme Court would follow this line of cases, a cautious practitioner would not refuse to refund the unearned portion of a nonrefundable retainer if, under the circumstances, it appeared manifestly unreasonable for the lawyer to keep the entire fee. However, nonrefundable retainers that are truly for the purpose of securing the lawyer's availability over a given period of time, and compensate the lawyer for foregoing other opportunities, have not been viewed as unreasonable.[6]

Advanced-fee Deposits

If the client has not agreed that the fee is nonrefundable, any fees paid before they are earned are advance fee deposits. This is true regardless of whether the lawyer is billing on an hourly basis or charging a flat fee for a particular service. Such advance fee deposits *must* be deposited in a trust account. If the advance fee deposit is large, or the lawyer does not anticipate using it for a period of time, the lawyer should consider placing it in a separate interest-bearing trust account, as discussed in RPC 1.14(c)(3). Otherwise, the advance fee deposit should be placed in a pooled IOLTA trust account, which is how such deposits are typically handled.

RPC 1.14(b)(3) requires lawyers to keep their clients informed about funds held on the client's behalf. A recommended practice is to provide the client periodically with a statement listing the beginning and ending balance of funds held in trust, and enumerating each addition and disbursement by listing the relevant amount and description. If billed fees will be paid out of the trust account unless the client objects, a statement to that effect should appear in the billing statement.[7] The advanced fee deposit must be promptly withdrawn from the trust account after the lawyer's entitlement to the funds is established.

[1] WSBA Formal Opinion 186 (1990).

[2] 1 Geoffrey C. Hazard, Jr. & W. William Hodes, The Law of Lawyering § 1.5:201, at 111 (2d ed. 1994).

[3] *In re Fraser*, 83 Wn.2d, 892 (1974).

[4] *In re Cooperman*, 83 N.Y.2d 465, 633 N.E.2d 1069 (1994).

[5] *In re Gastineau*, 857 P.2d 136 (Or. 1993).

[6] *See* 1 Hazard & Hodes, *supra* note 2, at 111; WSBA Formal Opinion 186 (1990).

[7] *See* Rules, Regulations and Common Sense — Managing Client Trust Accounts, at 10. (This pamphlet, which provides a detailed discussion of trust account procedures, is available from the Bar Association offices.)

The Supreme Court Candidates **SPEAK**

Barbara Durham

Chief Justice Barbara Durham brings a wealth of experience and common sense to the Supreme Court. The first woman selected by her colleagues to lead Washington's court system, Durham has served with distinction on every level of the state judiciary.

The true mark of a good judge is performance on the bench. Durham's opinions have supported the continued confinement of dangerous sex offenders, established crime victims' rights, and upheld Washington's death penalty. Her opinions in civil matters demonstrate the same high degree of concise scholarship, thoughtfulness, and craftsmanship. She has consistently won highest marks from judicial-rating groups, receiving numerous awards for her excellence on the bench. In 1995, she was named judge of the year by Washington Women Lawyers, the King County Bar Association, and King County Women Lawyers. She has attracted national recognition, receiving the Matrix Award for Women in Communication.

Durham has worked hard to make the courts accessible, safe and responsible. Durham's commitment to making the courts accountable brought judges into the classroom and opened the Supreme Court to television scrutiny. In 1995, Durham successfully initiated a constitutional amendment to ensure continuity and leadership on the Supreme Court. She created a task force seeking better solutions to domestic violence. Under her leadership, the Supreme Court has adopted statewide courthouse security standards.

Durham is committed to giving Washington voters the tools they need to eliminate undue influence from the election process in order to select the most highly qualified judiciary. Her efforts have led to the publication of the state's first judicial voters' pamphlet for the primary election. She has spearheaded efforts to limit judicial-campaign contributions, voluntarily applying those limits to her own campaign. Durham supports the unanimous recommendations of the Walsh Commission which advocate further reforms designed to maintain the high quality of Washington's bench.

A native Washingtonian, Durham was born in Anacortes and raised on Vashon Island. She received her undergraduate education from Gonzaga University and Georgetown University. She was named outstanding business graduate at Georgetown. Prior to entering law, Durham was a securities analyst at Merrill Lynch in New York City. In 1968, she received her law degree from Stanford University Law School. Durham began her career in the King County Prosecutor's office, where she prosecuted primarily felony cases.

Durham understands that the quality of our courts is the ultimate reflection of the Washington bar. As your Chief Justice, Barbara Durham will continue to enforce the law and uphold the Constitution.

Mark Mestel

I am a candidate for the Washington State Supreme Court. However, I am not a politician. I believe that jurists, especially appellate-court judges, should not be political. The job of a Supreme Court Justice should be to interpret the law based on the Constitution and the intent of the Legislature. Personal and political ideas must be put aside. I will not use this position to further my personal beliefs. I believe that the quality of justice stagnates if it is controlled for too long by the same people. A constant infusion of new individuals with fresh perspectives is healthy for the system. I can bring a new experienced perspective to the Court.

My candidacy is the cumulation of close to twenty years as a trial lawyer. During my career, I have devoted myself to protecting the rights of individuals. My experience provides me with an insight into our system of justice. I want to serve on the Supreme Court because of its rule-making power. I believe that the system can be improved and be made more accessible, affordable and user friendly.

The criminal-justice system can meet the needs of the victim, the accused and the public. The rules of procedure can be used to assist litigants and victims in the orderly and timely progression of their trials. However, there is room for improvement. I have tried hundreds of criminal cases. I know the strengths and weaknesses of the system. I can make informed, experienced decisions that will improve the efficiency of criminal practice.

My experience is not limited to criminal cases, as I also have tried many civil cases. There is no reason why a simple tort case should generate more paperwork and higher legal fees than a murder case. Costly depositions and voluminous interrogatories should be the exception rather than the rule. I do know the difficulties of preparing and trying both civil and criminal cases. I can use my experience to assist attorneys, litigants and the public.

My hope is to modify the existing rules of procedure and evidence to create a system that functions more productively and better serves the citizens. I believe that I have the experience to improve and contribute to the system. I have worked for more than twenty years to develop the experience to run for this position. For that reason I ask for your support.

** Following a tradition started last year, the* Bar News *presents a statement from each candidate running for the Washington Supreme Court. The statements are presented numerically by position and alphabetically by name. Because Justice Charles Smith is running unopposed in Position Two, no statement appears for that position. Also, please note that Douglas J. Smith, candidate for Position Three, should not be confused with Douglas J. Smith, presiding judge of the King County District Court — Shoreline Division.*

OUT: Position One *

Kathryn Ross

Goal: To bring a practical, experienced voice for the future to the Washington Supreme Court.

Law Practice: Twenty years litigating at every level of the state courts, as well as in the federal courts. A general practice in Snohomish County helping clients with the broad array of legal needs and problems that are typical of everyday life. Kathryn Ross is recognized for taking on tough, life-and-death cases, protecting constitutional rights of individuals in Washington. A seasoned litigator, she wouldn't hesitate to make the tough but correct decisions as a justice.

Bar activities: Long active in the WSBA, served on the Board of Trustees of the Young Lawyer's Division, the Interprofessional Committee, the Bench-Bar-Press Committee, and the executive board of the Criminal Law Section.

Active member of the American Bar Association. Cochaired the ABA's Conference of Lawyers and Representatives of the Media for two years. Member: Litigation Section; Criminal Law Section. Fellow of the American Bar Foundation.

Issues of fundamental importance to you and your clients:

Right to vote for judges: The incumbent instigated, championed and fully supports the report of the Walsh Commission. The Walsh report recommends that the current system of open judicial elections be eliminated and replaced by an appointment and "retention" vote system. Read the Walsh recommendation. It is essentially life tenure for judges. Ross supports open election of judges — voters of Washington can and should be informed regarding judicial elections and then allowed to exercise their vote.

Reducing the size of the Supreme Court: The incumbent strongly supports the reduction of the supreme court from nine justices to seven justices. There are dangerous pitfalls in reducing the size of the court, especially if the incumbent's plan to eliminate election of judges is realized. With a reduced number of justices, the influence of each individual justice is increased. A two-term governor could pack the court with youthful politically like-minded justices who could control jurisprudence in the state for 30-40 years — again particularly if elections are eliminated. Think carefully about this "reform."

Changes to selecting chief justice: The incumbent has changed selection of chief justice to election by justices to a 4 year term with eligibility for reelection. Her eight colleagues would have to vote "no confidence" to change the chief — a bad idea. With the change in selection and term of chief justice, there should be a limit on consecutive terms to avoid the court permanently reflecting the personality or political bent of one individual.

Lawyers must be careful to distinguish judicial "reform" from a benefits package for incumbents.

Legal Services: Access to Justice. The Courts have been increasingly unavailable to disadvantaged people. In October 1995, 127 judges, including seven Supreme Court justices, signed a letter to the Washington congressional delegation demanding continued federal funding for legal services for the poor. The incumbent refused to sign that letter. Ross fully supports legal services for the poor and will take a leadership position on that and related issues as a supreme court justice.

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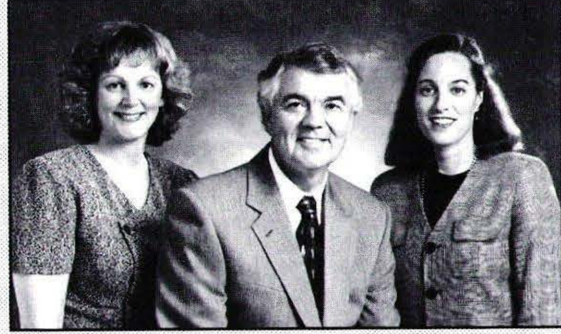

Heather Cameron, Tom Chambers and Gail Lundgren are available to represent individuals in matters of wrongful death, serious bodily injury, sexual abuse and harassment, and psychiatric malpractice.

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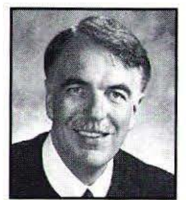


Charles Johnson

Barnett Kalikow

Since joining the State Supreme Court in 1991, Justice Charles W. Johnson has earned the respect and trust of lawyers and citizens throughout the state. Many attorneys, including three past presidents of the Washington State Bar Association, are enthusiastic in their support of his reelection campaign.

Although Justice Johnson's election in 1990 surprised many, his exceptional performance on the Court has surprised few. Justice Johnson's background as a small-office practitioner provided the solid foundation and a much-needed perspective in the debate that goes into resolving cases before the state's highest court. In that debate, and in his opinion-writing, Justice Johnson has shown that he understands the concerns and needs of ordinary, law-abiding citizens — the same people he served so ably as a solo practitioner during the first 14 years of his legal career.

Justice Johnson has worked hard throughout his first term to stay in touch with those who elected him:

He has traveled extensively across the state, listening to citizens' concerns about the court system. In doing so, Justice Johnson has developed a statewide following of enthusiastic supporters.

He has worked hard to improve the judicial system. The Young Lawyers of the Pierce County Bar Association awarded Justice Johnson their 1994 Liberty Bell Award in recognition of his work to create model local rules establishing uniformity within the state's trial courts. These efforts help simplify an attorney's job when representing a client outside of his or her county.

Justice Johnson has further developed his keen interest and expertise in state constitutional law. On his own time, Justice Johnson has been teaching that subject at the Seattle University School of Law, and he regularly lectures at law schools, colleges and high schools throughout Washington.

His principled, thorough and clear opinions have earned the respect of fellow justices and the admiration of attorneys, who especially value Justice Johnson's expertise and perspective. Justice Johnson works tirelessly to improve the legal system. He chairs the Court's Rules Committee and Security Committee; he cochairs the Court's Local Rules Committee; and he serves on the Court's Committee for Expediting Opinions and Traveling Court Committee. Also, Justice Johnson represents the Court as liaison to the Board for Trial Court Education.

Retired Justice Robert Utter, campaign cochair, says Justice Johnson "has been a wonderful addition to the Washington State Supreme Court. He rounds out the Court in a very important way." Justice Johnson's understanding of the issues facing ordinary citizens combined with his dedication, fairness, open-mindedness and knowledge of the law explain the broad-based support for his campaign. In addition to numerous endorsements from individual attorneys, organizations representing teachers, firefighters, law enforcement, unions and builders have endorsed Justice Johnson.

Justice Johnson seeks a second term on the state's highest Court. His first term is evidence of why he deserves your support. This fall, please reelect Justice Charles W. Johnson.

I want to thank the *Bar News* for providing this space. I take particular pleasure and pride in appearing here as a member of our profession.

Contemplate these points as you make your choice for Supreme Court Justice:

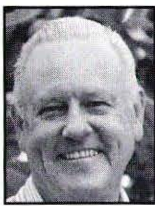
Balance. This is the keynote of my candidacy. In my legal career, I have had no "constituency" except the people as a whole. As a former county prosecuting attorney, my main duty was to do justice. There is a misperception that prosecutors feel their job is to get convictions, but professional prosecutors understand that the main client is the people and the main task is justice. Both my private and public civil practice have been representing plaintiffs and defendants alike. It is serious business to challenge a sitting Justice. But I have gotten the sense from the incumbent's opinions that he never left his advocate's hat behind when he went to the bench and has been representing a certain constituency of lawyers.

Consistency and Predictability. We cannot expect people to respect the law or even understand their duties as citizens when the rules change with each sitting of the appellate courts. Whether in the civil or criminal arena, knowing the consequences of our actions is usually more important than liking those consequences. And consistency has more than a nodding acquaintanceship with justice.

Deciding cases on the merits. Unfortunately, the law is filled with procedural pitfalls for the unwary. Often, the object of legal proceedings is how to capitalize when your opponent falls into one. And in a fairly large appellate practice I've noticed this: In criminal appeals the state usually argues that reversal of a conviction for error, if there were any, would be an elevation of form over substance, and the defendant argues that, with constitutional rights, form *is* substance. Frequently the defendant is right. But sometimes form is just form. The danger is that when courts start enforcing arbitrary procedures at the expense of a fair hearing, whether civil or criminal, we risk a serious and dangerous breakdown in popular confidence in the law.

Scholarship and Communication. We need a profound understanding of the law from our appellate judges and also the ability to communicate that understanding. I have spent much of my life as a teacher and journalist honing these skills. Many years ago, I taught French, Latin, chemistry, history, and a lot more in high schools in New York and Connecticut. More recently I was adjunct faculty at Heritage College's Omak campus teaching administrative law and education law to masters' degree candidates. I currently am adjunct professor of state and local government at Seattle University School of Law. My writing has appeared in such publications as *The New York Times, Technology Review*, and *The Seattle Post-Intelligencer*. My law-related writing has appeared in the *Washington Journal* and the *Bar News*.

I hope you will give me the opportunity to exercise some of these skills on the Court.



Douglas Smith

A native of the state of Washington, I was born in Olympia, attended public schools in Port Angeles, and graduated from Whitman College in Walla Walla and from the University of Washington School of Law in Seattle.

I served as deputy prosecutor under Ray Munson in Yakima before joining the Seattle law firm of Cartano, Botzer & Chapman. The scope of my practice was general, with emphasis on trial and appellate work, and it ultimately gravitated to cases involving broad legal and constitutional issues. I represented the Seattle-King County Board of Realtors in several cases leading to the Civil Rights Act. I tried (and appealed) a highly publicized case involving the teaching of religion in the public schools and at the University of Washington. I coordinated the efforts of several law firms in a series of challenges to the constitutional rights of private clubs. The latter issues were resolved favorably by the Black-Douglas Supreme Court.

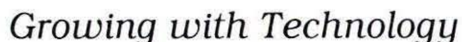
My professional and community activities have included lecturing at legal seminars on property law and various First Amendment issues, as well as accepting two important court-appointed criminal defense assignments. I served for three years as president of my alumni association, and in 1968 I received a citation for civic and professional contributions. I served in the U.S. Navy during the Korean War as an air intelligence officer on two tours of duty, including one combat tour and one Far Eastern tour, and retired from the naval reserve with the rank of Captain.

In 1973, I received an appointment to a policy position in the Office of the Secretary of Defense. After serving in a series of positions at the Pentagon, I was appointed Special Assistant to President Gerald Ford, acting as executive assistant to the President's ranking policy counselor. Following my White House service, I opened an office in Washington, D.C., representing small-business owners from many states who were struggling to comply with increased government regulations.

In 1986, I decided to devote the remainder of my career to serving average citizens. For the past eight years, my practice in Everett has included a heavy schedule of trial and appellate work in courts of all levels, both federal and state, from municipal courts to the United States Supreme Court.

Why am I running? I believe there is a need for some change. At present, court-created gate-keeping rules are jeopardizing the independence of the judiciary and undermining public confidence by limiting citizen access to the courts and foreclosing timely debate on the constitutional limits of government authority.

Court rules should encourage judicial economy, and ensure sharp adversarial debate. Too frequently, though, they have accomplished the opposite. The result has been confusion for lawyers and the public alike. Public confidence in the judiciary cannot be taken for granted; it must be continually earned — and it can be. Those rules were created by the court. And they can be revised by the court. I would favor doing so.



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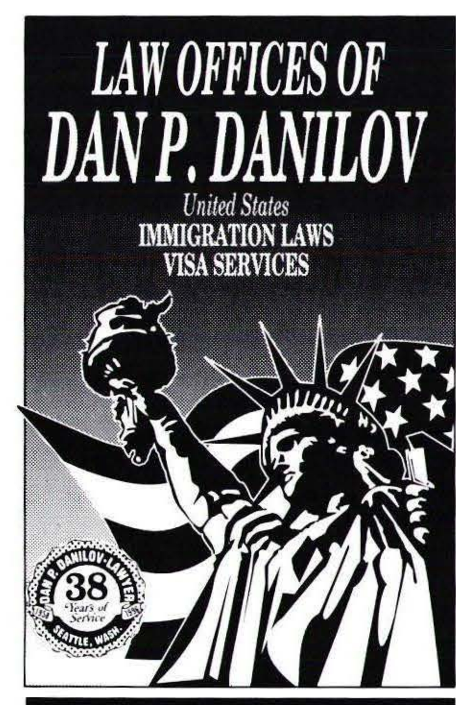

Usury Rate

The average coupon equivalent yield from the first auction of 26-week treasury bills in August 1996 is 5.34%. The maximum allowable interest rate permissible for September 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 appeared on page 41 of the July *Bar News*.

Gov't Accountability Project

The Seattle branch of the Washington, D.C.-based Government Accountability Project celebrates four years of operation in Washington state. This nonprofit law firm represents whistle blowers who report waste or wrongdoing in areas such as water quality, toxic waste and worker safety. Attorneys wishing to volunteer for GAP projects may contact the Seattle office at (206) 292-2850.

Attorney General Opinions

Cities & Towns - Counties - Sheriff - Police - Public Employment - Transfer rights of sheriff's employees laid off as result of formation of police department in city incorporated before enactment of statutes granting transfer rights.

RCW 35.13.360 through .400 do not entitle sheriff's employees to transfer to the police department of a city which, having incorporated prior to the effective date of those statutes, but having contracted with the county for law enforcement services for several years, then (subsequent to the enactment of the statutes) forms its own police department. [AGO 1996 No. 7]

Liquor - Liquor Control Board - Authority of liquor wholesalers who also wholesale nonliquor items to offer premiums or price incentives to retailers on the nonliquor items.

RCW 66.28.190 does not authorize a liquor wholesaler who also wholesales nonliquor items to offer free product, price discounts or similar sales incentives to retailers on nonliquor items. [AGO 1996 No. 8]

School Districts - School Employees - School funds - Salary and Benefits - Health Insurance - Health Care Authority - Obligation to provide "basic benefits" before offering "optional" benefit package.

RCW 28A.400.280 requires a school district to offer some form of each of the five "basic benefits" defined in RCW 28A.400.270, before it can expend school funds for additional or alternative "optional" benefits. [AGO 1996 No. 9]

Schools - School Districts - Districts - Religion - Churches - Constitutionality of prayer at commencement exercises.

1. Under current U.S. Supreme Court case law, it would not be constitutional for the officers or employees of a school district (or other governmental entity operating a school) to plan for and include prayer as a part of a commencement exercise or similar official school function.

2. Under current Ninth Circuit case precedent, it would not be constitutional for a school district (or other governmental entity operating a school) to allow its students to include prayer as a part of a student-planned commencement exercise or similar official school function.

3. Private, nondisruptive prayers at commencement exercises, which are not a part of the planned program and which do not disrupt it, are constitutional under current case law.

4. Because the state constitution is stricter than the federal with regard to the support of religion with public funds and/or property, there is no purpose to be served in separately analyzing the state constitutional issues raised by prayer at commencement programs. [AGO 1996 No. 10]

RAP & RALJ Comment Sought

When it reconvenes this fall, the WSBA Court Rules and Procedures Committee is scheduled to review the Rules of Appellate Procedure (RAP) and the Rules for Appeal of Decisions of Courts of Limited Jurisdiction (RALJ). Comments and suggestions are welcome. Please send them, by November 15 if possible, to the attention of Steven Rosen, Staff Liaison, care of the WSBA, 2001 6th Ave., Ste. 500, Seattle, WA 98121-2599.

Courthouse Security Task Force Update

The 17-member Courthouse Security Task Force has issued its final report on courthouse safety standards. With minor modifications to standards such as "Courthouse Security Officers" and "Weapons in Courthouse Facilities," it closely parallels the draft report discussed in the March *Bar News*. The final standards are advisory, rather than state-mandated. The Chief Justice and the Board for Judicial Administration will determine whether specific legislation or funding is necessary to implement the standards. Copies are available at the Washington Courts Internet homepage at http://www.wa.gov/courts, or through Jude Cryderman @ (360) 357-2121.

Transfer

On May 29, 1996, John R. Stair (WSBA. # 0530, admitted 1952) became an inactive member of the Association.

Interim Suspensions

Sequim lawyer Jason M. Kays (WSBA #20438, admitted 1991) was ordered suspended from the practice of law pending the outcome of disciplinary proceedings by Supreme Court order entered June 28, 1996.

Bellingham lawyer George Livesey (WSBA #2492, admitted 1949) was ordered suspended from the practice of law pending the outcome of disciplinary proceedings by Supreme Court order entered April 11, 1996.

Interim suspension is pursuant to RLD 3.1 and is not a disciplinary action.

Reprimand

Kent lawyer Robert Kuvara (WSBA

#3603, admitted 1963) has been ordered reprimanded pursuant to a stipulation for discipline, approved July 1996. The discipline is based upon his filing suit against a former client for a debt that had been discharged in bankruptcy.

Kuvara represented a client who did not pay for all or part of the representation. The representation ended in February 1986. At that time, Kuvara was owed $1,650. In March 1986, the client's husband told Kuvara that he and his wife intended to file for bankruptcy. Kuvara agreed to represent the couple in their bankruptcy proceedings for $600 and filed a Chapter 7 petition on their behalf. His debt of $1,650 from his prior representation of the wife was listed as an unsecured debt. Neither the husband nor the wife signed a written reaffirmation of the $1,650 debt to Kuvara. Kuvara did not disclose to the bankruptcy court that he believed he had obtained an oral reaffirmation from his clients of the $1,650 debt.

The bankruptcy judge entered an order releasing the clients from all dischargeable debts, which included Kuvara's debt. The discharge order specifically enjoined all creditors whose debts were discharged from "commencing . . . any action . . . to collect . . . any such debt as a personal liability of the debtor."

In December 1986, Kuvara initiated a lawsuit against his former clients in Aukeen District Court, alleging that they had failed to pay $2,184.52. The former clients, who were not represented by counsel, asserted the bankruptcy in their answer as a defense. At a bench trial in March 1987, Kuvara told the court that the debt had been reaffirmed.

During the pendency of the couple's bankruptcy, 11 U.S. C. § 524(c) required that a reaffirmation of a debt must be filed with the court and must "contain a clear and conspicuous statement which advises the debtor that the agreement may be rescinded at any time prior to discharge or within 60 days after such agreement is filed with the court, whichever occurs later, by giving notice of rescission to the holder of such claim." Kuvara did not inform the court of this legal authority because he believed the husband had orally reaffirmed the debt and he was not aware of the requirements of 11 U.S. C § 524(c). The district court awarded judgment to Kuvara. The couple did not appeal the judgment against them or move to have the case reopened. In February 1992, the former clients paid $3,344.90 to satisfy the judgment in order to obtain a home mortgage.

Kuvara stipulated that by failing to inform the Aukeen District Court of the provisions of 11 U.S. C § 524, he negligently violated RPC 3.3(a)(3). He also stipulated that by obtaining an oral reaffirmation from his clients, he attempted to violate RPC 1.8(a) in that he attempted to obtain a pecuniary interest adverse to his clients when the terms were not disclosed in writing. Kuvara further stipulated that obtaining an oral reaffirmation from the clients violated RPC 1.7(b) because his status as a creditor materially limited his responsibilities to his clients to discharge their debts.

Kuvara agreed to make restitution to the former clients of the full $3,344.90 they paid to satisfy the judgment.

The hearing officer was Ronald A. Roberts of Tacoma. Respondent was represented by Leland G. Ripley. The Bar Association was represented by disciplinary counsel Anne I. Seidel.

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

In Memoriam

Lloyd Bever, former WSBA Governor and 20-year King County Superior Court

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judge, died at age 75 in June. Born on a Centralia farm, he earned a Purple Heart in the WW II Marine Corps in Okinawa, oversaw the installation of computer systems to streamline judicial administration and was involved in community programs for the disabled.

Reuben C. Carlson, a native of Tacoma and founder of Eisenhower & Carlson, died in December 1995 at the age of 91. He participated in many civic activities, the Tacoma Yacht Club and enjoyed fishing.

Fred Dore, former Washington Supreme Court Justice, died in May at age 70. He was a Seattle native. He practiced law for nearly 30 years, some of them with his brother James Dore. His father, Fred Dore, was a judge in Seattle who died when his son was six years old; his uncle, John Dore, was mayor of Seattle in the 1930s. A staunch Democrat, for six years Fred Dore was a state representative, and for 14 years he was a state senator. He served as a judge for the court of appeals, Division 1, for three years.

Paul M. Elwell, a 30-year Clark County justice of the peace, died in November 1995. He was born in Chicago and lived most of his life in Clark County.

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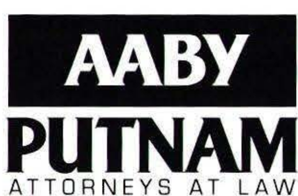

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Victor Felice, Spokane native and longtime attorney, died at age 76 in June. He organized and was the first president of Spokane's American-Italian Club, served six consecutive four-year terms as U.S. magistrate and became known for his community activism following his resignation in 1978.

William T. Fountroy, former attorney for the U.S. Postal Service, Marion County Prosecutor's office and 6th Circuit Court of Appeals judge, died in June at age 89. He lived on Mercer Island.

Betty Howard, journalist and retired Seattle District Court judge, died in December 1995 at age 84. She was a lifelong Seattle resident and the first woman appointed judge pro tem to the King County Superior Court.

Marcus Kelly, former Spokane County Superior Court judge, died at age 65 in May. Born and raised in Spokane, he served as justice of the peace, then followed in his father's footsteps to the bench, from which he retired in 1995.

Mary Meloy King, the first woman attorney to work in an Eastside law office, died in June at age 86. She served as Kirkland's municipal court judge and justice of the peace from 1942 to 1962, and by the end of her tenure was hearing more than 1,300 cases a year. She returned to full-time law practice until her retirement in 1980.

Sam L. Levinson, founder of Seattle's Levinson, Friedman, Vhugen, Duggan & Bland, died in December 1995 at the age of 94. Born in England and reared in Seattle and Tacoma, he was on the Seattle Opera Board for 18 years, a Seattle Symphony trustee for more than 50 years, and a director and former president of the Children's Home Society.

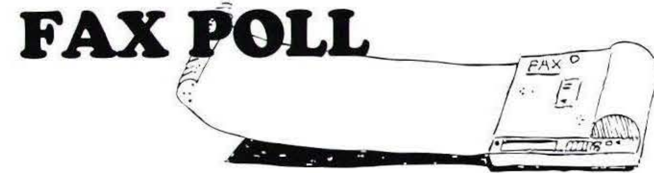
Jean P. Lowman, Vancouver attorney, died June at age 63. Born in Portland, Oregon, she taught legal assistants at the Bradford School. She also worked in real estate in Vancouver and for the U.S. Department of Interior.

Robert B. Piper, a Wenatchee native and a shareholder at Karr Tuttle Campbell, died at age 62 in December 1995. He was a fellow in the American College of Trial Lawyers and concentrated on defense litigation.

Hugh Ralph Ridgway, longtime attorney and municipal court judge in Sedro Woolley, whose legal career spanned 70 years, died in January. He served as a district court judge from 1966-1982. His survivors include three daughters and a son-in -law who are WSBA members.

THE WASHINGTON STATE BAR NEWS

FAX POLL



What is your opinion regarding the WSBA's rating of judicial candidates in contested elections? Proponents argue that the public could use WSBA input in order to make an informed choice. Opponents contend that a mandatory bar should not endorse specific candidates in an election, and that the WSBA should remain neutral in order to maintain good relations with members of the judiciary.

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.

1. ____ I strongly believe the WSBA should rate judicial candidates.
2. ____ I somewhat believe the WSBA should rate judicial candidates.
3. ____ I am undecided, but I believe the issue should be studied.
4. ____ I somewhat oppose the WSBA rating judicial candidates.
5. ____ I strongly oppose the WSBA rating judicial candidates.

Comments/Other:____

Name and city of faxing attorney (required): ____________________
(This will not be printed unless your comments are chosen for publication along with poll results in the October *Bar News*.)

Fax your response by September 14 to:
(206) 727-8320

Or, mail your response by September 11 to:
Washington State Bar Association
Attn.: *Bar News* Editor
2001 Sixth Ave., Suite 500
Seattle, WA 98121

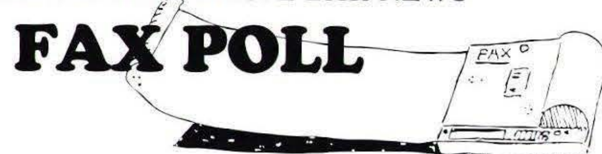
Please send suggestions for future fax polls to the above address.

RESULTS

of

THE WASHINGTON STATE BAR NEWS

FAX POLL



In last month's *Bar News*, we asked your opinion regarding the physician-assisted suicide of mentally competent, terminally ill patients. The results:

1. 62% strongly supported a patient's right to physician-assisted suicide.
2. 3% somewhat supported a patient's right to physician-assisted suicide.
3. 3% were undecided, but believed the issue should be studied.
4. 4% strongly opposed a patient's right to physician-assisted suicide.
5. 28% somewhat opposed a patient's right to physician-assisted suicide.

Overall, 77 valid responses were received.

Your Comments:

"After my father lost his nerve in at least one suicide attempt, motivated by declining health and mental competence, my mother and family watched him slowly and miserably deteriorate in a nursing home. In the end, our 'best' choice to end his suffering was to decline intubation and allow him to die of dehydration. I would never allow my dog to suffer such torture, and I am outraged that the state imposed it upon my father by refusing to allow a doctor to end his existence humanely."

Alice Wright, Bellevue

To deny to a still-competent, but suffering human being the right to die in peace is to engage in torture. The state is the instrument of our moral policy; to allow it to interfere in such a personal decision is inhumane."

Adam Kline, Seattle

"Assisted suicide is not justifiable homicide. It is society pressuring individuals to die because society doesn't think they should live."

Kathy Collings, Port Orchard

"My body, my choice."

John Follis, Everett

"Given the current mayhem in health care insurance and government health care entitlements, I believe individuals will be manipulated by health care benefit providers and at times be forced to live in intolerable medical conditions, thus encouraging suicide—much cheaper to allow suicide than to provide adequate health care."

Sam Elwonger, Seattle

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

September

4 **Americans with Disabilities Act**
Seattle
By NELI, (415) 924-3844
7.25 CLE credits

6 **Discovery — A Tool, Not a Club**
Seattle
By WSBA PR Comm.
(206) 727-8202
4 CLE credits (incl. .75 ethics)

6 **Basic NLRA Law & Procedures**
Seattle
By KCBA/NLRB, (206) 220-6311
7 CLE credits

8 **Juvenile Training Program** CLOSED
Leavenworth
By WA State Criminal Justice
Training, (360) 753-2175
15.5 CLE credits (incl. 2 ethics)

9 **Federal Income Taxation**
Seattle
By Golden Gate U., (206) 622-9996
41.25 CLE credits

9 **Internet Symposium '96**
Seattle
By Seattle U., (206) 329-3392
10.5 CLE credits (incl. 1.5 ethics)

10 **Res. & Com. Evictions**
Seattle
By NBI, (715) 835-8525
6.5 CLE credits (incl. 1.5 ethics)

10 **Ultimate Jury Guide**
Aberdeen (video replay seminar)
By WSBA CLE, (206) 727-8202
6.75 CLE credits

10 **Discovery Motions/Issues**
Seattle
By Assoc. Counsel for Accused
(206) 624-8105 ext. 263
1 CLE credit

11 **Judge Coughenour's "Elements of Trial"**
Seattle - 1st of 15 sessions
By UW CLE, (206) 543-0059/
(800) CLE UNIV
CLE credit pending

11 **Restitution & Fines**
Seattle
By WACDL, (206) 623-1302
1 CLE credit

11&12 **Advanced Estate Planning**
Seattle - 11th, Spokane - 12th
By NBI, (715) 835-8525
7.25 CLE credits (incl. 1 ethics)

11-14 **Intellectual Property Certificate**
Seattle
By UW CLE, (206) 543-0059/
(800) CLE UNIV
23 CLE credits

12&19 **The Development & Construction Process** (Real Estate Professionals)
Seattle - 12th, Spokane - 19th
By WSBA CLE/RPPT Section
(206) 727-8202
6.5 CLE credits

12-13 **Western Regional Indian Law**
Seattle
By UW CLE, (206) 543-0059/
(800) CLE UNIV
CLE credit pending

13, 18, 19 & 20 **Chambers & Taylors Seminar**
Seattle - 13th, Olympia - 13th, Bellingham - 13th, Port Angeles - 18th, Vancouver - 19th, Spokane - 19th, Yakima - 20th
By WSTLA, (206) 464-1011
6.5 CLE credits (incl. .5 ethics)

13 **Impact Fees in WA**
Seattle
By LSI, (206) 567-4490
7.75 CLE credits

13 **Environmental Claims Handling**
Seattle
By NW ECA, (206) 447-7000
7 CLE credits (incl. 1 ethics)

17 **Commercial Law Development**
Seattle
By WSBA Business Law
Section, (206) 727-8202
1.25 CLE credits

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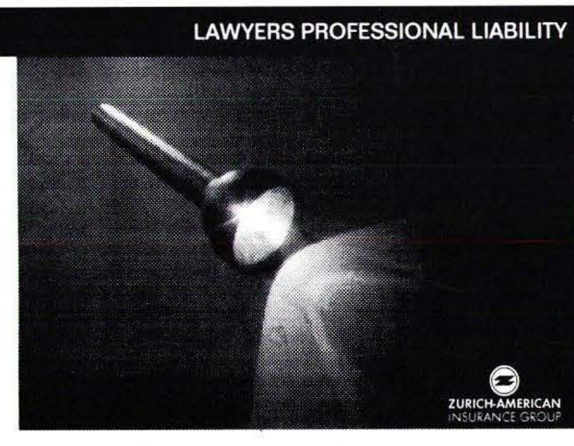

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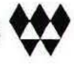
WILLIS SPECIALTY PROGRAMS 
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18, 20, 25 & 27 **Valuing Closely Held Businesses**
Spokane - 18th, Bellevue - 20th
Seattle - 25th, Portland - 27th
By BSA, (206) 223-5400
7.5 CLE credits

19 **School Law in WA**
Bellevue
By NBI, (715) 835-8525
6.5 CLE credits

19 **Construction Law**
Seattle
By LSI, (206) 621-1938/ (800) 854-0009
12.75 CLE credits

20 **Employee Benefits Conference**
Seattle
By WSBA CLE/Taxation Section, (206) 727-8202
7 CLE credits (est.)

20 **Wired for Law: Connect Your Law Practice to the Internet Now**
Seattle
By UW CLE, (206) 543-0059 (800) CLE UNIV
6.5 CLE credits (incl. .5 ethics)

20 **Labor Law Cert. I**
Seattle
By UW CLE (206) 543-0059 (800) CLE UNIV
44 CLE credits for all sessions (incl. 1 ethics credit per session)

20 **Invest. Issues in Estate Planning**
Seattle
By Themis, (206) 783-4014
7 CLE credits pending

20 **The Cost of Careless E-Mail**
Seattle
By Themis (206) 783-4014
3.75 CLE credits (incl. .75 ethics)

20 **Trends in Law Firm Compensation, Organization & Billing**
Seattle
By KCBA (206) 340-2572
6 CLE credits pending

20&21 **3rd Ann'l Crim. Justice Inst.**
SeaTac
By WSBA CLE/ Criminal Law Section, (206) 727-8202
10.5 CLE credits, incl. .75 ethics

24 **Pretrial Motions Practice**
Seattle
Associated Counsel for the Accused, (206) 624-8105 ext.263
1 CLE credit

24-26 **The Internet & the Practice of Intell. Prop. (24th), Environ. Law (25th), Employ. Law (26th)**
Seattle
By UW CLE, (206) 543-0059/ (800) CLE UNIV
CLE credit pending

25 **Judges Forum '96**
SeaTac
By Board of Industrial Ins. Appeals, (309) 676-0400
16 CLE credits (incl. 1.5 ethics)

26 **Evaluating & Settling P.I. Cases: Demo of a Mediation**
Seattle
By WSTLA, (206) 464-1011
CLE credits pending

26 **Collection Law in WA**
Spokane
By Lorman, (715) 833-3940
4 CLE credits

26 **Using Psychology Experts in Child Custody & Visitation Issues**
Seattle
By NBI, (715) 835-8525
6.5 CLE credits

26 **Winning the Judges & the Jury Under the New I.C. System**
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27 **Communication in the Courts**
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27 **3d Ann'l TPCBA Bar Convention**
Silverdale
By TPCBA, (206) 627-3883
7 CLE credits (incl. 2 ethics)

27 **WA Judgment Enforcement**
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By PESI, (800) 621-5336
6.5 CLE credits

27 **Moving to Master's Level**
Seattle
By UW CLE, (206) 543-0059 (800) CLE UNIV
14 CLE credits

27-28 **Trying Cases to Win: Featuring the Honorable Herbert J. Stern**
Seattle & Spokane
By UW CLE, (206) 543-0059/ (800) CLE UNIV
CLE credit pending

27-29 **24th Ann'l Aviation Law Seminar**
Coeur d'Alene, ID
By KCBA, OSB, FAA
9 CLE credits pending

28 **Adoption Practice for Social Workers**
Seattle
By KCBA & KC Adoption Service, (206) 340-2572
6 CLE credits pending

30 **International Sales Contracts**
Seattle
By NSCC & Bogle & Gates PLLC (206) 527-3705
CLE credits pending

The Law Firm of

EISENHOWER & CARLSON

is pleased to announce that

ROBERT J. BACKSTEIN

and

JAMES J. MASON

formerly with the Tacoma office of Preston Gates & Ellis have become of counsel to the firm at its Tacoma office

Mr. Backstein and Mr. Mason will continue a general practice emphasizing municipal, land use, environmental, and business law

SUSAN MACHLER

formerly with Kargianis Watkins & Marler has joined the firm as an associate in the Tacoma office

Ms. Machler's practice will emphasize personal injury and general litigation

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and

Christopher G. Emch
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(though he refused to change his first name)

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of

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John M. Johnson

formerly with
Graybeal Jackson Haley & Johnson
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is Of Counsel with the firm

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"A discourse on argument on an appeal would come with superior force from the judge who is in his judicial person the target and trier of the argument . . . Supposing fishes had the gift of speech, who would listen to a fisherman's weary discourse on fly-casting . . . if the fish himself could be induced to give his views on the most effective methods of approach?" — John W. Davis

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Former Judge, Court of Appeals
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Law books: RWCA — complete current set $1,100; Wash App Volumes 35-37, $200; Wn 2d Volumes 100-114, $25; call Jack Vincent (360) 385-5584.

Complete and up-to-date Revised Code of Washington Annotated. Absolutely mint condition. Most never opened. Can deliver. $1,500.00. Call Marc or Patty at (503) 627-0420.

For sale: WA Rprts 1st and 2nd (original volumes dating to 1880s); WA App. Rprts (complete through 3/96): $2,000. ALR 2nd-5th, ALR Fed., Digests, Later Case Service: $1,000. Call Paul McCarthy at 450-7391, leave message.

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Library for sale — RCWA; Am. Jur. 2nd; Wash. 1st; Wash. 2nd; Wash. Appellate; Wash Digest; Wash. Shepards; Wash. Practice. All good condition. All current through 1995. Shelving for same. Located in Seattle. Best offer for whole library or individual sets. Call (206) 284-0997.

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Position Available

Washington State *Bar News* editor: The Editorial Advisory Board seeks a WSBA member in good standing for the part-time contractor position of editor. Primary duties include: acquisition of articles, organization and development of annual calendar of theme issues, attendance and reporting of Board of Governors meetings, compiling the digest of disciplinary action and other official announcements, composing the table of contents, coordinating, acquisition of manuscripts for the *Bar News* departments and columns and overseeing compliance by contributors with publication deadlines and format requirements for text, coordinating preparation of editorial material with the managing editor and selecting cover art. Collateral duties include participating in: quarterly meetings of the Editorial Advisory Board, annual meetings of national conferences of legal publishers, and occasional county bar association meetings by invitation. Editorial experience or training desired. Payment is commensurate with experience. Residence in Seattle is not necessary. Submit résumé and writing samples, if available, to Bar News Editor Search, 500 Westin Building, 2001 Sixth Avenue, Seattle, WA 98121-2599. Applications must be received by not later than October 30, 1996. For more information, call the *Bar News* at (206) 727-8215.

Attorney jobs: indispensable monthly job-hunting bulletin listing 500-600 current jobs (federal/state government, courts, Capitol Hill, public interest, corporations, associations, law firms, universities, international organizations, RFPs) for attorneys at all levels of experience in Washington DC, nationwide and overseas. Order: *National and Federal Legal Employment Report*, 1010 Vermont Avenue NW, #408-WB, Washington DC 20005. $39-three months, $69-six months. (800) 296-9611. Visa/MC.

Swinomish Indian Tribe seeks experienced attorney to join its three attorney in-house legal department. Requires Washington State license, minimum three years' experience, knowledge of federal Indian law and strong communication skills. Tribal office is located across Swinomish Channel from Town of LaConner, 60 minutes north of Seattle. For complete job announcement, please contact Allan Olson, Tribal Attorney, PO Box 817, LaConner, WA 98257, (206) 466-7221.

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Litigation attorney wanted — Portland management labor and employment law firm seeks highly motivated litigation attorney with minimum of two years' experience and strong academic credentials. Send résumé and references to: Hiring Coordinator, Bullard, Korshoj, Smith & Jernstedt, 1000 SW Broadway, Suite 1900, Portland, OR 97205. Responses will remain confidential. Written replies only please.

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Will Search

James Peter Kraft, resided in King County. Anyone having knowledge of a will executed by Mr. Kraft, please contact attorney Bill Hickman at (206) 744-5658.

Anyone having knowledge of the existence of a Will for Herbert Kinderman, please contact L. Paul Alvestad at (206) 627-1181.

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Orcas Island farmhouse — 30 acres with marine/island views, meadows, stream and waterfalls. Fully furnished, woodstove, sleeps six. Available by weekend, week or month year-round. From $700/week. No smokers. (206) 781-2715.

Cabo San Lucas — deluxe one bedroom condo on waterfront. Fantastic view, pool, fully equipped kitchen, A/C, TV/VCR, three private balconies overlooking marina, restaurant and bar on premises, prime location. $125/night (503) 393-5059.

Attorneys wanted: attorneys wanted for nationwide legal panel for a legal plan distributed through a major insurance company. For an information kit, call LAWSTAR (800) 529-7377.

Newport, OR — One bedroom cottage overlooking Yaquina Bay. Five minutes from Oregon Coast Aquarium, bayfront, and beaches. $49/night; $294/week. (514) 265-8553.

Legal Notices

Notice: anyone with claims against the estate of the late John Sweet, attorney at law, in the nature of breach of fiduciary duty and related to the actions or inactions of John Sweet as personal representative, trustee or guardian, please contact Barbara Coster at (206) 587-6556, 801 Second Avenue, Suite 1104, Seattle, WA 98104.

FYI... State Bar Highlights

WSBA On the Move

The WSBA moves to a new location in November . We have outgrown our space at the Westin Building in downtown Seattle and will move just a couple blocks away to the "Darth Vader" building (black glass and funky angles) in the Belltown neighborhood.

As of November our official address will be:

2101 Fourth Avenue — Fourth Floor, Seattle, WA 98121-2330.

Most of our phone numbers remain the same (if it starts with a 727 then it will stay the same; if it starts with 443 it will change.) We'll publish the new numbers as soon as we have them. The main number remains 727-8200.

WSBA must move because its 10-year lease is expiring and the increases in staff due to revisions of the disciplinary program as well as the demands of a membership that increases by 1,000 members each year has made our present space unworkable. The new space allows for growth over the next 10 years.

Watch this space for the next two months for updates on the move, including our construction schedule and garage sale on old furniture. ◆

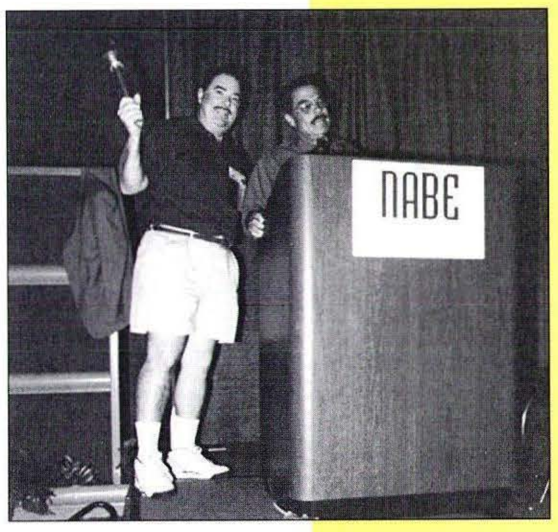


Photo by Jack Young

Dennis Harwick (left), executive director of WSBA, receives the presidential torch for the National Association of Bar Executives (NABE) from past president Bruce Hamilton last month in Orlando. Harwick will hold the post for one year.

"My role is to serve as spokesman for bar execs throughout the country, and to provide leadership for the association in delivering services to its members," Harwick explained.

NABE includes executives of national, state, local and specialty bars. Its role is education, representation, and professional development for bar executives. Harwick was a state bar delegate on the national board for two years before being elected vice president. That post automatically led to one year as president-elect, then president.

Harwick said he saw running for a NABE post as part of his professional responsibility. "I did it to repay what this group did for me when I started as a bar exec. The benefit to the WSBA is that it provides the WSBA with access and influence at the national level...Your calls get answered."

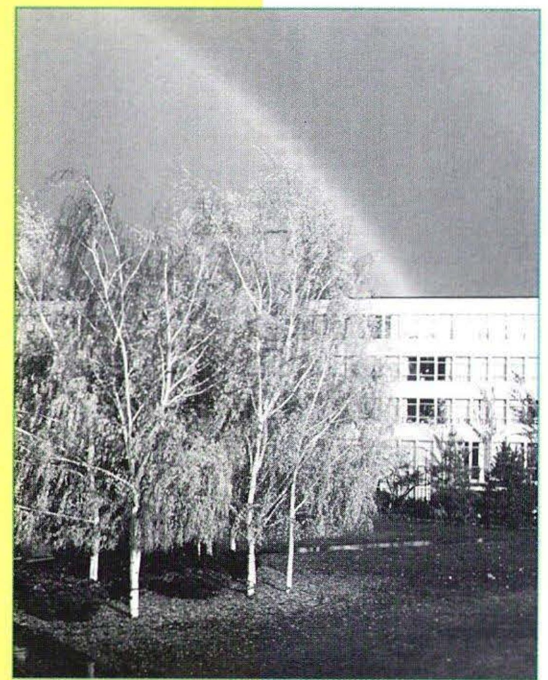
Reminder — WSBA Annual Meeting in Seattle Sept. 6

Don't forget the WSBA Annual Business Meeting and cheap CLE on September 6 at the Seattle Hilton. Although the CLE has sold out and the awards luncheon will probably be sold out by the time this issue is published, the business meeting is free and open to everyone. The business meeting follows the awards luncheon, beginning at approximately 1:15 p.m. Business matters will concentrate on the passing of the gavel from President Ed Shea to President-elect Tom Chambers. ◆

Dean's Message to the Bar

by John Clute

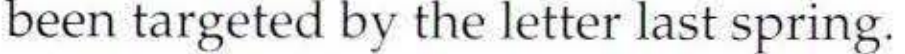
As Dean of Gonzaga University School of Law, I would like to share with the members of the Washington State Bar Association information regarding some difficult and troublesome events that have occurred on our campus — events which have both outraged and saddened our law school, Gonzaga University and the greater community around us.



Rainbow over the Gonzaga campus.

(Photo by John Redenbaugh)

I speak of a series of racial harassment letters that have been sent to African-American students at our law school. The first of the anonymous racial "hate mail" letters was sent to four African-American law students in the spring of 1995. The tenor of these letters was hateful and venomous. This spring, almost a year since the original incident, identical copies of a new letter were delivered to two of our second-year African-American law students. These students were the same who had been targeted by the letter last spring.



The most recent letter was a cruel and threatening racist's diatribe directed at three African-American law students, a respected professor and his family. The evidence in these cases suggests that the letters were written by one individual and that the individual is a law student at our school, indeed, in the same class as the targeted students. In addition, this year's letter was so similar to the letter of last spring that it seems certain that it was written by the same person.

Despite the ongoing efforts of the FBI and the local police in Spokane, the perpetrator has not yet been identified. We are continuing to work closely with the FBI and the police to identify the harasser and seek justice for these wrongdoings. Gonzaga University has offered a $25,000 reward for information leading to the identification of the individual. We are also providing academic and other appropriate assistance to the targeted students to assure their safety, help them continue with their legal education, and counteract the stress and intimidation this unwarranted attack has caused. In addition, we have held and will continue to hold programs and symposiums on issues relating to diversity, tolerance and anti-bias. We will also work with the people of Spokane in eradicating racist attitudes wherever they exist in our community.

Finally, we have taken this opportunity to examine ourselves and our school, and to explore ways in which we can make our Gonzaga environment more welcoming to a diverse group of students and faculty, and less hospitable to those who choose to express their hatred in such a cowardly and hurtful fashion. We will not let the actions of this hate-filled individual deter us in our goals of diversifying the students, faculty and staff of our law school.

The preparation and delivery of these "hate-mail" letters are acts of terrorism that were designed to intimidate, frighten and injure certain individuals solely on the basis of their race. The commission of these crimes is unacceptable and must be stopped.

This reprehensible conduct is unbefitting any person who is aspiring to become a lawyer and enter the legal profession. Our legal system is based on certain fundamental principles, including inherent rights of the individual and the respect those rights require.

I know there is little we can do to take away the pain and hurt that these targeted individuals have endured. However, as lawyers, we must be steadfast in our belief that professionalism demands a high level of respect for differences among people, whether those differences are of opinion, race, ethnic origin, gender, religion, sexual orientation or disability. We further must ensure that all of our actions and deeds, whether in our practices or in our lives outside the legal practice, are directed toward achieving these beliefs.

I am grateful to the Washington State Bar Association Board of Governors and the Law School Board of Advisors for their respective resolutions joining us in the condemnation of these acts. In addition, I am grateful to the other bar association committees, and minority and specialty bar associations that have expressed their concern and volunteered their assistance. With the support of the bar and the legal community, we hope to resolve this matter and recommit ourselves to achieving diversity, equality and tolerance at our law school. ◆

Recap of Mandatory Continuing Legal Education Requirements

by Scot Stout, MCLE Accreditation Clerk

As the CLE reporting time approaches, attorneys, particularly those in CLE Reporting Group 2, need to review their records to ensure that by December 31, 1996, they will have accrued 45 CLE credits. For those who desire a recap, following is a summary of continuing legal education requirements.

~~~~~~~~~~~~~~~~~~~~~~~~~~~~~

NEW WSBA MEMBERS

1992 Admittees Report this Year

If you were newly admitted to the Bar in 1992, you will need to have accrued a minimum of 45 CLE credits by December 31, 1996. Two of those 45 credits must be ethics credits. You will receive a CLE Certification form in your annual 1997 WSBA Licensing Form packet in December 1996. It includes detailed instructions for completing the form in the packet.

Bar Members admitted after 1992

You are exempt from CLE requirements for the year you were admitted to the Bar (from admission date to the end of the calendar year), as well as the following calendar year. However, any CLE credits you accrue during this period following date of admission may be applied to your first reporting cycle. Your first three-year reporting cycle will begin following your period of exemption. For instance, if you were admitted in 1993, you are exempt from CLE requirements for the remainder of 1993, as well as all of 1994. Your first reporting cycle will be January 1, 1995, through December 31, 1997, and you will need to file your Certification by January 31, 1998.

CLE REQUIREMENTS

Number of CLE Credits Required

Admission to Practice Rule 11 (APR 11), as adopted by the Supreme Court of Washington, requires that each active member of the WSBA complete a minimum of 45 credit hours of approved legal education within a three-year period. "A credit hour" equals one (1) clock hour of actual attendance. A maximum of 15 credits may be earned by self-study of approved audio/videotapes. Beginning this year, all members will need to report CLE credits in the areas of legal ethics, professionalism, or professional responsibility (see following section to determine how many ethics credits you are required to report).

Figuring your Ethics Requirements During the Phase-in Period

Current Reporting Period (1994-1996) for Group 2

You are in Group 2 if you were admitted between the years 1976-1983 or in 1992. If you are in Group 2, you are required to have completed a minimum of **2.00 ethics credits** out of the total of 45 required for the reporting cycle 1994-1996 by December 31, 1996. You will receive a CLE Certification form enclosed with your WSBA Licensing Form packet in December 1996, which you will need to complete and return by January 31, 1997.

Future Reporting Periods

Reporting Period 1995 - 1997 for Group 3

You are in Group 3 if you were admitted between the years 1984 through 1990 or in 1993. Group 3 members will be required to complete a minimum of **4.00 ethics credits** out of 45 by December 31, 1997, for the reporting period 1995-1997.

Subsequent Reporting Periods

All members will need to report a minimum of **6.00 ethics credits** out of the 45 after the 1995-1997 reporting period. An easy way to remember is, beginning with 1996, you should obtain an average of 2.00 ethics credits per year.

COURSE APPROVAL

To ensure review of a course for CLE pre-approval, it is important to mail (not fax) a completed "Form 1" application well in advance of the program date. Incomplete forms are returned to the applicant with a request for additional information. Under most circumstances, applications are processed in less than one week. However, some applica-

Continued on page 60

Book Group for Women Lawyers

LAP invites women lawyers to participate in an ongoing monthly book discussion group. Book selections examine specific challenges in one's personal and professional life; life enhancement and other topics chosen by the group. Meetings are held on the first Wednesday of each month from noon to 1:30 p.m. Fee is $10 per session. If interested please contact Jean Johnson, Lawyers' Assistance Program, (206) 727-8268. Services provided by LAP are confidential.
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MCLE — *Continued from page 59*

tions must be reviewed by the Washington State Board of Continuing Legal Education which meets bi-monthly. A photocopy will be mailed to the applicant indicating the action taken. Seminars occurring outside Washington State may qualify for CLE credit; it is not necessary to return to Washington State in order to obtain CLE credits. Standards for approval of CLE credit may be found in APR 11, Regulation 104. If you know the date, title and sponsor of the course you may contact the WSBA to find out if a particular course is already accredited.

Reporting CLE Compliance

You must file a CLE Certification by January 31 of the year following the close of your individual reporting period. If it is your year to report compliance, a Certification form is included in your annual Licensing Packet mailed to members in December. You will need to report on the Certification form the title of the seminar, the sponsoring organization, the exact date(s) of the seminar, and the amount of credits earned. Although a course may be accredited for a maximum number of hours, only the hours you actually attended qualify for credit and only those hours should be reported. Detailed instructions to complete the Certification form are included in your Licensing packet.

Late Filing Fee

To avoid a late filing fee, credits must be acquired by December 31 of the final year in your reporting period. Attorneys who fail to timely acquire the credits must: (1) pay a special filing fee of $150 for the first reporting period of non-compliance, and (2) make up the credit deficiency by May 1 of the year following the close of their reporting period. Attorneys who fail to pay the filing fee and report credit compliance by May 1 are subject to suspension. The late filing fee increases by $300 for each consecutive reporting period of non-compliance. For example: You incur a late filing fee of $150. Three years later, if you fail to timely comply with CLE requirements again, the late filing fee increases by $300 to $450.

Carry-over Credits

If an active member completes more than 45 credits during a three-year reporting period, a maximum of 15 of those excess credits may be carried forward and applied to the next reporting period. Of these 15 credits, a maximum of five audio/video credits may be carried forward to the subsequent reporting period. Two ethics credits may be carried forward.

Teaching credit

CLE credit for teaching or participation in a course can only be earned if the course itself is an approved CLE activity. Once a program has been approved for CLE credit, you may claim the actual preparation time, with a limit of 10 credit hours of preparation time for each hour of teaching. For example, if you spent seven hours preparing for a 45-minute lecture, you may claim 7.00 CLE credits for preparation, plus .75 credit for the 45-minute lecture, plus the credits for time spent attending the remainder of the seminar. If you spent 12 hours preparing for a 45-minute lecture, you have a limit of 10 CLE credits you may claim for preparation, plus the .75 credit for the 45-minute lecture, plus the credits for time spent attending the remainder of the seminar.

IMPORTANT

It is the responsibility of the individual attorney to document CLE attendance. Neither the Washington State Continuing Legal Education Board nor the WSBA records seminar attendance for the purpose of reporting CLE compliance. ◆

WSBA CLE Presents Promoting Diversity and Eliminating Bias in the Legal Profession

"**Promoting Diversity and Eliminating Bias in the Legal Profession"** will be presented in Seattle on Sept. 12 by the WSBA CLE Committee and Opportunities for Minorities in the Legal Profession Committee.

This program has been approved for 6.5 ethics credit by the Washington State Board of CLE. Here's your chance to fulfill the new mandatory CLE ethics requirement, explore the ethical implications of bias within the legal system, and determine how to decrease conflicts and improve your effectiveness within the legal system.

Keynote Speaker Mary Alice Theiler's remarks will address "*Multi-Cultural Awareness and Diversity — Keys to Enriching the Legal Profession and the Communities We Serve.*" Ms. Theiler — with the Seattle firm of Theiler Douglas Drachler & McKee — is a governor-elect of the WSBA's Board of Governors, a past president of the Seattle-King County Bar Association, and recipient of the 1996 Helen M. Geisness Award.

The featured presenter in the afternoon is Donna M. Stringer, Ph.D. , president of Executive Diversity Services, Inc. in Seattle. She will explore "*Diversity and Cross-Cultural Interactions — How to Decrease Conflicts and Improve Your Effectiveness within the Legal System.*" She is a social psychologist with nearly 20 years experience as a manager and teacher and trainer of multi-cultural issues who has been a featured speaker at many local, state and national conferences, and has conducted training programs for more than 30,000 people.

For more information contact Michele Kramer at the WSBA at (206) 727-8202. ◆

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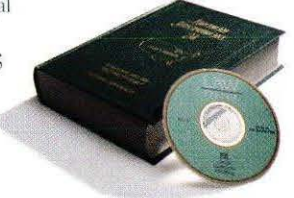

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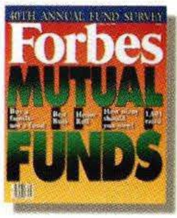
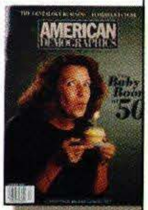
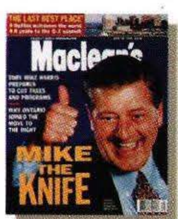
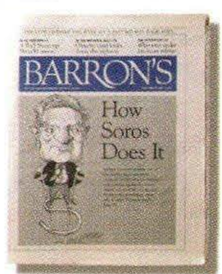
Vol. 50 , No. 9, September 1996









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