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Vol. 51 No. 2, February 1997

*The official publication of the Washington State Bar*



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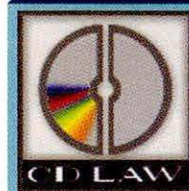
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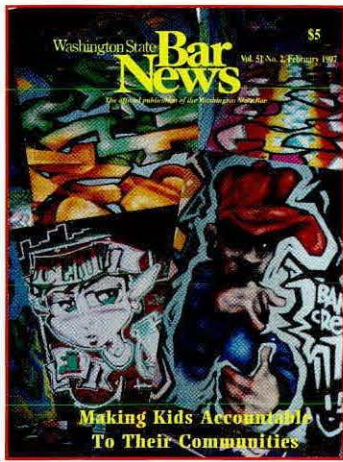
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# Washington State Bar News

Vol. 51 No. 2, February 1997

The official publication of the Washington State Bar

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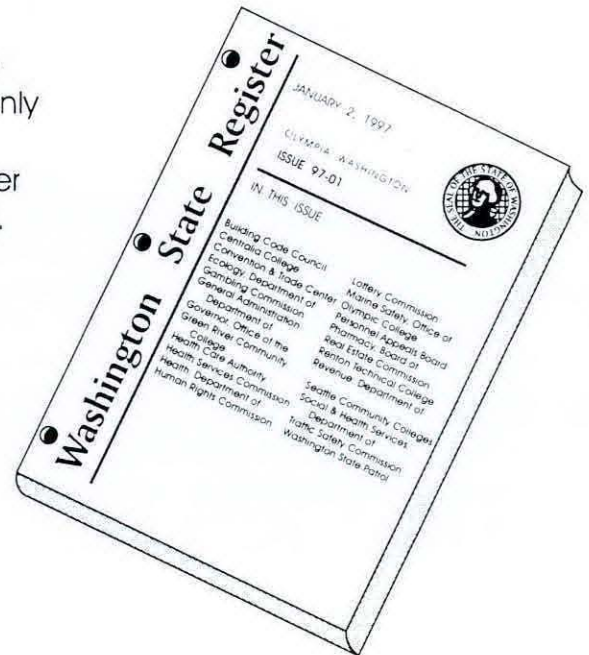
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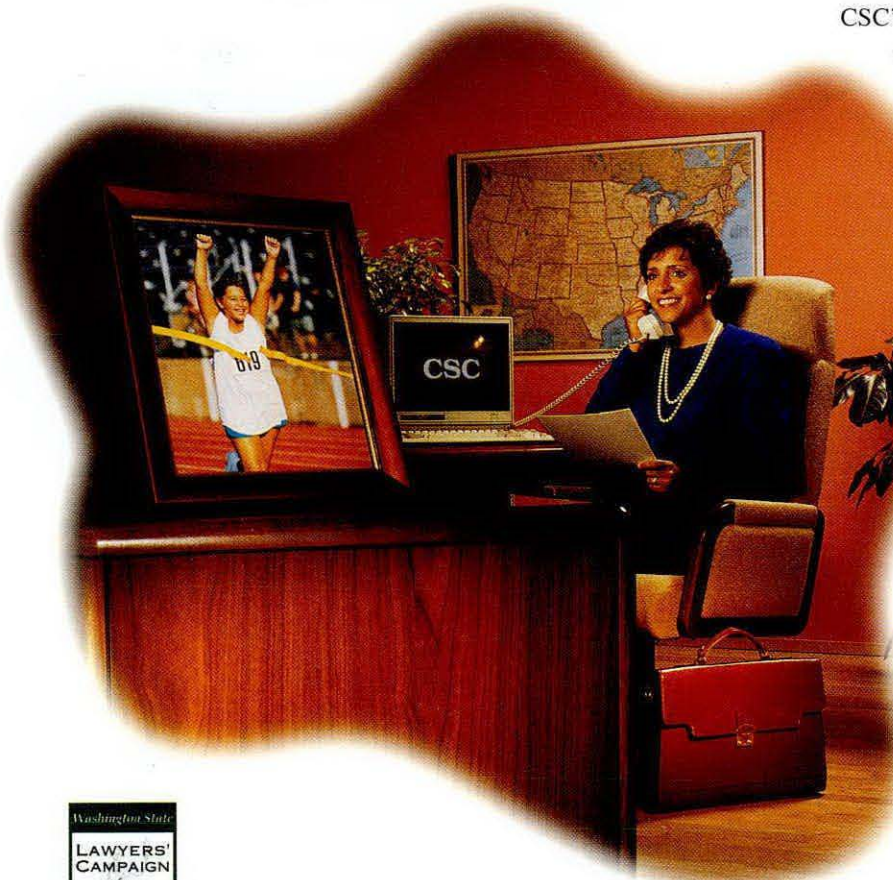
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## Unauthorized Practice of Law Complaints

Editor:

I have been an active participant in the ongoing process of figuring out what to do about the 'unauthorized practice' of law. I listened to constituents complain for three years while I served on the Board of Governors, and then volunteered to 'take the bull by the horns' in chairing the Consumer Protection (formerly the Unauthorized Practice) Committee for two years.

Many remedies were considered. A few were deemed worthy of pursuit. But there is a bottom line, and that is the willingness of the members of the Bar to step forward not only with their complaints, but with support for a program of enforcement.

The prosecutors are quick to say that they will prosecute. But only if there is a bona fide victim, i.e., a consumer of legal services harmed by the unauthorized practitioner, and not a business competitor. The Consumer Protection Act may provide a remedy, but only if there is evidence of damage. A damage-less claim is a worthless claim.

So a very real question is: 'Where are the victims?' To that end, our fellow lawyers in the Oregon Bar have financed a program designed to uncover them. Ads have been run in the media (TV, radio and newspapers) which note that problems occur when an unlicensed provider is involved. In response to their rhetorical question posed by the hypothetical consumer: "What went wrong?", the Oregon Bar responded: "Call a member of the Bar or the Oregon Bar Association."

The program is characterized as successful by Oregon Bar staff. The obvious question therefore is why this cannot be undertaken in Washington. The answer is simple and straightforward. The membership has not agreed to pay for it. And until there is a groundswell of commitment to discover the victims of unauthorized practice — to educate the consumer about the reasons and the need for regulation of the practice — the phenomenon will remain.

Critics respond that the problem is as old as Methuselah and enforcement is a waste of time and money. Well, just because there will always be speeders on the freeway is no reason to disband the State Patrol. They say that there is no effective remedy. I point to the Oregon experience.

*Readers are invited to submit letters of reasonable length to the editor. They should be typed on letterhead and signed. The editor reserves the right to select excerpts for publication or edit them as may be appropriate. Signatures in excess of three names will be printed only in exceptional circumstances, at the sole discretion of the editor.*

They say that the unlicensed generate work for us all. Indeed, this is true. But it's like saying that you support war as a physician because of the great surgical training the field hospital provides. I don't really think that this is an honorable response.

Many feel that they have enough on their platter to work with, and that they don't mind the 'crumbs' which fall to others. But the value in regulation (presumably there's some benefit to requirement of education, testing, trust accounts, etc.) is lost, if not certainly diminished,



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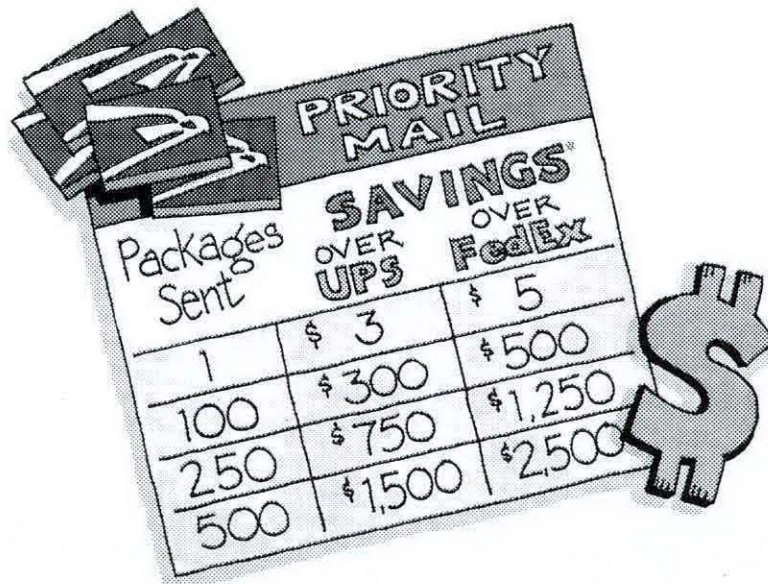
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by a policy which is deliberately blind to transgressions.

If unauthorized practice is a problem, then something should be done about it. That something begins with a commitment from the members of our profession to support a program which is designed to identify and assist those who have been harmed by the unlicensed. Unless Bar members are willing to make that commitment, all the studies in the world will not resolve the problem.

STEVEN B. TUBBS  
Vancouver

### The "Three S's" of Gun Ownership

Editor:

I found Joe Wishcamper's article on the law of self-defense both interesting and useful. It's good that he gave us the "ten commandments for responsible gun owners" — til now, I've advised my clients to follow the "Three Ss": "shoot, shovel, and shut up."

I stand corrected.

JOHN E. DAMMEYER  
Lynnwood

### Task Force Member Responds

Editor:

In the December 1996 *Bar News*, readers were asked whether they favored or opposed the proposed amendments to RPC 8.4(g). Unfortunately, the text of the proposed rule was not provided, and the editor's summary of the proposal was inaccurate. In preceding editions, *Bar News* coverage of the proposal has also been incomplete and inaccurate. I am writing in the hope that the *Bar News* will be willing, at last, to print a complete and accurate account of the proposed RPC amendments.

The proposed amendments are a response to the three bar association task force reports on gender, race and sexual orientation, released in 1989, 1990, and 1995. All of these reports have described and condemned discrimination and expressions of bias within the legal system. According to these reports, lawyers and judges have, on numerous occasions, expressed bias and prejudice during legal proceedings in a way that offended participants, perpetuated harmful stereotypes, polluted and undermined confidence in the legal system, and left many groups convinced that while the court-

house might be a nice looking building, it was not a place they could go to get justice. One recent example involved an attorney who insisted on referring to his opposing counsel, an African-American male, as "boy" in open court. Another involved a judge who, observing that the defendant before him appeared to be a gay man, began questioning him about whether he had AIDS; the man was charged with a minor traffic offense. The task force reports cite several more examples.

This kind of behavior has no place in our legal system. Accordingly, during the first seven months of 1996 a diverse drafting group developed amendments to prohibit such conduct. The drafting group eventually included representatives of the WSBA Rules of Professional Conduct Committee, the King County Bar's Committee on Lesbian and Gay Issues (which I then chaired), the WSBA Opportunities for Minorities Committee and the WSBA Office of Disciplinary Counsel. The group presented its proposed amendments to the RPC Committee, which amended and approved them in August 1996, and then to the Board of Governors, which in October 1996 amended them again and sent them on to the state Supreme Court with a unanimous recommendation for adoption. In December, the Court voted to publish the proposals for comment.

To understand the proposals, it helps to know where they came from. The drafting group was concerned, first, that existing rule 8.4(g) was woefully inadequate to stop the behavior we wanted to stop because it prohibits only acts of discrimination that are "prohibited by law." The WSBA's Chief Disciplinary Counsel, urging adoption of a better rule, described existing RPC 8.4(g) as "almost completely ineffectual." He went on to explain:

As written, the rule applies mainly to lawyers' conduct not directly related to their practice of law, i.e., in their role as employers. Since there are other avenues for relief for this type of conduct, it does not appear the rule as written serves much purpose. Although it could also potentially apply to a lawyer's conduct as a lawyer, as in a failure to accommodate a client with a disability, we have not yet received any such grievances. The griev-

ances that we do receive that allege discriminatory bias generally arise from conduct not covered by RPC 8.4(g), such as a lawyer's use of offensive language toward opposing counsel or sexual harassment of clients or court personnel.

Memorandum, Barrie Althoff to Bob Welden, April 25, 1996.

Searching, therefore, for a rule that would put some teeth into the Bar Association's traditional opposition to discrimination and bias, the drafting group found the Western District of Washington's General Rule 9, which states:

Litigation, inside and outside the courtroom in the United States District Court for the Western District of Washington, must be free from prejudice and bias in any form. Fair and equal treatment must be accorded all courtroom participants, whether judges, attorneys, witnesses, litigants, jurors, or court personnel. The duty to be respectful of others includes the responsibility to avoid comment or behavior that can reasonably be interpreted as manifesting prejudice or bias toward another on the basis of categories such as gender, race, ethnicity, religion, disability, age, or sexual orientation.

We viewed the first two sentences as mainly aspirational and focused on the third. We used this sentence as a model, and modified it to meet our needs.

In part to address the due process concerns raised against the 1991 proposal, we thought we needed a rule that stated an objective standard of behavior. Thus, we proposed to prohibit conduct that "a reasonable person would interpret as manifesting prejudice or bias . . ." This concept was lifted verbatim from the Western District's GR 9, and was derived from the evolving standards for sexual and racial harassment. These standards prohibit conduct that a reasonable person would regard as manifesting unwanted sexual attention or race-based enmity. Just as these standards protect the ac-



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cused from liability based on an unreasonable perception, so does our proposal. A person's perception that conduct is prejudicial or biased is not accepted as conclusive; the finder of fact has to find that the perception is reasonable. As with other RPC's, the state of mind of the lawyer who manifests bias or prejudice will go to the degree of the sanction, if any, that is imposed.

Because earlier, broadly worded versions of the rule had been criticized on free speech and due process grounds, we dramatically limited the scope of the proposed amendment while making sure we still addressed the behavior we most wanted to prohibit. Accordingly, we limited the rule to "conduct" and omitted the term "comment" which was thought by some to be overbroad. We took out the phrase "in connection with the lawyer's professional activities" which appears in RPC 8.4(g) but which some thought might apply to Bar Association social events and the like, and replaced it with "in representing a client." And we listed the categories of persons toward whom manifestations of bias are prohibited: "judges, other parties and/or their counsel, witnesses and/or their counsel, jurors, or court personnel." (Because of concerns raised both by members of our group and by members of the RPC Committee, we did not seek to prohibit a lawyer from manifesting bias against the lawyer's own client or prospective client.) Finally, responding to concerns raised by several litigators, the Board of Governors added the statement that "This rule does not restrict a lawyer from representing a client by advancing material factual or legal issues or arguments."

The result of our efforts is a proposed new paragraph 8.4(h) that would prohibit lawyers, under certain limited circumstances, from engaging in conduct that a reasonable person would regard as manifesting bias or prejudice based on sex, race, age, creed, religion, color, national origin, disability, sexual orientation, or marital status. The rule applies to lawyers only while they are actually representing a client, and only if their offensive behavior is directed toward another participant in the legal system. An exception is built in to protect litigators from being punished for presenting material evidence or arguments.

In addition to the new paragraph 8.4(h),

we proposed amendments to paragraph (g). As it exists, RPC 8.4(g) makes discrimination on any of the bases listed above unethical everywhere in the state — except for sexual orientation discrimination, which is considered unethical only where it happens to be unlawful. Thus, under the existing rule, the Bar considers it unethical to fire an associate for being a lesbian if you fire her in King County, Seattle, or one of several other local jurisdictions, but not if you do it anywhere else. Believing that we as a profession should hold ourselves to a higher standard, and that this kind of patchwork rule-making is inconsistent with the whole notion of a code of ethics, the drafting group proposed making statewide the prohibition on lawyers engaging in sexual orientation discrimination. Following the principal that the rule should apply to all lawyers, the Board of Governors modified the proposal so that 8.4(g) would also apply to all lawyers regardless of whether they work in firms with eight or more employees.

All of these amendments were collectively described in the December fax poll simply as a proposal that would "liberalize RPC 8.4(g)" and "prohibit discriminatory acts on the basis of sexual orienta-

tion, regardless of whether state laws prohibit such discrimination." The account of the arguments for and against the rule was no more accurate than the *Bar News* summary of the proposal itself.

The proposed amendments have been shaped by a long process with many steps and numerous amendments along the way. The former editor complains bitterly about the 1995 King County Gay and Lesbian Issues task force and its role in shaping the current proposal, but while the task force played a significant role in getting the process moving again, these are issues that have been on the table in some form since at least 1991. During the year before October 5, 1996, when it finally granted its unanimous approval to the proposals, the WSBA Board of Governors discussed the issues at five separate meetings, asked all state bar committees and sections to comment, and made sure everyone with an opinion was heard. In the end, the support was overwhelming. Now that the Supreme Court has published the rule for comment, I hope the *Bar News* will cover the issue in a way that enables members of the bar to provide informed comments to the Court.

DAVID M. HORN  
Seattle

PROPOSED AMENDMENTS TO RPC 8.4(g)  
AND NEW PARAGRAPH 8.4(h)  
as unanimously approved by the WSBA Board of Governors  
October 5, 1996

It is professional misconduct for a lawyer to:

\* \* \*

(g) Commit a discriminatory act prohibited by state law on the basis of sex, race, age, creed, religion, color, national origin, disability, sexual orientation, or marital status, regardless of the number of persons employed by the lawyer, where the act of discrimination is committed in connection with the lawyer's professional activities. In addition, it is professional misconduct to commit a discriminatory act on the basis of sexual orientation if such an act would violate this rule when committed on the basis of sex, race, age, creed, religion, color, national origin, disability, or marital status. This rule shall not limit the ability of a lawyer to accept, decline, or withdraw from the representation of a client in accordance with RPC 1.15: or

(h) In representing a client, engage in conduct toward judges, other parties and/or their counsel, witnesses and/or their counsel, jurors, or court personnel or officers, that a reasonable person would interpret as manifesting prejudice or bias on the basis of sex, race, age, creed, religion, color, national origin, disability, sexual orientation, or marital status. This rule does not restrict a lawyer from representing a client by advancing material, factual or legal issues or arguments.

## Editor's Agenda Apparent

Editor:

The irrational fears and worst case scenarios expressed in Mr. Rigby's letter to the editor (December 1996) clearly show that he has spent a great deal of time thinking about homosexuality and how it might affect him, the legal profession and society as a whole.

Perhaps if he spent less time obsessing about homosexuality and its supposed threat to society and more time talking with and listening to gay attorneys (such as me), he'd get a better idea of how discrimination can (and does) occur and what good the proposed rule change to RPC 8.4(g) could do.

Of greater concern to me than Mr. Rigby's musings, however, was your gratuitous and slanted comment following his letter. With no basis, you questioned the validity of the KCBA Task Force findings and insinuated that its members were incapable of making an objective report. Your own agenda and prejudice against the findings are apparent; I had expected better from the editor of the State Bar's official publication.

JAMES K. MIERSMA  
Seattle

Editor:

I am a subscriber to the *Bar News*, a recent successful applicant for the 1996 Washington Bar Examination, and a reader of your publication since 1968.

I was mortified to discover in the December issue, a *two-page* letter from a James Rigby of a most undignified, un-scholarly and intolerant sort. While purporting to address a proposed RPC change, the letter goes on at great length salaciously and pruriently discussing the writer's stereotypical conjecture of what gay and lesbian lawyers do when not in the courthouse. Further, the writer continues with other misogynistic generalizations clearly indicating his opinion of female members of the bar.

In America, the only usual ways that we have empirical factual knowledge about the intimate affairs of others is if a person shows up pregnant in public, we have personally witnessed the sexual activities ourselves, or if we indeed participate in a private sexual act with such a person. I am hard-pressed to believe the many lesbian, gay and bisexual attorneys I personally know in Washington state have comported in such a way in the presence of Mr. Rigby. I know that nei-

ther those people nor their heterosexual cohorts have so performed in my presence.

The way Mr. Rigby's uninformed emotional pyrotechnics fall upon women attorneys is equally incredible. (I personally am grateful that he did not take on race or national origin.) Apparently, according to him, a criterion for hiring new (male) associates in Seattle is that they be adept at discussing the personal affectionate attributes of their female colleagues or at least condone a pattern of such behavior. Arguably, the ideal behavior would be for all people to refrain from talking about (and, apparently, enjoying) disempowering sexual talk about each other — at the very least in a professional setting.

I think, to borrow a word from the correspondent, Mr. Rigby's letter should be deeply "offensive" to all members of the bar, whatever their gender or sexual orientation.

My own tolerance allows Mr. Rigby the opportunity to oppose the rule in any manner he wishes as long as it is rational, dignified, and decorous. The direct condemnation of brother/sister bar members is exactly the sort of practice an enlight-

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ened discussion of the relevant rule should be designed to prevent.

I was taught at the University of Washington School of Law and elsewhere to maintain the respect and dignity of the bench and bar. I believe the publication of this letter in its two-page form has undermined that decorum and taken away much hard-earned respect.

D. DOUGLAS TITUS  
Seattle

### What's in a Name?

Editor:

In the past, I have commented on the availability of firm names should new WSBA admittees elect to join together in the practice of law. My selection this year is Hatfield and McCoy. Perhaps they could have new ideas in the area of alternative dispute resolution.

TED D. ZYLSTRA  
Oak Harbor

### Police Apology Evidentiary Rule?

Editor:

A *Seattle Post Intelligencer* article of October 29, 1996, headlined "Suspects may be cleared but the damage is done" described the tremendous financial and emotional burdens falling on individuals such as Atlanta security guard Richard Jewell who are wrongly accused of a crime. The article also discussed cases from Washington state — for example, a Seattle journalist, accused of four rapes in 1983. The police ignored the journalist's passport, which showed the man was out of the country when all but one of the rapes occurred; the man's ordeal went on until a blood test finally cleared him. By then, the man had spent over \$20,000 in lawyers' fees and had suffered harrowing publicity. As in the Jewell case, the law enforcement agency involved offered no apology.

One cause of this somewhat cruel police silence is a fear that an apology will provide ammunition in a civil suit against the police agency. It is a sad reason to refuse a simple decency to a person who has suffered so unjustly. Yet naturally police will be reluctant to say anything that might expose them to damages. A solution suggests itself: add an evidentiary rule prohibiting the admission of

apologies as evidence of liability in civil suits. The precedent for such a rule, and evidence of its workability, exists. Currently, the federal and state rules of evidence prohibit admitting evidence of subsequent remedial modification of a product by a manufacturer sued for injury allegedly caused by the product. Rule 407, "Subsequent Remedial Measures," avoids discouraging manufacturers from making product changes that might prevent injury; the rationale behind a ban on apology evidence is not so dissimilar.

Perhaps this proposed rule should ban apology evidence from any kind of lawsuit. The classic legal advice regarding auto accidents "Don't apologize," for example, leads people to squelching a natural and polite impulse to express regret following a traumatic incident in which they may or may not have played a role. That statements of traumatized people should be forbidden in a court of law seems no very great evidentiary loss and would allow a measure of civility back into our society.

JOSEPH REINER  
Seattle

### Pro Hac Vice Fees?

Editor:

I note that, effective in 1997, the Bar Association is increasing the annual membership fees that it charges to WSBA members. This increase, which will assuredly be felt by many members, is puzzling to me. The claimed reason for the higher fees is the fact that the WSBA's expenses are higher. Yet, for whatever reason, the WSBA has decided to impose these fees solely on WSBA members and will not charge anything to out-of-state practitioners who are practicing law in the courts of the state of Washington.

There is no reason that the WSBA cannot impose an appropriate charge on pro hac vice applicants. For example, the federal court in Seattle charges \$25 for each such application. The State Bar of California charges \$50 per pro hac vice applicant — and, incidentally, keeps track of all such applications so that it can prevent out-of-state, unlicensed counsel from regularly practicing law in California.

Certainly, the WSBA can impose similar fees. In the past, I have suggested to various WSBA Governors that they ex-

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plore this possibility but none expressed any interest. Perhaps this letter, coupled with the 1997 membership fees imposed on WSBA members, will trigger some interest.

It seems quite strange that we are ignoring this revenue source, increasing WSBA member fees, and, in effect, allowing a free ride to non-WSBA members who are permitted to compete with WSBA members by practicing law in the state of Washington under the *pro hac vice* rules.

BRUCE E.H. JOHNSON  
Seattle

### Lawyer Humor Should be More Selective

Editor:

I disagree with Robert McMenamin's

article in support of "lawyer jokes," because he apparently embraces all lawyer jokes. Just as I hope my auto mechanic doesn't laugh about repair shops overcharging their customers, I want clients, judges, and juries to know that I don't laugh about lawyers suborning perjury or double-billing for their work.

For better and worse, levity opens the mind to ideas that might previously have been rejected. Humor, as Mr. McMenamin writes, "is a facilitator, a lubricant, a method of gaining attention and acceptance." The more we joke about lawyer misconduct, the more we will believe that it is commonplace . . . inevitable . . . and (among attorneys) acceptable.

I propose a variation on Mr. McMenamin's point of view. Let's enjoy humor, but let's try to be selective about it.

BOB CASEY  
Portland, OR

### Lead-based Paint Article Appreciated

Editor:

One of the many useful services provided by the *Bar News* is keeping attorneys informed about changes in the law. The article about "New Lead-Based Paint Requirements For Housing Sales," October 1996, is a classic example.

The article not only warned us of new requirements for real estate sales and leases, but was detailed enough to save valuable research time. (With permission, of course) the article formed the base of a package that was circulated to members of the Island County Bar Association. In the rural areas, we also help each other to keep informed.

The *Bar News* is encouraged to continue printing articles as current and useful as this one.

ROBERT A. WOLLE  
Oak Harbor

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## Exercise Your Mind Before You Exercise Your Opinion

by **Sherrie Bennett**, Bar News *Editor*

I begin my editorship in the midst of considerable controversy over the editorial content of this publication. My predecessor did not hesitate to publish articles on topics previously unheard of in the pages of the *Bar News*. He also did not stint on interjecting his personal opinions in response to letters written to the editor. These feats apparently made him the recipient of what Machiavelli termed "benevolent hostility," which has been oozing venomously from the fax machine. I have also been astounded by the intensity with which some bar members have unhesitatingly trashed the moral character of entire segments of bar readership not in agreement with their own political views.

As I set about fashioning a policy regarding editorial content, I am mindful that we, the lawyers practicing in this state, are over 20,000 strong now and more diverse than any one of us could imagine. The bar is no longer (if it ever was) a "good ole boys club": we all have our own vastly different political and personal agendas, which frequently clash and are mutually offensive. Each of us is entitled to voice our own opinion(s), however diverse. While I may not agree with what you have to say on a given topic, I will always defend your right to say it.

But as my children, who are (un?)lucky enough to have attorney parents to educate them on constitutional law, are fond of saying: "You don't get your rights

without your responsibilities." With the right to speak your piece comes the responsibility to communicate in a respectful, thoughtful manner, without attacking others' personal integrity and character. When I encounter arguably slanderous or simply derogatory remarks spoken by one attorney about another attorney's personal respectability and moral strength, I tend to think less of the speaker than I do of the spoken of. And I am reminded of H. G. Wells's characterization of moral indignation as "jealousy with a halo." If the other lawyer truly is so despicable simply because of his political views, why waste so much energy and ink stating the obvious?

I have long been a fan of the recently-departed John Rupp, the first editor of the *Bar News*. His wit and common sense have become a part of state bar lore, and his writing acumen makes me feel inadequate by comparison. He was obviously a man who measured his words carefully before uttering or writing them, and elocuted in a tactful, humble and compassionate manner. In a speech entitled "The Wicked Flea," John Rupp had this to say about committing thoughts to paper:

What I am suggesting to you — to all of us as word men — is to think once in awhile of what we say and write. Most of our failures are due to a simple lack of thought of what we really



*Sherrie Bennett*

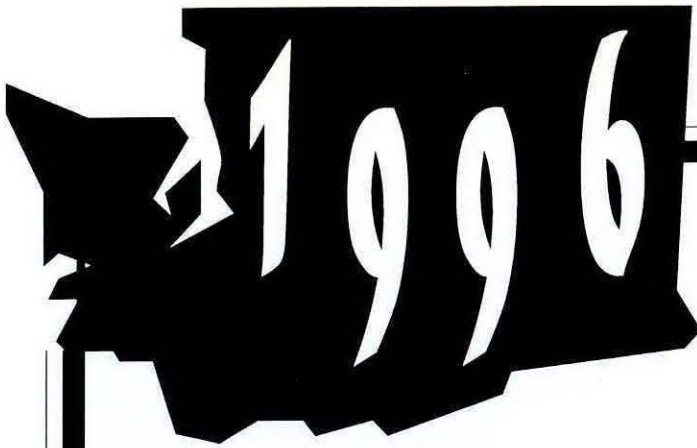
want to say. Less accuracy is expected in conversation or oral reports than in writing. In talking one has less time to reflect. You may remember the old story about the man who said he wanted two lawyers to try his case. One could be thinking while the other was talking.

But in writing one does have time to think and to arrange one's thoughts in order and then to put them down in simple, accurate language. I think that most of us have an adequate English vocabulary. Where we fall down, when we do fall down, we do so because we have failed to think about what we want to say and how best to say it.

I promise to think about what I say before I say it and I challenge you to do the same.



*Sherrie Bennett is the director of Student Legal Services at the University of Washington. A former appellate law clerk, she has been a solo practitioner in a rural county as well as a "complex litigator" in a downtown Seattle law firm.*



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# When Our Forebears Created the Judicial Branch



by **Tom Chambers**  
WSBA President

*design by Alan Troy Hunter*

It is my belief that when our forebears drafted our constitution, they recognized that the rich, the powerful and the majority would have their way with the legislative branch of government. They further recognized that

those same rich, those same powerful and that same majority would also have their way with the executive branch.

That structure leaves to a third arm of government the duty to protect the poor, the weak and the powerless.

## **Realizing that the minority must be protected from oppression by the majority, our forebears created the judicial branch.**

Don't get me wrong. I believe everyone, including the rich and the powerful, is entitled to representation. I want to stress the point that in our scheme of government, we lawyers and judges — as officers of the court — often do our finest work when we protect the weak from the powerful and the poor from abuses by the rich.

We help ensure that there is justice for all. At times, that means representing an unpopular person or advocating an unpopular idea. Who among us has not been asked, "How can you represent someone you believe to be guilty?" As lawyers, we know that such representation is a necessary part of our government's function.

Some years ago, a politician was quoted as saying, "I shall not rest until every German knows what a shameful thing it is to be a lawyer." That politician was Adolph Hitler. Why did he hold lawyers in such low regard? For the same reason that all despots who care nothing for basic human rights deplore lawyers. For a dictator, a lawyer is an obstacle. Lawyers defend individual rights and freedoms. Lawyers defend the rule of law against the whims of individual politicians or political groups.

No one ever said justice was cheap. Justice cannot be subjected to a corporate-profit, cost-benefit or other economic analysis. And part of our job as members of the judicial branch of government is to

assure that there is adequate funding for the courts, legal services and public defenders. In addition, we must strive to create and maintain programs that assure access to justice for the poor.

Also essential to our job as lawyers is to see that judges and fellow attorneys adhere to the highest standards of conduct. We must be ever diligent and watchful that there be no erosion of standards of professionalism by lawyers.

I hope that all lawyers in our state, both individually and through the voice of the Washington State Bar Association, will join me in what I see as a critical part of my role as your president: to educate the public about the importance and function of the judicial branch of government.

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## A Green Team — And I Don't Mean the Sonics!

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

Does your office have a Green Team? That's one of the first suggestions in a recently published book that identifies ways for the legal profession to reduce waste and benefit the environment. The book is called *The Case for Waste Prevention: A "How-To" Guidebook by and for Legal Professionals* and the moving force behind the book is a group of volunteers with the official sounding title of the "Law Firm Waste Reduction Network." As nearly as I can tell, no government official or bar association appointed this group. Rather, they are the best kind of volunteers — a bunch of enthusiastic, self-identifying individuals who have taken it upon themselves to help others in the legal profession find ways to prevent waste in the law office.

I met recently with members of the Law Firm Waste Reduction Network and observed that: 1) they are generally young lawyers, 2) they are primarily motivated by identifying ways to lessen demands on the environment, and 3) they are well-grounded in the realities of law office politics and management, i.e., they have no illusions that superior motives alone will convince lawyers to change the way they generate paper and operate their of-

fices. The "How-To" guidebook is a reflection of that realism.

Here is their basic case: By harnessing even a handful of the waste-minimizing tools presented in the guidebook, your law firm can realize a triple benefit:

- improve its bottom line,
- reduce your impact on the environment, and
- demonstrate your commitment to environmental stewardship.

To an old fiscal conservative like me, there's an equally compelling argument: **using less means buying less.** And if using less has environmental benefits, terrific!

It's my understanding that the guidebook will be distributed free of charge to all Seattle area law firms. Why the special deal for Seattle law firms? Because publication of the guidebook was funded by a grant from the Seattle Solid Waste Utility. I am confident, however, that law firms outside the Seattle area will be able to get their hands on the guidebook by contacting the Law Firm Waste Reduction Network.



*Dennis P. Harwick*

This column may be perceived by some as a shameless plug for the work of the Law Firm Waste Reduction Network. Quite frankly, it is. And why not? They've done the work for you and me. They've developed the "how to" resource for both of us. They've already done the leg work and heavy lifting.

The guidebook is about more than putting recycling boxes under your desk. Topics in the guidebook include anticipating client reaction, photocopying do's and don'ts, purchasing environmentally friendly products, recycling hazardous wastes (and we all have them, e.g., copier toner cartridges), and understanding computer and printer energy use. It's not a one person project. Hence the need for a green team. I'm betting, however, that you will be amazed how many people in your office will eagerly volunteer for such a project. By the time you read this, even the WSBA office will have a green team! For more information on the Law Firm Waste Reduction Network, you can contact Perry Weinberg at Preston Gates & Ellis — (206) 623-7580, or Jan Kraft at J. Lee Kraft Enterprises — (206) 270-8918. I'm warning you — their enthusiasm is infectious.

## THIS NEW METHOD MAY REVOLUTIONIZE THE ROLE OF LAWYERS IN RESOLVING CONFLICT.

Political scientist, world renowned game theorist and prolific author Steven Brams and mathematician Alan Taylor have discovered a mathematical formula for creating *envy free* allocations. Termed "Adjusted Winner," this formula was selected by the *Encyclopedia Britannica* as one of the top mathematical discoveries of the year. UW CLE recently interviewed Brams:

**Q. What makes your fair division method different from others?**

A. Our procedure works on the basis that different people value different things and we start by giving each person the thing that he or she values most. By using our method, each person may wind up with two-thirds or more of what he or she wants. By giving each person what he or she believes to be the more valuable portion, we take envy out of the process. Our procedure is also equitable and efficient - and it is extraordinarily difficult for one side to exploit the other. This procedure could be applied to any division at any level: an international border dispute, a divorce, labor negotiations, a contested will or even the division of household chores between spouses.

**Q. How can both sides wind up with more than 50 percent? That doesn't sound possible.**

A. The key is that both parties wind up with more than 50 percent of *the things they want*. Let's oversimplify a divorce and say that there are three areas of dispute: the house, custody of the children, and the savings account. Each spouse is given 100 points. Working in secret, each one assigns points to each item. The points reflect how much value each person places on that item. For example,

the husband may assign 45 points to the house, while the wife assigns 30. In that case, he gets the house. She may have assigned 60 points to custody of the kids to the husband's 20, so she gets the kids. In this example, the husband just got 45 points of what he wants and the wife got 60 points of what she wants, so goods must be transferred from the wife to the husband in order to achieve equitability. We devised an adjustment mechanism for equitably distributing the remaining assets, which because they are liquid each side values more or less equally, so that neither side envies the other.

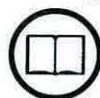
**Q. Couldn't one party posture and say he or she wanted a certain thing, just to deprive the other one?**

A. Sure, but there's a big risk there. Imagine the wife didn't really want the house, but she knew the husband did. She could 'spend' 85 of her 100 points on the house. But then what happens to her? She may wind up with the house, which she doesn't really want. In order to get the house, she had to take points away from something she did want, which was custody of the kids. In order for our procedure to work, both sides must be committed to working all the way through to a result. If they do, then dishonesty is not in their best interest.

For a free, no-obligation transcript of the full UW CLE interview with Steven Brams, call us at 800-CLE-UNIV. Steven Brams and Alan Taylor, live and in-person, will present their unique CLE training on envy free allocations, *Conflict Resolution Without Conflict*, in Seattle on February 28, 1997. Mention this ad to register at the priority rate of just **\$100 for this full-day CLE (7 CLE credits)**. **Don't miss this unique opportunity!**

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# Making Your Argument More Appealing

by *The Honorable Philip Talmadge*  
*Justice, Washington Supreme Court*

**B**oth as a former appellate practitioner and now as a judge, I am passionate about oral argument. Oral argument *can* affect the outcome of a case. In conference, my vote on cases has changed because of the oral argument, both good and bad.

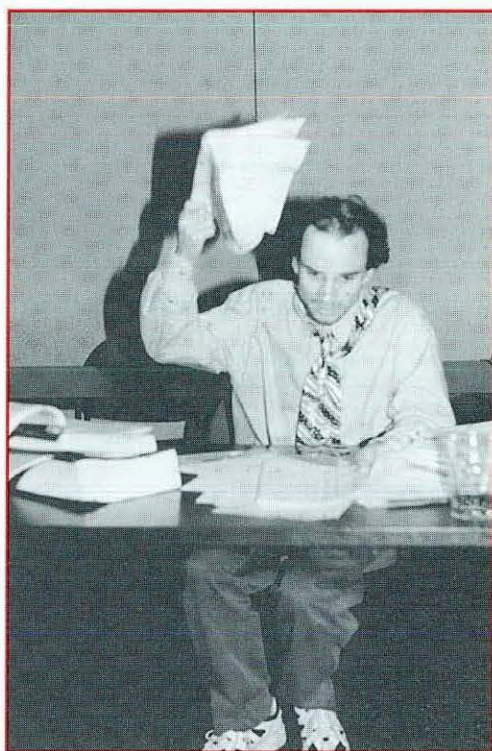
Too many attorneys see oral argument as something to be endured, an exercise to meander through the numerous arguments raised in the briefs, to recite factual minutiae, or to provide string cites to the judges. Not so!

Oral argument is the culmination of the appellate process. It is far more important than its bare bones treatment in Title 11 of the Rules of Appellate Procedure indicates. The judges have read the briefs, the record, and the bench memoranda in anticipation of this moment. It is the one time the advocate has the focused, undivided attention of the decisionmakers on the key issues to be decided in the case. The effective advocate seizes this opportunity.

In making an effective appellate argument, there are important considerations of content and technique worthy of consideration by counsel that will improve the argument and enhance the chance for success.

## (1) Be Comfortable With the Location of the Oral Argument

The attorney who will argue an appellate case must know and feel comfortable with the place in which the argument will take place. Courtrooms can be intimidating and surprises in the configuration of the courtroom will only increase the natural nervousness all advocates feel. The courtroom in the Temple of Justice in Olympia, for example, is ornate and impressive, and can be intimidating, par-



ticularly if counsel learns the argument is televised. It is best to conquer the butterflies all advocates get *before* the argument, not *during* it.

I was surprised to learn that the United States Court of Appeals for the Federal Circuit in Washington, D.C., met in 13 member panels. Fortunately, I learned this from visiting the court the day before my argument.

The courtroom environment is an important aspect of the argument. Microphones can be sensitive, for example. It is advisable to avoid the annoying sounds spat into an overly sensitive sound system. It is best to make the argument near to the rostrum. Counsel moving to and fro often will not be picked up on the sound system.

Many rules of the court are unwritten. For example, be sure to introduce yourself and your client at the outset. At the Supreme Court, warning lights on the

rostrum signal five minutes to go (yellow) or an end to argument (red). End your argument when the red light goes on. Court personnel generally are very helpful on these types of rules. Counsel should not be afraid to discuss court practices with the bailiff or other court personnel. Jack Day, our Supreme Court bailiff, is friendly and helpful. Jack keeps track of the reserved rebuttal time for counsel and the apportioned time between lawyers on the same side of a case.

In summary, a key to an effective argument is to be comfortable with the physical environs in which the argument occurs.

## Practice Pointers

- *Despite RAP 11.6, never waive oral argument on the merits* in an appeal.

In my view, this is tantamount to malpractice.

- *Do not begin your argument by testing the microphone*, adjusting the podium, etc. Do not first discover during your argument that the sound of the pages of your yellow pad flipping over the microphone will startle and annoy everyone in the room. Instead, make an early visit to the place of the argument and familiarize yourself with the room in which you will be working so that you can begin immediately and confidently with your argument when it is your turn.

- *Resist the urge to wander to and fro* before the bench, in the manner of Gerry Spence performing closing argument. The sound system will not pick up your voice otherwise. Stand close to the podium, keeping focus and eye contact with the individual members of the Court. A lawyer arguing before the Supreme Court recently got so excited he pulled the light covers off the rostrum. This can be embarrassing.

## (2) Be Fully Prepared in Your Case and Understand the Appellate Process

The hallmark of good oral advocacy is preparation. A strong appellate attorney is conversant with the facts from the record and the legal issues in the case, as well as the key cases.

Central to this preparation is focus. The basics of the argument should be practiced in advance. If the attorney is confident in his or her sense of the case, the argument can relate to the most critical issues and the extraneous arguments can be avoided. Good appellate lawyers winnow out the unnecessary facts and issues because of the short time given them for argument. This stands in contrast to the effective trial lawyer who uses every fact and argument at his or her disposal.

An appellate court is not a jury. We are rarely moved by emotional perorations and rhetorical flourishes. An appellate court decides questions of law, and those are what we focus on. Questions of law are rarely clarified by allusions to how many billions of dollars an insurance company may have in reserves, or by the mere fact that a petitioner fought in Desert

Storm (these points were actually raised in recent Supreme Court arguments).

When an appellate court decides a case, it resolves the particular factual and legal issues before it. But this is obviously too simplistic an understanding of the appellate process. We are not chancery courts doing equity in each case without consideration of its future policy effect. We are courts of law who, by our published decisions, establish the policy of the law in this and future cases. Counsel should not get lost in the particular facts of the particular case. Rather, they should help the court identify the key policy issues in the case and articulate why the resolution of the legal issue or issues in this case should be the rule of law in future circumstances.

In summary, counsel must be completely prepared for the argument and be conversant with the role of appellate courts in our legal system.

### Practice Pointers

- **Do not try to cover 17 different critically important issues** in one oral argument. Select the handful of arguments which are: (a) most meritorious; (b) capable of being developed and advanced at

oral argument; and (c) most likely to get your client some relief on appeal.

- **Do not read your argument** to the Court. This is forbidden by RAP 11.5(b). Your notes should be in outline form, except perhaps for a clever opening paragraph and a pithy conclusion. However, preparation is critical. Do practice your argument in advance with your colleagues to: (a) discover weak spots in your argument; and (b) anticipate likely questions from the bench and formulate answers.

- **Do not cite new cases** to the Court or read at length from anything.

- **Do not start your argument with a boring recitation** of the procedural or factual history of the case. You can assume the Court is generally conversant with the case. Start crisply with an interesting and inviting statement of the important facts and issue(s) presented.

- **Do not fumble through the clerk's record** or the transcripts at the podium trying to find a particular passage or document. Know the record well enough ahead of time so that you can easily recite a critical page number or record cite. Have the critical page or record cites clearly tabbed at counsel table so that you can

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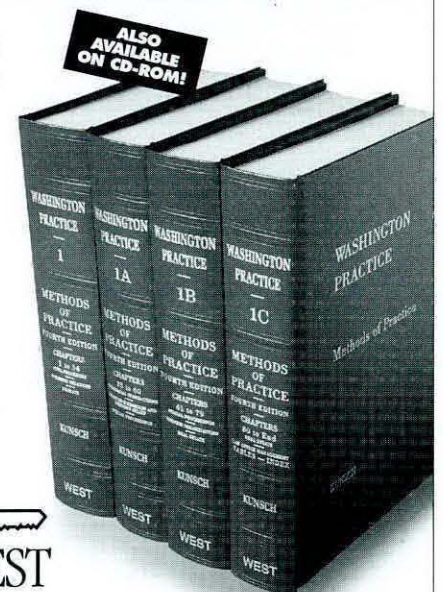
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reach and refer to them in a moment if that becomes necessary during the argument.

• *Never end your argument by saying, "I've run out of time."* Try to end with a positive statement summarizing the merits of your case and the relief you are requesting.

### (3) Know and Respect the Decisionmakers

Judges are decisionmakers. In each case, they are confronted with an issue or issues requiring resolution. Help them. Attorneys should communicate with judges as respectful equals, with thoughtful and forceful arguments. Tell the judges why your client should win and why. Most importantly, answer the questions of the court directly and clearly. Questions from the bench are an *opportunity to articulate your case*, not a hindrance to be dismissed. I have found that when opposing counsel does not fully answer a question from the bench, it can be very effective for respondent's counsel or appellant's counsel in rebuttal to answer it.

Listening carefully to questions from the bench is essential. Early in my career,

*"Questions from the bench are an opportunity to articulate your case, not a hindrance to be dismissed."*

I argued a case before a panel of the Ninth Circuit Court of Appeals on which Judge Eugene Wright sat. My argument related to an attorney fee issue. When I stood up to argue, Judge Wright asked me, "Counsel, how do you want your attorney fees paid?" I replied, "Any way the Court deems appropriate, your Honor." I then sat down, having given my shortest argument ever. The Court plainly indicated they didn't want a lot of talk from me and I heard that directive quite clearly.

When a judge asks a hypothetical question, do not respond, "That's not this case." The judge already knows that. What the judge is seeking is your insight into the broad implications, if any, of a ruling

in your client's favor. Although you, as an advocate, have quite properly focused narrowly on your client's case, and may not give a fig for its implications, an appellate court cares about such things. It might very well be, for instance, that the court would happily decide in your client's favor because of sympathetic facts, but is reluctant to do so because of the implications of such a decision. Think through those implications in advance. Prepare to answer questions about them. Answer questions about them, even if they are "not this case." Try to persuade the court that your case has no slippery slopes, thickets, or floodgates to worry about.

It never hurts to do research on the decisionmakers themselves. This information is generally in the public domain. Excellent biographies of the Justices of Washington's Supreme Court can be found on the Internet at the Homepage of the Office of the Administrator for the Courts. For example, it is helpful to know a judge has also served as a legislator in a case where legislative history or statutory interpretation is relevant. Similarly, if a judge was a property rights advocate, a prosecutor, insurance defense counsel, or



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a criminal defense lawyer, these experiences may prompt more questions from the court and may also explain views expressed from the bench.

Attorneys can now watch the Supreme Court on television. TVW is a unique and exceedingly valuable preparation tool. Observing the question pattern of judges is most helpful.

Counsel should also talk to other law-

yers who have appeared before an appellate panel. This can offer valuable insights into a judge's behavior and voting.

Finally, research on judicial voting patterns using Westlaw can be very insightful. If a judge's voting pattern suggests a trend, it is useful to know this trend in advance of argument and to be ready for it.

In sum, to be forewarned about your

panel in a case is to be forearmed. Take the time to know the decisionmakers in your case.

### *Practice Pointers*

- **Do not patronize the Court** by directing remarks to a particular judge and referring to that judge's position in a previous written opinion. But do conduct research on the judges who will be hearing your case to determine: (a) how they have voted or written on the particular issues you are presenting; (b) whether a judge's work experience or background might give insight on how a particular issue will be viewed; and (c) whether your LSAT score was better than any of the judges on the panel.

- **Do not try to be funny** by cracking a joke or telling a funny story unless: (a) you have experience as a very successful stand-up comic; or (b) the joke just happens to present itself by accident and you effortlessly stumble into it; and (c) there is not a hint of racism, sexism, or anything else inappropriate in the remark. Always laugh at the Court's jokes.

- **Do not lightly concede** a major point of your position at oral argument, particularly if being drawn into it by an apparently hostile member of the bench. That judge may be attempting to lay a foundation for an adverse decision and may need a way around a particular factual or legal issue. It is disconcerting when the opinion affirming your client's conviction begins: "As defense counsel conceded at oral argument . . ." Do not, however, lose credibility with the Court by arguing issues having no chance of success.

- **Do not conjure up hypotheticals** to illustrate a point unless: (a) you have thoroughly brainstormed all the possible disastrous permutations with which the hypothetical might illustrate your opponent's point; and (b) you have confidence that you are quicker of wit than all of the judges on the panel.

- **Do not point your finger at the judges** or employ any other hand signs which could be interpreted as hostile or truculent. Gang hand signs will probably gain you little support. As you address the judges, you should assume the stature of a respectful equal, reasoning together to solve a problem.

- **Do not let your facial expression or tone of voice** reveal any possible negative

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personal view of: (a) the quality of the judge's question; (b) the merits of the point the judge is apparently trying to make; or (c) the judge's chances for reelection in November.

- **Do not interrupt the judge** in the middle of a question or comment. Let the other judges do that. *Do* let the judges interrupt you: (a) to make sure you are addressing the Court's genuine questions about the merits of your case; (b) because they are going to get the final word on your client's fate; and (c) to demonstrate your respect for their elevated position in the legal system.

- **When answering a question**, never say "I'll get to that later in my argument." Your chance to present your argument in an organized fashion was in the brief. Now is the time to answer what is on the judge's mind, regardless of the analytical structure of your brief or your notes.

- **Do not avoid giving a direct answer** to the Court, even if the question seems complicated. If the question is capable of a "yes" or "no" answer, answer it and then explain any complexity or ambiguity.

- **If you do not know the answer to a**

**question, say so.** If it seems important, ask to provide the Court the requested information or a supplemental brief after the argument.

- **Do not pass up the opportunity** to answer a question from the Court which your opponent has fumbled or dodged. Make note of the judge's question as you listen, and answer it. (Never raise your hand during oral argument; wait until your turn to respond.)

#### (4) Avoid Annoying Behavior in Argument

Given the critical importance of oral argument, it is important for counsel to avoid the little distractions or annoying behavior that detract from the argument. Reading the argument, giving a boring recitation of an endless string of cases, wearing inappropriate attire, and the like should be avoided.

Give careful consideration to how your argument is presented. I am not a fan of exhibits in oral argument. Too often the exhibits contain such fine print, they are

very difficult to see from the bench. Counsel feel compelled to stand near the exhibits or pull out laser pointers to emphasize some feature of the exhibit, again distracting the court from the argument. Exhibits can be useful if visualization of a document or a scene or the like is needed. But if the exhibit is merely designed to emphasize the words of a document, a statute, or other writing, I do not believe they are helpful and it may be better to simply hand small copies of exhibits to the bailiff for distribution to the judges.

One of the most distracting things in argument is when multiple lawyers make presentations on one side of an argument. I dislike multiple presenters because the issues argued by the various lawyers may not fit the bench's questions and may overlap. The egos of the attorneys notwithstanding, it is better to have a single lawyer do an argument.

In summary, we see many arguments as appellate judges. While we focus on the merits of the case, little annoyances in arguments can be harmful and should be avoided by counsel.

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### Practice Pointers

• **Dress appropriately.** Wear traditional business attire for men and women. Three piece suits with tennis shoes are usually inappropriate. For example, do not wear an American flag tie, as a lawyer arguing a case before the Supreme Court actually did.

• **Do not chew gum.** repeat the court's questions before answering them, look up at the ceiling, ruffle through papers, take long pauses, or snap your fingers to have an associate retrieve a document (this, too, actually occurred in a Supreme Court argument).

• **Do not talk in a boring monotone** or adopt a mousy countenance. Assume a confident presence. Project your voice to fill the room. Do not talk so fast or so slow that everyone in the room has trouble staying with you. Vary your pitch, volume and rhythm so that the argument is interesting and enjoyable for the Court. Neither pounding the table in a tub-thumping jury argument nor blending into the wall are effective argument techniques.

• **Do not denigrate opposing counsel** or whine about the issues. Be courteous and respectful of counsel. Do not permit your facial expressions, body language, or exhalations to reveal your opinion of opposing counsel's argument.

• **Use exhibits rarely,** carefully, and after rehearsal, but be certain the exhibits are legible and visible. See RAP 11.5.

• **Avoid multiple lawyers,** if possible. Try to have one lawyer present the entire argument.

Oral argument is a critical component to success on appeal. I subscribe to the thoughts of the many judges and scholars who believe oral argument is vital to appellate practice. See, e.g., *WSBA Wash. Appellate Practice Handbook* § 23.2. Oral argument is the time great appellate attorneys earn their pay.

As an advocate, I found oral argument exhilarating. As a judge, I admire effective oral argument. Selfishly, I want to see more of it.

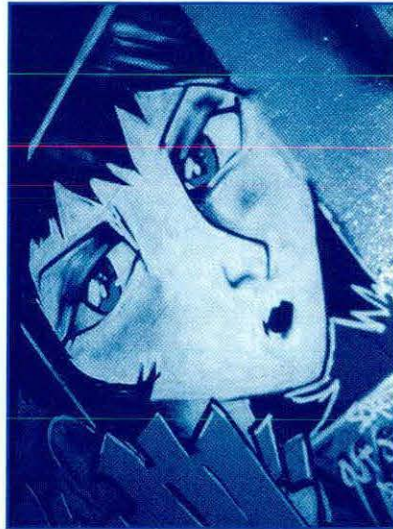
# The Search for Effective Rehabilitation: Reforming Juvenile Diversion Through Community Accountability Boards

by **Bernardean Broadous**  
*Thurston County*  
*Prosecuting Attorney*

**J**uvenile crime is a matter of increasing concern in the state of Washington. The period since 1988 has experienced a steady growth in juvenile violence. The number of juvenile convictions for violent felonies was 111% higher in 1994 than it was six years earlier.<sup>1</sup> That trend is continuing at the present time.

This startling increase in juvenile violence is not the result of a static proportion of juvenile offenders becoming more violent and committing repeat offenses over time. Rather, the increase is due to a higher percentage of juveniles committing violent crimes. In 1988, only 6.4% of juveniles had a conviction for a violent felony by age 18. However, in 1994, 13.5% had such a conviction upon reaching 18 years of age.<sup>2</sup> As a result of such trends, there has been increasing discussion as to whether violent juveniles should be prosecuted as adult offenders.<sup>3</sup>

Whatever the outcome of that particular debate, there is a related issue that has received inadequate attention to date: how to maximize the effectiveness of available tools in accomplishing rehabilitation prior to a youth's commission of a violent offense. Many violent offenders first enter the juvenile justice system with the commission at an earlier age of a less serious offense, such as a misdemeanor or gross misdemeanor. For such first-time offenders, existing Washington law provides for a program of diversion as an alternative to prosecution. Of first-time juvenile offenders in Washington who receive diversion, 95 percent have committed a misdemeanor or gross misdemeanor and 45 percent of them are under 15 years of age.<sup>4</sup>



The assumption behind Washington's juvenile diversion program is that there is the potential to more effectively promote rehabilitation among first-time offenders in a cost-efficient manner by side-stepping the court process. To the extent that this assumption is correct, maximization of such effectiveness is a goal that should receive the united support of all those concerned with the increasing levels of juvenile crime. But how do we maximize the potential of a diversion program to promote rehabilitation among early offenders? In Thurston County, we have sought to do so by means of two principal reforms: first, by having each diverted offender attend a hearing no more than 12 days after the case is first referred to the Prosecuting Attorney by law enforcement; and second, by having one hundred percent of those hearings conducted by Community Accountability Boards composed of volunteers from the community in which the offender lives.

When a Thurston County case involving a juvenile is referred to the Prosecuting Attorney by law enforcement, the first decision to be made is whether there exists legal sufficiency for a criminal charge. If so, if the alleged offense would be a first offense, and the appropriate charge is for a misdemeanor or gross

misdemeanor, then diversion is required. With certain exceptions, if the appropriate charge would be a class C felony or the youth has had one prior diversion, then diversion is optional. A maximum of two diversions are allowed.<sup>5</sup>

A youth who is offered diversion may accept or reject the offer. Due process is accorded the juvenile throughout the process. A rejection results in the filing of an Information in the Juvenile Court. Acceptance of the offer results in the formation of a diversion agreement, the requirements of which may include community service, restitution, a fine, counseling or education, requirements to remain during specified hours at home, school, or work, and restrictions on leaving or entering specified geographical areas. A diversion agreement is limited to six months in duration unless additional time is necessary to complete restitution, with a maximum time of 12 months. In certain limited circumstances, the offender may be counseled and released without entry into a diversion agreement. In either event, the offense becomes part of the juvenile's criminal record.<sup>6</sup>

In all but three counties, diversion is run by staff of the Juvenile Court. Thurston County is one of those exceptions. In Thurston County, a private nonprofit agency titled Community Youth Services (CYS) contracts with county government to administer the diversion program.

State statute provides for community volunteers to be involved in determining the appropriate punishment for diverted offenders. This is accomplished by having a juvenile who has accepted diversion appear before a Community Accountability Board (CAB) which determines



the terms of the diversion agreement that the youth enters into.<sup>7</sup> This marvelous idea merits only a few sentences in the juvenile statutes but provides a far-reaching opportunity for citizens to become directly involved in the adjudication of young criminal offenders. Although the statute was enacted in 1977, by 1995 only 20 percent of diverted juvenile offenders were appearing before a CAB. The rest were simply interviewed by a staff member of the administering agency to determine the appropriate diversion agreement. That system not only restricted community participation but also restricted the victim's ability to participate in the process.

One of the most intractable problems that all those in the criminal justice system must struggle with is procedural delay. That serious negative impacts occur as a result of such delay is almost universally recognized and acknowledged. The

results of delay are even more troubling when juveniles are involved and rehabilitation is the goal. If the response to a juvenile's offense is not timely, if months go by before the matter is addressed by the juvenile justice system, and if punishment is imposed at a point in time distant from the commission of the offense, then the rehabilitative message loses clarity and forcefulness. The cause and effect relationship between offense and punishment is obscured. Such a display of the system's ability to respond to crime is unlikely to impress and less likely to deter. Unacceptable delays were the norm in this county's juvenile diversion program until very recently. There was often a wait of 90 to 180 days from the date of offense before the diversion agreement was signed.

During the spring and summer of 1995, I engaged in a series of discussions with law enforcement throughout Thurston

County, Community Youth Services, and the administration of the Juvenile Court in order to develop proposals to eliminate these procedural delays and to realize full implementation of community involvement in the diversion process. In August 1995, I then presented to the parties involved a 12-day plan for the processing of all juvenile diversion cases, a plan which was designed to accomplish both of those goals. In October 1995, implementation of that plan was initiated. With the enthusiastic assistance of Community Youth Services and its executive director, Charles Shelan, and with many hours of dedicated effort from the support staff and attorneys in this office, full implementation was accomplished by the end of 1995.

Under Thurston County's present juvenile diversion program, the processing of a diversion case from the initial law enforcement referral to the completion of a diversion agreement by means of a hearing before a CAB is accomplished within 12 days. Within two to four days following receipt of law enforcement's referral, the Office of Prosecuting Attorney opens a file on the alleged offense, determines the alleged offender's criminal history through computer linkup with the JUVIS records system, reviews the file for diversion eligibility, and if diversion is deemed to be appropriate a letter is sent to the alleged offender. That letter informs the alleged offender of his or her rights in this process, including the right to accept or reject diversion, and provides notice of a date, time, and location for that individual to attend a hearing before the applicable Community Accountability Board if the decision is to accept diversion. The date of the hearing is within eight days of the issuance of the letter.

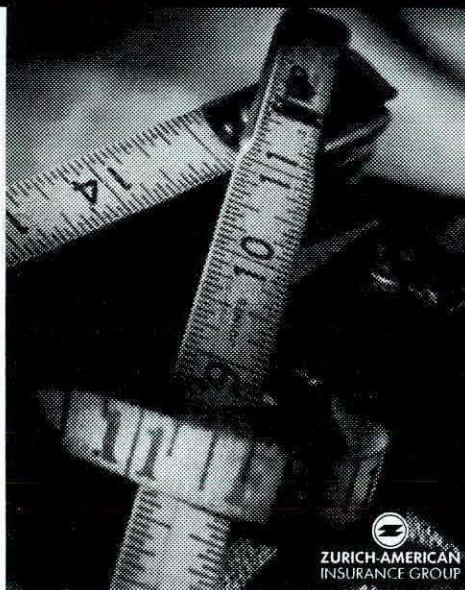
Community Youth Services receives the referral on the same day the letter is sent to the alleged offender. It is the responsibility of that agency to recruit and train the CAB volunteers, as well as schedule sufficient CABs in sufficient locations to adhere to the goal of a CAB hearing in each case within 12 days of the referral, with that CAB composed of persons from that offender's community. The agency also contacts victims with regard to restitution and the CAB hearings. Finally, the agency monitors compliance with the diversion agreement. If the juvenile refuses diversion or is removed from diversion for noncompliance, the case is

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returned to the Prosecuting Attorney's office within one day and an Information is immediately filed in the Juvenile Court.

Recruitment of CAB volunteers is a constant process. As of June 1996, there were 171 volunteers participating in the CABs, conducting on average 36 CAB hearings each month. Each CAB is composed of members of a particular community and hears cases concerning offenders from that same community. There is great diversity in the ages, income levels, ethnic backgrounds, and occupations of the CAB volunteers. Training classes for new volunteers are held each month. Each volunteer receives five hours of training before participating in a CAB and, of course, also undergoes a criminal records check and reference checks.

One hundred percent of juveniles who are diverted now appear before a Community Accountability Board. The diverted offender is usually accompanied by his or her parents at the CAB hearing, and sometimes siblings and grandparents also attend. In addition to the Board members, a representative from CYS is also present. Occasionally, the youth is represented by counsel and sometimes the victim chooses to appear and participate.

The CYS representative briefs the Board on the particulars of the offense before the youth is brought in. Once the youth and his family enter, the CAB Chairperson explains the CAB process. Then CAB members question the offender, his family, and the victim, if present. The questions cover not only the offense but also the offender's feelings about it, family background, and future plans. The youth and family then leave and the Board deliberates on the proper punishment. Once a decision is reached, the offender is called back in and presented with the Board's decision. The youth can accept and sign the diversion agreement or reject it and be referred back to the Prosecuting Attorney's Office for prosecution. The hearing usually takes approximately 45 minutes to complete.

The present system has received enthusiastic support from throughout the community. Those who participate are convinced that this process provides a superior approach at rehabilitating first-time offenders. The swift response conveys the message that consequences will follow delinquent behavior. Punishment follows quickly enough that the diversion



agreement can often work in conjunction with penalties imposed by a parent at home. The involvement of community members communicates the seriousness accorded the youth's actions by the community.

It is my belief that severely reducing the time period for the diversion process and maximizing the use of community volunteers in that process will further enhance the rehabilitative effectiveness of diversion. A recent study supports the conclusions that diversion is effective in the rehabilitation of first-time offenders. That study compared first-time offenders who were diverted with those who were given community supervision, detention, or institutional time. Those given diversion had the lowest recidivism rate.<sup>8</sup>

At the very least, the Thurston County diversion process now gives members of the community a unique opportunity to participate in the juvenile justice system, requires juvenile offenders to be swiftly accountable, and accords offenders just punishment in an effort to redirect their future choices. I greatly appreciate the willingness of Thurston County Community Accountability Board members who volunteer their time in this process. Too often citizens complain about the ineffectiveness of our criminal justice system and express frustration that there is nothing they can do on a personal level to improve that system. To all those in Thurston County who harbor such frustration, I extend an open invitation to join in the effort to make juvenile diversion a success. To those in other counties, I encourage them to either do the same or, if such opportunities are not yet available in a particular community, to press for the full implementation of a community-based diversion program.

#### Endnotes

<sup>1</sup> *Juvenile Violence in Washington: First-Time and Repeat Offenders* (February 1996) (report issued by the Washing-

ton State Institute for Public Policy).

<sup>2</sup> *Juvenile Violence in Washington, supra*, at 2.

<sup>3</sup> In 1994, the Washington Legislature enacted ESHB 2319 which *inter alia* provided for exclusive adult jurisdiction when a youth aged 16 or 17 is charged with a serious violent offense. That legislative provision also provided for such exclusive federal jurisdiction when a 16 or 17-year old is charged with a violent offense and has a criminal background involving one or more serious violent offenses, two or more violent offenses of any combination involving any class A felony, class B felony, vehicular assault, or second-degree manslaughter as long as such prior offenses occurred before the offender's 13th birthday and were prosecuted separately. 1994 Wash. Laws, sp. sess. ch. 7 s. 519, codified as RCW 13.04.030(1)(d)(iv).

In the 1996 legislative session, HB 2219 proposed to extend such adult jurisdiction to any 16- or 17-year-old charged with a violent felony or felony sex offense, and would also have extended such jurisdiction to any juvenile charged with a violent felony or felony sex offense if that juvenile had previously been committed to the Department of Juvenile Rehabilitation Services or had been adjudicated for a felony sex offense. This proposal sparked an emotional debate over the increasing rejection of rehabilitation as the primary goal in the criminal justice system's response to violent juveniles, a debate which is continuing at present. While HB 2219 did not pass this last session, undoubtedly similar proposals will be presented next year.

<sup>4</sup> *First-Time Juvenile Offenders in Washington State: Where Do They Serve Their Sentences?* (February 1996), a report by the Washington State Institute for Public Policy.

<sup>5</sup> RCW 13.40.030.

<sup>6</sup> RCW 13.40.080.

<sup>7</sup> RCW 13.40.080(3).

<sup>8</sup> *First-Time Juvenile Offenders in Washington State, supra*, at 4.

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# pro • tec • tion

n. To keep from harm, attack or injury.



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by **Sherrie Bennett**, Bar News Editor  
January 9-11, Olympia

#### Meeting With Supreme Court:

The Board of Governors met in a roundtable discussion with members of the state Supreme Court, discussing several matters, including the rule-making process.

#### Licensing Suspension for Student Loan Defaulters:

The Board of Governors was asked by the Rules Committee of the state Supreme Court to comment on whether or not the WSBA supports the license suspension of attorneys for failure to repay student loans, and also asked the WSBA to draft an appropriate court rule to accomplish those ends. RCW 2.48.165, enacted by the legislature in 1996, provides that the state Supreme Court "may provide by court rule that nonpayment or default on a federally or state-guaranteed educational loan shall result in disbarment or license suspen-

sion of the license of any person who has been certified by a lending agency and reported to the court for nonpayment or default on a federally or state-guaranteed educational loan or service-conditional scholarship."

The Board of Governors were particularly vocal in their individual abhorrence of the general concept behind the rule. Governor Whitson described the legislation as "a poorly conceived punitive device not intended to resolve the underlying problems." After considerable discussion, the Board unanimously passed a resolution proposed by Governor Ehrlichman that the WSBA did not support the promulgating of a court rule establishing a process for suspending attorneys who were found to be in default on student loans, and that the WSBA opposed the underlying philosophy of such a court rule. The Board then discussed whether or not WSBA should provide a draft of the court rule to the state

Supreme Court despite having voiced vehement opposition to the use of such a court rule. Governor Theiler was persuasive in her argument that there was a need for the WSBA to become involved in the rule drafting process, as there was apparently going to be a court rule in any event, and involvement in the drafting process would insure appropriate safeguards were put into place.

There then ensued a lengthy discussion regarding some of the pitfalls inherent in the student loan default process. Governor Williams described the glacial speed with which some loan agencies moved in working with a student who is attempting in good faith to correct what the agency has characterized as "default." After considerable input from the Young Lawyers' representatives, Professor John Strait and the King County Bar Association, the Governors arrived at the following proposed court rule to send back to the state Supreme Court:

#### PROPOSED APR 16: SUSPENSION FROM PRACTICE

(a) **Suspension from Practice:** The Washington State Bar Association may request that the Supreme Court suspend a member from the practice of law, upon receipt of certification from a lending agency: (1) that the member is delinquent on a federally or state guaranteed educational loan for the member's education and for which the lending agency is the obligee, (2) that the member is financially able to pay, and (3) that the lending agency has exhausted all administrative and legal remedies. Suspension shall not be recommended unless (1), (2) and (3) are established by a clear preponderance of the evidence.

(b) **Notice and Hearing:** The Washington State Bar Association, upon receipt of the certification in part (a) shall give actual written notice by certified mail, return receipt requested, to the member that the member may be suspended from practice no sooner than 60 days after the date the Washington State Bar Association sends the notice to the member, unless during the 60-day period the member submits to the Washington State Bar Association satisfactory proof of one or more of the following: (1) the member is not delinquent, (2) the member is unable in good faith to pay, (3) the member is currently negotiating a repayment or deferral agreement or other modification to the loan, (4) the loan has been discharged by operation of law or may be subject to discharge in a pending bankruptcy proceeding, or (5) the lending agency has not exhausted all administrative or legal remedies. If the Washington State Bar Association deems the proof unsatisfactory, a hearing will be held before the Commissioner of the Supreme Court to give the member an opportunity to show cause why the member should not be suspended from practice.

(c) **Order of Suspension:** After the 60-day period, the Supreme Court may enter an order suspending the member from practice, unless satisfactory proof provided for in part (b) has been received, or unless the Commissioner has found good cause not to suspend the member.

(d) **Reinstatement:** The Supreme Court may reinstate the member upon receipt of satisfactory proof that the member meets the criteria of part (b) (1), (2), (3), (4) or (5) and the member continues to meet all other requirements to practice law.

#### Legislative Committee Report:

The Board of Governors approved the supporting of a proposed amendment to child support laws which would allow the deduction of voluntary pension payments, up to the maximum permitted by federal law, from gross income definitions in calculating a parent's net monthly income. Also approved was a proposed "pocket bill" (to be introduced only if necessary to head off more stringent legislation) requiring a showing of specific circumstances before a court would require post secondary education support, and capping a parent's support obligation at the maximum amount charged for tuition, fees, room and board, books and supplies at a Washington state public institution of higher learning, except in exceptional circumstances.

Representatives from the Attorney General's office gave a synopsis of a proposed bill intended to provide greater protection to vulnerable adults in custodial care. The Board of Governors gave their support for the bill, with recommendations regarding concerns of individual governors on the definitions of assault and criminal negligence within the bill.

The Board of Governors then agreed to support a proposed bill which clarifies property ownership and liability issues surrounding unincorporated nonprofit associations.

**Law Clerk Task Force Report:** Frank Slak, Chair of the Law Clerk Task Force, reviewed the Task Force's Final Report with the Board of Governors, and the Board adopted in principle the following recommendations of the Task Force: (1) The Law Clerk Committee will be severed from the Committee of Law Examiners; (2) The Board of Governors will appoint a "strong, willing and well-organized" chairperson to reassess the current committee's needs and efforts and report each year to the Board of Governors; (3) The committee will be staffed with a sufficient number of dedicated volunteers to meet the demands of the program and the WSBA will provide sufficient staff-person hours to support the needs of the committee and participants; (4) The law clerk program will be financially self-supporting and not subsidized by the bar association. All program costs, including staff and volunteer funding, will be passed directly to those participating in it; (5) The stipend of the lawyer-volunteers will be increased to \$2,000 per year. The recommendations were referred to a

committee to study and report back to the Board on implementation.

**Young Lawyers Division Projects:** Trustees from the Young Lawyers Division of the WSBA reported on several projects currently underway, including a minority pre-law conference slated for eastern Washington, an Aspiring Youth program targeting at-risk "latchkey" students in local schools, a YMCA Mock Trial Program which will involve approximately 50 schools this year, hosting of an Affiliate Outreach Project gathering, a program promoting a "Stay in School" video in local schools, and the creation of three public access TV programs covering discrimination in the workplace, landlord/tenant issues and other legal problems commonly encountered.

Kathleen Hopkins, WYLD president-elect, described the FEMA Disaster Legal Assistance hotline project plans currently being put into place to assist flood victims in Western Washington after the recent flooding disasters. The Board of Governors commended and applauded

WYLD Trustees for their continuing energy and determination as they proceed with these many projects.

Tim Szambelan, president of WYLD, received Board of Governors approval to comment positively on the Walsh Commission's Report before legislative committees during the 1997 legislative session.

**Lawyers' Fund for Client Protection Rules:** The Board of Governors passed an amendment of Lawyers' Fund for Client Protection Rule, changing the limit on reimbursement from the Fund from \$50,000 aggregate maximum per lawyer to \$30,000 per applicant.

**GR 9 Supreme Court Rule-making Changes proposed:** The Board of Governors voted to send concerns regarding the GR 9 amendments currently proposed by the state Supreme Court to the WSBA committee to improve relations with the Supreme Court. One concern is the need for requiring that any changes to rules directly affecting the practice of law (Admission to Practice Rules, Rules of Professional Conduct, and Rules for Lawyer

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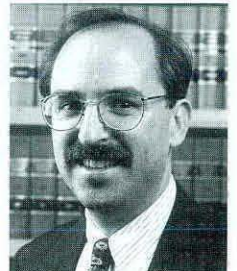
#### Stephen W. Hayne

Past President, Washington Association  
of Criminal Defense Lawyers;  
Past Chair, Washington State Bar  
Association and Washington State Trial  
Lawyers Association, Criminal Law Sections;  
Voted a "Top 10" Trial Lawyer in poll of 100  
Judges (Washington Law Journal)



#### Jon Scott Fox

Past Chair, Washington State Bar  
Association, Criminal Law Section;  
Founder and Board Member, Washington  
Association of Criminal Defense  
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Discipline) be referred to the WSBA, as the original GR 9 provided. Additionally, the Board of Governors is concerned that the WSBA ought to be consulted regarding changes to other rules affecting lawyers, such as evidence rules, civil procedure, criminal procedure, appeals, etc. Governor Perey suggested that *en banc* state Supreme Court meetings ought to be open to a WSBA representative, just as Board of Governor meetings are open to the public.

**Budget and Audit Committee Report:** Governor Williams reported that the final audit from last fiscal year should be available by the February BOG meeting. A motion to increase the budget for the Bar Leadership Conference made by Governor Williams passed.

**Washington Journal Proposal:** Carol Angel from the *Washington Journal* publication pitched the Board of Governors a proposal for the *Washington Journal* to take over publication of the editorial content now appearing in the *Bar News*, possibly placing the material as an insert in the *Washington Journal*. The Board referred the matter to the Editorial Advisory Board to determine whether this proposal merited consideration, given economic, speed, aesthetic and "readability" considerations. Governor Theiler pointed out that the integrity and format of the publication are just as important as the economic considerations involved.

**Appointments:** The Board of Governors appointed Blaine Gibson to the Board for Judicial Administration. Nancy Isserlis and Greg Tripp were appointed to the Legal Foundation of Washington Board.

**President's Report:** President Chambers reported that the Board of Governors met with the state Supreme Court in a roundtable discussion regarding the rule-making process and other matters. The chairman also informed the Board of Governors regarding the Public Relations and Bench-Bar-Press committees' efforts to invigorate the Bar Association's public relations function.

**Executive Director's Report:** Dennis Harwick described the Bar Association's successful move to new quarters at 2101 4th Avenue in Seattle. Executive Harwick also reported a volume of 8,000 phone calls per day (up from the usual volume of 5,000 phone calls per day) as the licensing and CLE "season" is in full

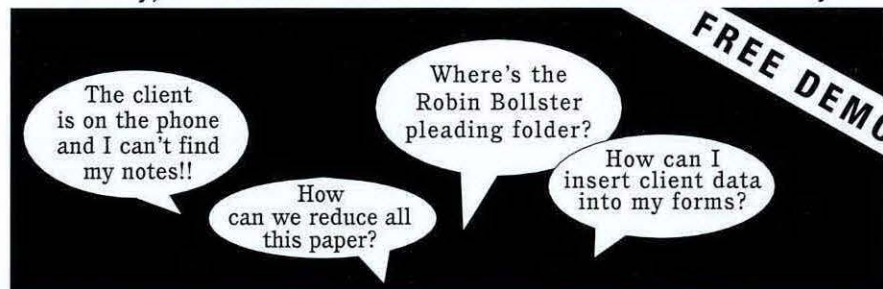
swing. He also described the woeful sight of anxious lawyers lining the Bar Association hallways at 5 p.m. on New Year's Eve in order to purchase CLE tapes to fulfill their requirements before the end of the year.

**Long-range Planning Committee Report:** President-elect Fairhurst reported on the Long Range Planning Committee's general perspective in meetings. The committee is focusing on continuity between

old and new committee chairs, looking at all options and alternatives and trying to be as creative as possible, revising committee descriptions and looking at the appropriateness of current deadlines for committee selections.

**Executive Session:** The Board met in closed session to consider disciplinary matters, pending litigation and other matters not specified.

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**Usury Rate**

The average coupon equivalent yield from the first auction of 26-week treasury bills in January 1997 is 5.32%. The maximum allowable interest rate permissible for February 1997 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 1996 *Bar News*.

**Notice of Board of Governors Election**

Three positions on the WSBA Board of Governors will be up for election this year, i.e., the Governors representing the First and Fifth congressional districts, along with one of the King county at Large positions. These positions are currently held by Peter Ehrlichman (First District), Patricia Williams (Fifth District) and Ron Perey (King County at Large).

The WSBA Bylaws provide that any member in good standing, except a mem-

ber previously elected to the Board of Governors, may be nominated for the office of Governor from the Congressional District in which such member is entitled to vote by filing a petition signed by at least twenty (20) active members of the WSBA then entitled to vote in that district. This represents a modest change, i.e., all out-of-state active WSBA members are now eligible to vote in the district of the address of their agent within the State of Washington for the purpose of receiving service of process as required by APR 5(e) or, if specifically designated to the Executive Director, within the district of their primary Washington practice.

Nominating petitions are available from the Office of the WSBA Executive Director from Brynn Hancock at WSBA, 2101 4th Ave, 4th Fl, Seattle, WA 98121-2330; (206) 727-8244. Petitions must be received by the Executive Director of the WSBA by 5 p.m. on March 1, 1997. The Board of Governors determines the official dates of the election. Ballots are usually mailed around the first of June and counted approximately the first of July.

Note: The *Bar News* intends to include in its May issue a section carrying statements of 100 words or less from all the

nominated candidates. Those statements should accompany the nominating petitions.

**Northwest Justice Project**

1997 quarterly meetings of the Board of Directors of Northwest Justice Project, a 501(c)(3) not-for-profit organization which provides civil legal services to eligible low-income clients, are scheduled on the following dates in 1997: January 25, April 19, June 20 and October 25.

NWJP currently receives federal funding through the Legal Services Corporation and maintains 10 offices throughout Washington.

These public meetings usually start at 9 a.m. in the vicinity of the Seattle-Tacoma airport, but specific meeting sites may vary. All meetings are open, except for executive session pursuant to a vote of the majority of the Board of Directors. In such sessions, the Board reviews, considers and, in some cases votes upon, matters related to: 1) litigation to which the program is or may become a party; or 2) internal personnel, operational, investigative and sensitive labor relations mat-

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ters. Any such closed sessions will be as authorized by pertinent laws and regulations and will be noted, in summary form, in open session and corresponding minutes. Closed sessions will also be formally certified by the program's executive director or general counsel, with a copy maintained for public inspection at the program's main office at 401 2nd Ave. S., Ste. 407, Seattle, WA 98104, and will be available upon request.

For specific meeting site information, contact Lisa Guiffre, (206) 464-1519 [toll-free (888) 201-1012].

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### Judicial Recommendation Committee

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The WSBA Judicial Recommendation Committee is currently accepting applications from attorneys and judges seeking consideration for appointment to fill potential appellate-court vacancies. Interested candidates will be interviewed by the Committee at its spring meeting to be held in May 1997. The deadline for receipt of questionnaires by the WSBA offices is 5 p.m., March 14, 1997.

The Committee's recommendations are reviewed by the WSBA Board of Governors and then referred to the Governor for review when appointments are made to fill vacancies on the Washington Court of Appeals and Supreme Court.

If you are interested in scheduling an interview, please contact the WSBA at 2101 4th Avenue, 4th Floor, Seattle, WA 98121-2330, telephone (206) 727-8227, to obtain a questionnaire. Please specify whether you need the questionnaire designed for a judge or an attorney.

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### In Memoriam

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**John (Jack) Ashton** of Kirkland died December 24, 1996. He served as a lieutenant commander in the South Pacific in WW II before practicing law for the railroads in the midwest. He came to Seattle in 1981 as senior vice president for corporate affairs for Burlington Northern Inc.

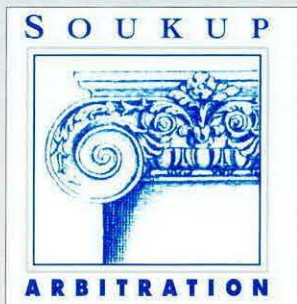
**Allen A. Bowden**, LCDR, USN Retired, died May 16, 1996 in Tacoma. Born on Christmas day, 1925, he practiced law in the Seattle-Tacoma area with his daughter, Barbara.

**Elizabeth Bracelin**, lifelong Seattle resident, died December after a five-year battle with kidney disease. She co-founded a law firm with fellow UW law graduates in 1972 and practiced primarily in medical malpractice and personal-injury law, served as a WSBA Governor and as the first woman WSBA president in 1986-1987.

**Winston Ingman**, a Bellingham native, died October 23, 1996. He served as special agent of the FBI during WW II and practiced criminal and civil law in Honolulu, Hawaii, until 1954, before returning to the Northwest to continue practice for the next 30 years.

**Brian Linn**, civil rights pioneer, died in December from cancer. He was active in protecting abused and neglected children and was a leader in the WSBA World Peace Through Law Section.

**Jeffrey P. Smith**, raised in Spokane and a resident of the Puget Sound area since 1978, died in November 1996. A member of numerous medical-legal associations, he was Deputy Prosecuting Attorney for Kitsap County from 1978-1980 and, later, general counsel to the Washington State Medical Association.



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## National Law Center on Homelessness & Poverty

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The National Law Center on Homelessness & Poverty is conducting an outreach campaign to inform homeless persons that they may be eligible to receive the Earned Income Tax Credit (EITC). The Center has created a free packet to help nonprofits to educate their clients. It addresses such issues as eligibility, how the credit will be affected by the welfare reform bill, a list of free tax assistance clinic phone numbers and other agencies able to answer specific questions about the EITC. Order the packet directly from Antonia Fasanelli, National Law Center on Homelessness & Poverty, 918 F Street NW #412, Washington, D.C. 20004; phone (202) 638-2535; fax (202) 628-2737.

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## Suspended

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Tacoma lawyer Albert Peter Germano (WSBA #08739, admitted 1978) has been ordered suspended for 60 days, effective December 3, 1996, by Order of the Supreme Court. The Order was entered after a default hearing and approved the recommendations of the Hearing Officer and Disciplinary Board.

In the first grievance, Germano failed to have a final judgment or order entered documenting that the judge had granted his client's Motion to Modify the Parenting Plan. Germano also failed to return his client's telephone calls and failed to participate in the disciplinary proceedings. The hearing officer found that Germano violated RPC 1.1 (failure to understand relevant legal doctrines or procedures) and/or RPC 1.3 (negligent failure to act with reasonable diligence); RPC 1.4 (communication with client); and RLD 2.8 (requiring a lawyer to cooperate fully and promptly with a disciplinary investigation).

In the second grievance, Germano failed to provide the client with a written settlement statement showing how the client's portion of the settlement had been calculated, failed to pay the client's outstanding chiropractic bill out of the settlement proceeds despite agreeing to do so, and failed to retain sufficient funds in his trust account to pay the chiropractic bill. Germano later paid the chiropractic bill in full. The hearing officer found that Germano violated RPC 1.5 (failure to

provide a written statement showing how the client's portion of the settlement was determined in a contingent fee case); RPC 1.14(b)(4) (requiring a lawyer to deliver the funds as requested by a client); and RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation) and/or RPC 1.14(b)(3) (requiring a lawyer to keep and maintain complete records of all client funds coming into his possession).

The Disciplinary Board adopted the hearing officer's Findings of Fact, Conclusions of Law, and Recommendations. The Disciplinary Board further ordered payment of restitution to the first client as a condition of reinstatement and a monitored probation for two years after reinstatement during which time Germano must earn 20 CLE credits in law office management or client communication skills.

The hearing officer was Stephen J. Bean of Olympia. The Bar Association was represented by disciplinary counsel Leslie Ching Allen. Germano was not represented.

Olympia lawyer Nathan Dysart (WSBA # 15065, admitted 1985) has been ordered suspended from the practice of law for six months, pursuant to a stipulation for discipline, approved November 20, 1996. The discipline is based upon his neglect of three client matters, in violation of RPCs 1.2, 1.3, 1.4, and 3.2.

### *Holmes Matter*

In 1990, lawyer Dysart agreed to represent client Holmes in a contract dispute. Holmes sold his vending machine business to Bert Gower, who then failed to pay on the promissory note. Dysart filed Holmes's lawsuit in King County Superior Court on or about December 6, 1990, but he did not send the Summons and Complaint to the Sheriff for service until April 4, 1991. This delay between filing and service violated RCW 4.16.170 (commencement of action) and the King County Superior Court Case Scheduling Order. Based on violation of the Scheduling Order, the Court set a non-compliance hearing. Based on the improper commencement of the lawsuit, the defendant demanded that the lawsuit be dismissed and threatened a counter-claim for rescission. Dysart, apparently, determined that the counter-claim was serious and that Holmes should dismiss his lawsuit. Dysart states that he sent Holmes a letter indicating that Dysart would allow the lawsuit to be dismissed if he had not heard from Holmes by the end of the month. This letter was addressed to Bart Gower, the

opposing party, and contained Holmes's prior address. Holmes states that he never received this letter. Dysart did not attend the required noncompliance hearing and Holmes's lawsuit was dismissed. Dysart never told Holmes that his lawsuit had been dismissed.

### *Malit Matter*

Client Malit retained lawyer Dysart in January 1991 to represent him on felony charges. The first trial ended in a mistrial, however, the second trial ended in a conviction. On June 19, 1992, Malit was sentenced, told Dysart that he wanted to appeal, and Dysart agreed to prosecute this appeal. Dysart filed Malit's Notice of Appeal on July 13, 1992, but did not pay the filing fee. On July 24, 1992, Dysart received a notice from the Court of Appeals Clerk stating that if he did not pay the filing fee or file an Order of Indigency by August 28, 1992, Malit's appeal would be dismissed. Dysart filed a Motion for Partial Indigency, but did not obtain an order until December 16, 1992 — 14 days after the Court of Appeals dismissed Malit's case for want of prosecution. Dysart wrote to Malit indicating that his appeal had been dismissed because the superior court failed to timely authorize payment for the transcripts. Two superior court judges and the Office of Assigned Counsel wrote to Malit explaining that it was Dysart's responsibility to perfect Malit's appeal.

### *Parsons Matter*

Lawyer Dysart represented client Parsons in a dissolution and the subsequent bankruptcy. Dysart filed Parsons' Answer to Petition for Dissolution on the same day the court entered an Order of Default against Parsons. Dysart filed a Motion to Set Aside Default, which the court granted. Dysart did not inform his client of the Default Order or the Motion to Set Aside Default. In April 1991, Parsons signed what he believed to be the final pleadings in his dissolution and then left town for two months. During these two months, the opposing counsel scheduled Parsons' deposition. Dysart obtained a continuance of the deposition, but did not notify Parsons of the new date. At the conclusion of the dissolution, the court awarded a \$500 judgment against Parsons for failure to attend two depositions. The court also awarded six additional judgments against Parsons. Dysart told Parsons not to pay the judgments because they would appeal. Dysart did file an appeal, but did not file a supersedeas bond to stay enforcement of the judgments during appeal.

In September 1992, Dysart filed Parsons's bankruptcy petition. After the Court granted Dysart's motion to extend the time to file particular schedules, Dysart failed to file the schedules and the Court dismissed the case. Dysart did not notify Parsons that his bankruptcy had been dismissed.

For approximately one year after filing the civil appeal, Dysart continued to tell Parsons that he was receiving extensions from the Court of Appeals. After many motions to dismiss for failure to meet deadlines and several sanctions against Parsons for late filings, the court ordered that the case be automatically dismissed unless Dysart filed the Verbatim Report of Proceedings or confirmation that the automatic stay from the Bankruptcy Court was in effect. On March 28, 1993, Dysart told Parsons that lawyer Dysart had forgotten to order the transcripts, the court reporter told him it would take three weeks, and that March 28, 1993, was the last day to perfect the appeal. On April 7, 1993, the Court of Appeals dismissed Parsons' case. The court reinstated Parsons's appeal, pursuant to a motion from Parsons's new counsel and payment of an additional \$500 in attorneys fees.

The hearing officer was Judith Mandel of Port Orchard. Respondent was represented by Thomas Meyer. The Bar Association was represented by disciplinary counsel Julie Shankland.

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### Reprimanded

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Bellevue lawyer Julian J. Nuxoll (WSBA # 3506, admitted 1965) has been ordered reprimanded pursuant to a stipulation for discipline, approved by the Disciplinary Board in December 1996. The discipline is based upon his failure to determine the appropriate jurisdiction for a client's lawsuit and his failure to file the lawsuit within the applicable statute of limitations.

In July 1993, Nuxoll was retained by a client who wished to bring suit against a cruise ship line for an illness she believed resulted from food poisoning on a cruise ship the prior month. Nuxoll attempted to negotiate a settlement, but the cruise line believed that the illness was caused by a preexisting condition. The cruise line's highest settlement offer was \$5,000.

Nuxoll told the client that the statute of limitations on her claim was three years based on his belief that the state superior court had jurisdiction over the matter. The client told Nuxoll that she was con-

cerned because her contract with the cruise line said the statute of limitations was one year. Nuxoll did not believe this term in the contract could alter the state law statute of limitations.

On June 28, 1995, Nuxoll filed a lawsuit on the client's behalf in King County Superior Court. The defendants successfully removed the matter to federal court on the grounds that the claims were preempted by federal admiralty law. The defendants then filed a motion to dismiss, alleging *inter alia* that the statute of limitations was the one year provided in the contract and that the lawsuit was not timely filed. The lawsuit was dismissed on March 1, 1996.

Nuxoll stipulated that by failing to determine the appropriate jurisdiction for the lawsuit and failing to file the lawsuit within the one year statute of limitations, he violated Rules 1.1 (competence) and 1.3 (diligence) of the Rules of Professional Conduct. Nuxoll also agreed to pay his former client \$5,000 in restitution, based on the defendants' last settlement offer.

Respondent represented himself. 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.

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# Lawyer Bank: A Modest Proposal for Curing Court Congestion

To: Any legislators who will read this  
From: Jeff Tolman, Attorney at Law  
In re: A solution to the glut of litigation in America  
My Good Legislator:

I am writing as a constituent and as a lawyer. The popular view is that there is presently too much litigation in this country. The Columbia Center in Seattle is said to, itself, house more lawyers than exist in all of Japan. Our courts are clogged. Civil litigants wait years for trial dates. America's lawyers are clearly too productive for the judicial system.

Over coffee one day, my partners and I debated what can be done to solve this problem. My then-partner Jay Roof (now a Kitsap County Superior Court judge), recommended that we bring the SEC into the judicial system and be allowed to trade trial dates among lawyers, like stocks and bonds.

Certainly there is a potential market for trial date futures. I settled a case today that is scheduled to go to trial in two months. No doubt, several of my colleagues who have trial settings in the next decade would part with some currency, or at least a bottle of good gin, for the four days I have reserved in our superior court. My sense, though (perhaps because I tend to have investing dyslexia: buy high, sell low), is that Jay's scheme is too complicated. The burdens would outweigh the benefits over time.

My partner, Mike Kirk, wondered if perhaps we don't have the pyramid turned upside down. Shouldn't two law-abiding litigants who have a genuine boundary dispute have priority in court over confessed felons, who are going to trial only in

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Depression has been called an "occupational hazard" of practicing law, since so many lawyers experience it.

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hopes that a witness won't show up? Wouldn't criminal defendants be afforded greater benefit if they got to wait years for a trial while their witnesses died, forgot what they saw or moved out of state? While this suggestion has some logic, I think the Constitution makes it less than likely to be implemented.

My proposal is much more practical, and it has been tried successfully before. Do you remember what the government did when farmers became too productive? When they were raising more wheat than could be sold? The government paid them not to produce. Otherwise productive land was placed in fallow and the owners were paid a reasonable stipend not to work it.

I propose that the same could be done to some of these overly productive attorneys. For a lot less than the government is paying farmers to fallow their land, we would fallow lawyers. Though some lawyers will argue that this has been done for years under a different name — of counsel — I don't believe that practice is sufficiently widespread to impact the system, and I will volunteer to be one of the first fallowed lawyers.

If the courts would later become empty, I would — of course — return to production. Until then, Laurie and our boys would just have to put up with me. Relaxed. Home all the time. Available to teach the boys to pitch and fly fish and be good citizens. It would be a dirty job, but if it would work for us as it has for our nation's farmers, I'll join the Lawyer Bank with glee.

I look forward to your comments on this "can't miss" suggestion. My partners — each of them equally willing to be fallowed for the cause — do, too.

Very Truly Yours,  
Jeffrey L. Tolman



*Jeffrey (Jeff) L. Tolman is a partner in Tolman & Kirk and serves as a part-time judge of the Poulsbo Municipal Court.*

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The pull-out form is on page 60 of this issue

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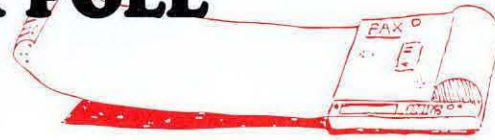
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THE WASHINGTON STATE BAR NEWS

**FAX POLL**



What is your opinion regarding legislation requiring the videotaping of child abuse victim interviews? (See the January 1997 *Bar News* article, by John Hill, regarding professionalism in child sex abuse interviews.) Proponents contend that such videotaping would eliminate or minimize the need for subsequent interviews and accurately preserve evidence of interviewing techniques used and victims' statements. Opponents argue that videotaping is counterproductive to full disclosure and a misdirection of scarce funds which could be used more productively elsewhere.

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 support required videotaping of child abuse victim interviews.
2. \_\_\_\_ I somewhat support required videotaping of child abuse victim interviews.
3. \_\_\_\_ I am undecided, but I believe the issue should be studied further.
4. \_\_\_\_ I somewhat oppose required videotaping of child abuse victim interviews.
5. \_\_\_\_ I strongly oppose required videotaping of child abuse victim interviews.

Comments/Other: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

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

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

Or, mail your response by February 11 to:  
**ATTN BAR NEWS EDITOR  
WASHINGTON STATE BAR ASSOCIATION  
2101 4TH AVE 4TH FL  
SEATTLE WA 98121-2330**

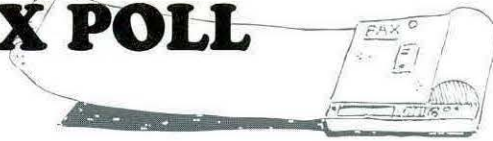
*Please send suggestions for future polls to the above address.*

# RESULTS

of

## THE WASHINGTON STATE BAR NEWS

# FAX POLL



In last month's *Bar News*, we asked your opinion regarding the pending rule change before the Washington Supreme Court to amend RPC 8.4(g). The results:

1. 2 strongly supported reducing the size of the Supreme Court.
2. 1 somewhat supported reducing the size of the Supreme Court.
3. 0 were undecided, but believed the concept should be studied.
4. 0 somewhat opposed reducing the size of the Supreme Court.
5. 12 strongly opposed reducing the size of the Supreme Court.

Overall, 15 valid responses were received.

### *Your Comments:*

"Nine justices bring diversity and different strengths to the debate. It also minimizes the possibility of a small cabal controlling the issues of the day."

*Michael Olver, Seattle*

"Any changes in the number of judges on the high court are likely to include some changes in the manner of selection or retention. Are we ready to take on all of the issues at once, or to piecemeal our way through change?"

*Roderick Dimoff, Seattle*

"California only has seven; they do it all!! Our present Justices have recommended it. Also, orals would go faster."

*Ronald Vernon, Seattle*

"This initiative to reduce the policy-making role of the third branch of government reveals an ignorance of history and our system of government. The courts have been the ONLY branch of government protecting our freedom. Reducing the size of the Supreme Court is simply a crude and obvious method of reducing any oversight on the legislative and executive branches. That's a terrible idea."

*Douglas P. Becker, 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.*



*Hugo Black: A Biography*, by Roger K. Newman, Pantheon Books, 1994  
&  
*The Return of George Sutherland*, by Hadley Arkes, Princeton University Press, 1994

by *The Hon. Richard Sanders*,  
*Justice, Washington Supreme Court*

Saddle up. George "four horse-men" Sutherland has returned. Not even the grave can keep a good man down and Sutherland's ideas are not about to be laid to rest as another casualty of the New Deal, at least if Professor Hadley Arkes has anything to say about it.

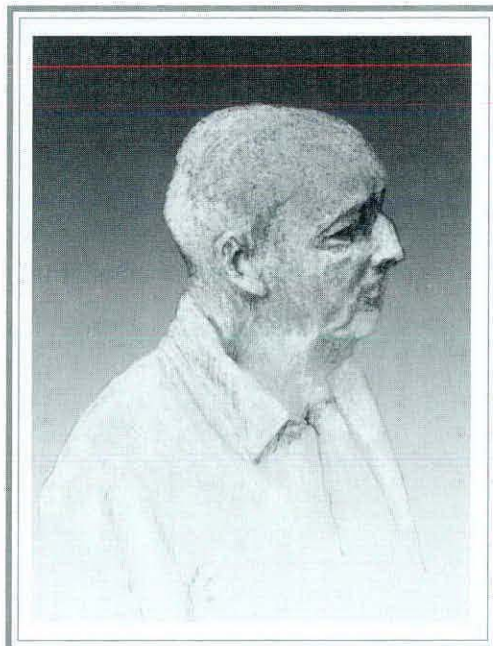
And here we thought Sutherland and his three apocalyptic brethren, Van Devanter, McReynolds, and Butler were neatly shot out of the saddle at FDR's high noon to make way for their enlightened replacements Hugo Black, William O. Douglas and company. But it ain't over yet, and Roger Newman's *Hugo Black* attests that his ideas have a life of their own as well. These sequels do justice.

The biographies read together tell the story of the United States Supreme Court between Sutherland's appointment in 1922 and Black's retirement in 1971 through the lives of Justices who at once had so much in common yet are usually depicted so far apart.

Of the two, Hugo Black is by far the best remembered and most highly respected. His decisions are studied in law school. He is quoted that the Bill of Rights "means what it says" when civil liberties are at issue.

But what about Sutherland: who was this man, from whence did he come, what did he think? Wasn't George Sutherland the justice who wouldn't let go of the past while force feeding victims of capitalist depression (and oppression) more of the same poison? That is the Sutherland we love to hate, but not the Sutherland who rides again.

For a short time Black and Sutherland were on the court together. Black respected and admired Sutherland, but these volumes disclose no more about their personal relationship. Yet the parallels between the two are inescapable.



At age 7, George Sutherland moved to Tintick, Utah, in 1869. Seventeen years later, Hugo Lafayette Black was born in back-country Clay County, Alabama. By the time Hugo was born, George had graduated from law school and was immersed in the jurisprudence of a time no doubt closer in thought and content to the spirit and thought of the American Revolution than can be adequately appreciated over a century later.

The biography of Sutherland, more a defense of his ideas than an explanation of his life, begins with an actual copy from his commonplace book which 20-year-old George Sutherland wrote in 1882:

Natural liberty is the right which nature gives to all mankind of disposing of their persons and property, after the manner they judge most convenient to their happiness, on condition of their

acting within the limits of the law of nature, and that they do not (in) anyway abuse it to the prejudice of other men. To this right of liberty there is a reciprocal obligation corresponding, by which the law of nature binds all mankind to respect the liberty of other men and not to distrust them in the use they make of it as long as they do not abuse it.

While perhaps not a very helpful formula for deciding cases, the comment is at least a statement of concern about the ultimate purpose of the system. Such light no doubt guided Sutherland through his career in the United States Senate as Utah's first senator, yet did not fully manifest itself until his two decades on the Supreme Court (1922-1937).

Again and again, in the name of law and the spirit of liberty, Sutherland applied these principles.

Both Sutherland and Black made their mark in private practice. Black's contact with the appellate practice before his appointment seemed to be centered upon the defense of "excessive" jury verdicts rendered on behalf of his personal injury clients.

Black was active in community affairs and more enthusiastic in his Klu Klux Klan membership than given credit. "The Hooded Order," as Newman calls it, makes an interesting chapter in Black's life. Black read from the Klan official prayer in argument and he marched in their parades. He spoke at their Konklave. And he initiated new members into the invisible empire as Kladd of the Klavern. The Klan letterhead listed Hugo as an officer and Klan support was instrumental in his initial election to the United States Senate. Later a newspaper ran the unlikely headline: "Klan Elects Black to Senate." But Black's





# CALENDAR

## February

- |   |   |  |
|---|---|--|
| <p>1-2 <b>Annual Military Law Update</b><br/>Seattle<br/>By UW School of Law<br/>Judge Advocate General's<br/>Detachment<br/>(206) 281-3002<br/>CLE credits pending</p> <p>7 <b>Killer Cross-examinations</b><br/>Seattle<br/>By WSBA CLE (206) 727-8202<br/>6.5 CLE credits</p> <p>10-12 <b>1997 Police Law Institute</b><br/>SeaTac<br/>By Labor Relations Information<br/>System (503) 282-5440<br/>12.5 CLE credits pending</p> <p>13 <b>Buying &amp; Selling a Business</b><br/>Seattle<br/>By LSI (206) 621-1938<br/>14.25 CLE credits (incl. 1 ethics)</p> | <p>13 <b>Essentials of Starting, Surviving &amp; Successfully Managing Your Solo or Small-firm Practice</b><br/>Seattle<br/>By WSBA CLE (206) 727-8202<br/>3.5 CLE credits (incl. 1.25 ethics)</p> <p>13 <b>Technology &amp; the P.I. Practice</b><br/>Seattle<br/>By WSTLA (206) 464-1011<br/>6 CLE credits pending</p> <p>14-15 <b>WSBA Board of Governors Meeting</b><br/>Tacoma<br/>(206) 727-8200</p> <p>18 <b>Successful Judgment Collection</b><br/>Seattle<br/>By NBI (715) 835-8525<br/>6 CLE credits (incl. 1 ethics)</p> | <p>20 <b>Common Medical Problems: Blood &amp; Guts for Lawyers</b><br/>Seattle<br/>By PESI (715) 833-5296<br/>6.5 CLE credits</p> <p>20-21 <b>1997 NW Regional Immigration Seminar</b><br/>Seattle<br/>By KCBA/Amer. Imm. Lwyers<br/>(206) 340-2578<br/>CLE credits TBA</p> <p>21 <b>Elder Law</b><br/>Spokane<br/>By WSBA CLE/Elder Law<br/>Section<br/>(206) 727-8200<br/>CLE credits TBA</p> <p>21-22 <b>NW Securities Institute</b><br/>Seattle<br/>By WSBA CLE/Business Law<br/>Section (206) 727-8202<br/>11.25 CLE credits (incl. 1 ethics)</p> |
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28 **1st Annual Inter-county  
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By WSBA CLE (206) 727-8202  
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28 **Intellectual Property for the  
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Property Issues in a Business  
Law Practice**  
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By KCBA (206) 340-2578  
CLE credits TBA

28 **Cost-effective Litigation**  
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5.25 CLE credits  
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28 **The Science Behind  
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**March**

1 **WSBA presidential nomina-  
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3 **Premises Liability**  
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By WSTLA (206) 464-1011  
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20 **Workers' Compensation**  
SeaTac  
By WSTLA (206) 464-1011  
CLE credits pending

21 **How to Handle Boundary & Title Disputes**  
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26 **Telling Your Story: Creating & Using Cost-effective Exhibits**  
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By WSBA CLE (206) 727-8202  
6 CLE credits pending

27 **Rights & Remedies of Consumer Debts In and Out of Bankruptcy**  
Seattle  
By KCBA (206) 340-2578  
6.5 CLE credits pending

28-29 **WSBA Board of Governors Meeting**  
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(206) 727-8200

31-  
APR **Skills Training**  
Bothell  
5 By WSBA CLE (206) 727-8202  
45 CLE credits pending

## April

17 **Auto Cases**  
SeaTac  
By WSTLA (206) 464-1011  
CLE credits pending

18-19 **NW Bankruptcy Institute**  
Seattle  
Sponsored by Oregon State Bar  
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Section (503) 684-7404  
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24 **Retirement Plans in the Estate Planning Process**  
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**May**

- 2-3 **WSBA Board of Governors Meeting**  
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- 12 **Estate & Gift Taxation; Tax Timing**  
Seattle  
By Golden Gate U.  
(206) 622-9996  
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- 12 **Intellectual Property**  
Richland  
U. Ctr for Prof. Ed  
7 CLE credits (incl. 1 ethics)
  
- 16 **Employment Law**  
Seattle  
By WSTLA (206) 464-1011  
CLE credits pending

- 22 **Tax-saving Ideas Using LLCs**  
Walla Walla  
Walla Walla Valley Estate  
Planning Council  
(509) 382-2541  
1.5 CLE credits


**June**

- 31 **WSTLA 1997 Annual Meeting & Convention**  
Vancouver, B.C., Canada  
(206) 464-1011  
By WSTLA (206) 464-1011  
CLE credits TBA
  
- 20-21 **WSBA Board of Governors Meeting**  
Yakima  
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# Practical Suggestions to Avoid Problems With Fees, Part 2

(Part 1 appeared on page 40 of the January *Bar News*)

by **Joy McLean**, *WSBA Disciplinary Counsel*

This continues our series of articles suggesting practical ways to avoid fee problems. A prior article addressed issues arising at the formation of the attorney-client relationship. This one continues that discussion and also addresses issues arising in an ongoing representation.

### **Practice Suggestion 1 - Charge Enough for Your Work**

This sounds obvious, but it is important. Do not charge less than you really think you should merely because the client is a friend, a friend's friend, a relative, or a sad case. RPC 6.1 asks us to render public interest legal service and recognizes this may include providing professional services at no fee or a reduced fee to persons of limited means. But if you are planning on doing pro bono work, plan it when you take on the client, don't let the representation become "involuntary" pro bono because you didn't initially accurately estimate what it would cost you to provide the services or deter-

mine the prospective client's ability to pay. Too frequently, such "involuntary" pro bono leads to resentment on the lawyer's part and dissatisfaction and the filing of a disciplinary grievance on the client's part.

If you work hard without regularly insisting on payment of your bill, your client expects you to do much for little. Meanwhile, you will likely resent working without being paid. You may also likely begin having a more lax attitude toward your ethical duties, such as diligence, because, "after all, it's just my buddy/my sister/a favor." Don't. Your involuntary pro bono client deserves, and the RPCs require you to provide, the same quality of legal services and the same ethical representation as your paying client.

### **Practice Suggestion 2 - Bill Monthly**

Bill monthly, whether or not you intend to be paid monthly. This assures that your clients know what you are doing and, if

you are working on an hourly basis, how much it is costing them. Disciplinary Counsel often cite the absence of regular time records/bills as evidence the client was not kept informed, diligently represented, or reasonably charged for services. Additionally, you may want to establish an ongoing advance fee deposit to be paid in set monthly installments. This avoids the client having to come up with a large "trial retainer" all at once. Insist upon monthly payments, either toward advance deposit or on account. This helps assure that the client appreciates the cost of your services and will not take your work for granted, and, equally important, that you get paid or realize early the necessity of withdrawal for nonpayment.

### **Practice Suggestion 3 - Make the Unhappy Client a Priority**

If you think the client is in any way dissatisfied, attend to it immediately. An upset client is a priority. Your staff can often best gauge your client's attitude. When your secretary tells you, "Client Jones seemed upset by our paperwork," or, "Client Smith said it doesn't do any good to have a lawyer," pay attention. This is a dissatisfied client and dissatisfied clients file grievances and malpractice suits. An in-person conference with your client more effectively gets to the root of the problem. You must both be and appear caring and open, not confrontational or defensive. Say, "You seem upset/unhappy/dissatisfied with us. Can we talk about that?" You may be surprised to learn the client has some misconception of procedure or law which you can easily correct.

### **Practice Suggestion 4 - Withdraw Before You Start Working for Free**

Before the client's bill becomes too large to collect, consider withdrawing from representation or counseling the client on the merits of settling to avoid

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further legal fees. The debt must become a reality for the client long before the trial retainer is due. You may begin your representation with a full expectation of being paid for your work, obtaining a substantial advance fee deposit, regularly billing your client, and assuring the client is making payments on the bill. Somewhere in the heat of battle, this often is lost. A series of motion hearings can add thousands of dollars to a client's bill over a period of a few weeks. In the stress and frenzy of litigation, you fail to notice the client had fallen behind on monthly payments. Suddenly, the dust settles, and you realize the client's bill has grown to an outstanding balance of thousands of dollars, an amount your client can only pay in small installments over a long period of time. Trial may be on the horizon. This scenario happens all too easily and frequently. You become caught because you are doing what you are trained to do and feel useful doing (litigating) and because you carry a sense of ethical and moral duty toward your client's case. On balance, energy may be better spent advocating for clients who pay. The ethical rules do not expect you to work for free, except to discharge your pro bono obligation. Consider withdrawing as soon as the client's unpaid bill reaches a certain amount, but review *Short v. Demopolis*, 103 Wn.2d 52, to consider possible consumer protection ramifications before doing so. Withdraw by motion, rather than by notice, if you need judicial involvement in the process to afford the client a simultaneous continuance, etc. More grievances involve withdrawals within four-to-six weeks of trial, or attempts to collect fees post-case, than involve withdrawals mid-case. Withdrawal may not, of course, be available to you in criminal and certain other cases where withdrawal requires court approval, and whether the lawyer works for free may not be the deciding factor for the court in the withdrawal decision.

### Practice Suggestion 5 - Conduct an Exit Interview

Conduct an "exit" interview with your clients and consider arranging a feasible plan for payment of any outstanding bill. This may well prevent a malpractice suit or bar grievance if the client is at all dissatisfied with you. Although these in-

terviews are sometimes left to the receptionist or bookkeeper, you will likely be far more effective if you yourself conduct the interview.

*What situations call for it?* Although you should do so with every client, you may not be able to take the time, particularly if you have a volume practice. If your client has a large outstanding balance, however, or has suffered an unfavorable outcome, or has recently become either noncommunicative or hostile with your staff or you, or his or her ability to pay seems marginal, you should discuss these matters with the client before closing the client's file.

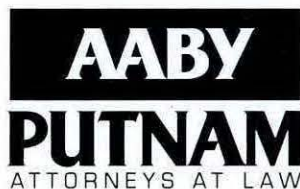
*Why should it be done?* People usually do not sue their friends since friends communicate openly, resolve issues between each other, and demonstrate understanding of each other's problems. Thus if you meet with your dissatisfied client, it helps the client to express or take a position regarding his or her feeling about your work and your bill, and it gives you an opportunity to fix any mistakes you made or to settle a potential malpractice claim. Clients who do not have money cannot pay you and may become immobilized by not having a plan for how to pay. Face-to-face communication may help you clear up misconceptions, allow your client to vent pent-up feelings, and give you and your client a chance to devise a workable plan for paying the bill.

*When should it be done?* Sometimes it's best to allow a final, complete billing to be sent and digested by your client before you meet with the client. If your client received an unfavorable result in the case, you may want to allow the client a "breather" of a few weeks to come to terms with it. Certainly, you should conduct this meeting before sending an "overdue" billing notice, dunning letter, or notice of collection agency referral.

*What should you cover?* You should sympathetically allow your client to express any dissatisfaction with your services. Was there anything you did not like about my representation of you?" If your client is completely satisfied, let that point register with the client. You should forthrightly explain that you face a statute of limitation cut-off in collecting your fee and need to make arrangements to have it paid or to toll the statute. You should bring to the meeting optional agreements, promissory notes, liens, or other documents which the client can take home, review, and select. This extra step of meeting with the client can smooth the way for nonresistant payment of your bill. It also allows you to repair any errors or problems with the representation. In the end, of course, some unhappy clients, often the ones you felt most sorry for in the beginning, will decide they should not have to pay you no matter how well you represented them. Hopefully, you have documented your steps to satisfy them.

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**National nonprofit association** — Needs F/T or P/T attorney to assist our members with revocable living trust, will, and charitable trust documents. Pay will consist of number of documents completed. Potential 50k annually. Currently 6,000 members. Please reply with letter/ résumé to WSBA Bar News Box 513.

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## INFORMATION SOUGHT

**Lawyer who assisted King County adoption of male (Steven/Stephen?),** latter half of 1959. Mother ("Geri" Day/Dey) at Florence Crittendon Home. Father David Stock. Adoptee born Providence Hospital, Seattle. Parents may be from Des Moines/Renton. Call in confidence to attorney Larry Johnson (206) 621-1045.

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## MISCELLANEOUS

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**San Juan Island — Friday Harbor House** is 20-room inn, perched on a bluff overlooking San Juan Channel and Friday Harbor Marina. Rooms feature fireplace, Jacuzzi soaking tub, spectacular views and continental breakfast. Water view dining room serves dinner using fresh, local, seasonal ingredients. Special "quiet" season rates available. Reservations: (360) 378-8455.

**Olympic Peninsula** — Built in 1994, the Inn at Ludlow Bay is a 37-room inn surrounded by beach and shoreline, overlooking Port Ludlow Marina. Rooms feature fireplace, Jacuzzi soaking tub, European mattress and duvet, views of Olympic and Cascade Mountain ranges and continental breakfast. Waterfront dining room and bar serves dinner using fresh, seasonal ingredients; 27-hole world-class golf course. Special "quiet" season rates available. Reservations: (360) 437-0411.

## WSBA Deskbooks: New and in the Pipeline from CLE Publications

*Yes, it's finally finished . . . .*

The last of the nine volumes of the new third edition of the *Real Property Deskbook* has just been sent to the printer, and shipment of the sets should begin in early March.

Over two years in the making, the third edition is the largest, most comprehensive Deskbook ever published by the WSBA. Led by editor-in-chief Edward W. Kuhrau of Perkins Coie, more than 160 experienced Washington lawyers contributed to the 121 chapters on topics essential to practitioners analyzing real property issues.

The first five volumes, addressing "real property" issues, contain updated treatment of all topics covered in the second edition, plus 11 new chapters. These volumes (I through V, plus index and tables volume) are available as a separate set. The three volumes addressing land use and environmental law issues include 33 entirely new chapters. These volumes (VI through VIII plus index and tables volume) are also available as a separate set.

*Family Law update is here . . . .*

The 1996 cumulative supplement to the two-volume *Family Law Deskbook* is available now. Published in September 1996, the supplement updates this valuable resource for family law practitioners as well as adding new chapters on federal and military pensions. Vancouver attorney Scott J. Horenstein served as editor-in-chief of the supplement.

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*And watch your mail for notice of publication of these works-in-progress . . .*

- Supplement to *Community Property Deskbook*, by Hon. George T. Shields and John Huston.
- Supplement to *Civil Procedure Deskbook* (editor-in-chief David D. Swartling). ♦

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## Young Lawyers Join FEMA to Provide Free Legal Advice to Disaster Victims

Following the recent floods in much of Washington state, the WSBA Young Lawyers Division wants to remind bar members that WYLD has an agreement with the Federal Emergency Management Agency (FEMA) to provide free legal assistance to low-income individuals in federal disaster areas.

According to a January 10 letter from WYLD President-elect Kathleen J. Hopkins to the WSBA Board of Governors, if FEMA determines that there's a need for free legal assistance to disaster victims, it will activate the terms of a letter agreement with the ABA-WYLD. As an affiliate of the ABA, the WYLD is obligated to facilitate the provision of legal advice, counseling and representation in non-fee-generating cases to disaster victims. Such action was required last spring during the southwest Washington floods. At that time, FEMA paid for the installation of a toll-free line at the WSBA office, which served more than 100 callers needing assistance. WYLD expects even heavier demand this year

since the damage was statewide.

WYLD wants to work with local bar leaders throughout the state to find volunteers to respond to legal questions. WSBA's WYLD Administrator will maintain the roster of volunteers to whom disaster victims can be referred.

FEMA, WYLD, the ABA and the Attorney General's Office will provide a training session for volunteer attorneys. The ABA has developed an instruction manual, which includes answers to the top 20 questions asked by disaster victims. WYLD will host the training session in Seattle, videotape the training, and distribute tapes to bar leaders who have provided them with rosters.

For more information, contact Kathleen J. Hopkins, WYLD President-elect, Graham & James LLP/Riddell Williams P.S., at (206) 389-1684, or WSBA's WYLD Administrator, Sheri Borgford at (206) 727-8239. ♦



## State Judges Learn to Handle Increasing Number of Pro Se Litigants

Nearly 50 new members of Washington's judiciary attended a workshop on January 16 entitled "Dealing with *Pro Ses*," which was developed and presented by the Access to Justice (ATJ) Board's Education Committee. This workshop was part of the curricula of the Office of the Administrator for the Court's (OAC) annual week-long Judicial College.

The goal of the workshop was to provide new judges with tools for handling the increasing numbers of *pro se* litigants flooding their courts, a phenomenon that is forcing many courts to rethink how they run their calendars.

ATJ Board Chair **Mary Wechsler** introduced the session and provided an overview of the Courthouse Facilitator Project currently operating in 17 Washington counties. Supreme Court Justice **Richard Guy** noted that the

methods for adjudicating justice continue to shift as technology advances at such a rapid pace. He encouraged the participants to rethink how they currently run their courtrooms in order to accommodate these changes. **Ron Roseman**, Director of Public Affairs for the Northwest Justice Project, presented each judge with a packet of social and legal resource information for *pro ses* compiled from his or her county. He also provided an overview of CLEAR (Coordinated Legal Education Advice and Referral), operated by the Northwest Justice Project. **Robin Lester**, Legal Services Director for the King County Bar Association, reviewed a demographic profile of *pro se* litigants and suggested ways that judges could facilitate communication in the courtroom. For

*Continued on next page*

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**Pro Se** — *Continued from previous page*

example, *pro ses* frequently do not understand court procedures and require detailed explanations. Court of Appeals Judge **Anne Ellington** discussed the role of the judges as "guardians of the constitutional rights of all litigants." She made three key suggestions: creating an atmosphere of respect and fairness in the courtroom; explaining rulings to *pro ses* in very simple language; and hiring staff who treat *pro ses* with respect and fairness.

After the panel presentations, the judges broke into small groups to discuss hypothetical situations involving *pro ses* on one or both sides of a case. The Education Committee will provide the judges with written summaries of these discussions for their future reference.

Representatives from the Equal Justice Coalition, a committee of the Access to Justice Board, asked the judges to add their signatures to a letter signed by nearly 125 of their colleagues in support of continued funding for legal services programs. Recent dramatic cuts in funding have played a major role in creating the dramatic increase in the number of *pro se* litigants. ♦

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## Peer Counselors for Lawyers' Assistance Program Lend a Helping Hand

As the Lawyers' Assistance Program (LAP) approaches its 10th year, it seems appropriate to take a few lines to explain one of its most important components, that being the ongoing peer counselor training program offered by LAP clinicians in five locations around the state. For the last nine years, LAP has assisted peer counselors in helping colleagues uphold the ethical standards of the profession.

The continued success of the Lawyers' Assistance Program depends upon a network of lawyers who give generously of their time to reach out to their colleagues. LAP's peer counselors fulfill a number of functions:

(1) While not asked to be therapists, peer counselors provide one-to-one assistance, such as a sympathetic ear and referrals to 12-step programs.

(2) All persons acting as peer counselors may appear on behalf of LAP clients as advocates or witnesses at the counselor's discretion. They do not represent themselves when they appear before the court in the name of the Washington State Bar Association. Peer counselors do not act as legal counsel to represent any LAP client they are counseling.

(3) They spend their own time to attend ongoing training offered by the LAP staff on topics that help them to assist impaired attorneys.

(4) They disseminate information about LAP by offering presentations to local and specialty bars.

Peer counselors receive no remuneration. They donate their time and abilities out of a belief in "lawyers helping lawyers." Through this volunteer network, lawyers are able to contribute in a tangible way to improving the profession.

Upcoming peer counselor training topics include: Dual Disorders (alcoholism, mental illness); Cultural Diversity — The Color of Fear; Issues in Aging (relationships, losses, a potential for growth, transitions); Cross-cultural Counseling; Therapeutic Approaches to Working with the Depressed Lawyer (substance abuse induced depression, reactive depression, major depression, bipolar disorder, theories of treatment); and Client Centered Counseling Skills.

For further information, call the Lawyers' Assistance Program at (206) 727-8268. ♦

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## Stepping Out with Tacoma Bar Foundation to Benefit Volunteer Legal Services

The Tacoma Pierce County Bar Foundation presents its Third Annual Night at the Theatre, to benefit the volunteer legal services program. This year's presentation is "Chaps," a "cowboy cabaret with an English accent."

A reception will begin at 6 p.m. followed by a 7 p.m. curtain call on Sunday, April 6, at the Tacoma Actors Guild at 915 Broadway. Tickets are \$12.50. Call Elsie at the Volunteer Legal Services office at (206) 572-5134. All proceeds go toward the VLS Program. ♦

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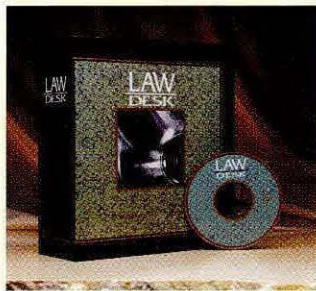
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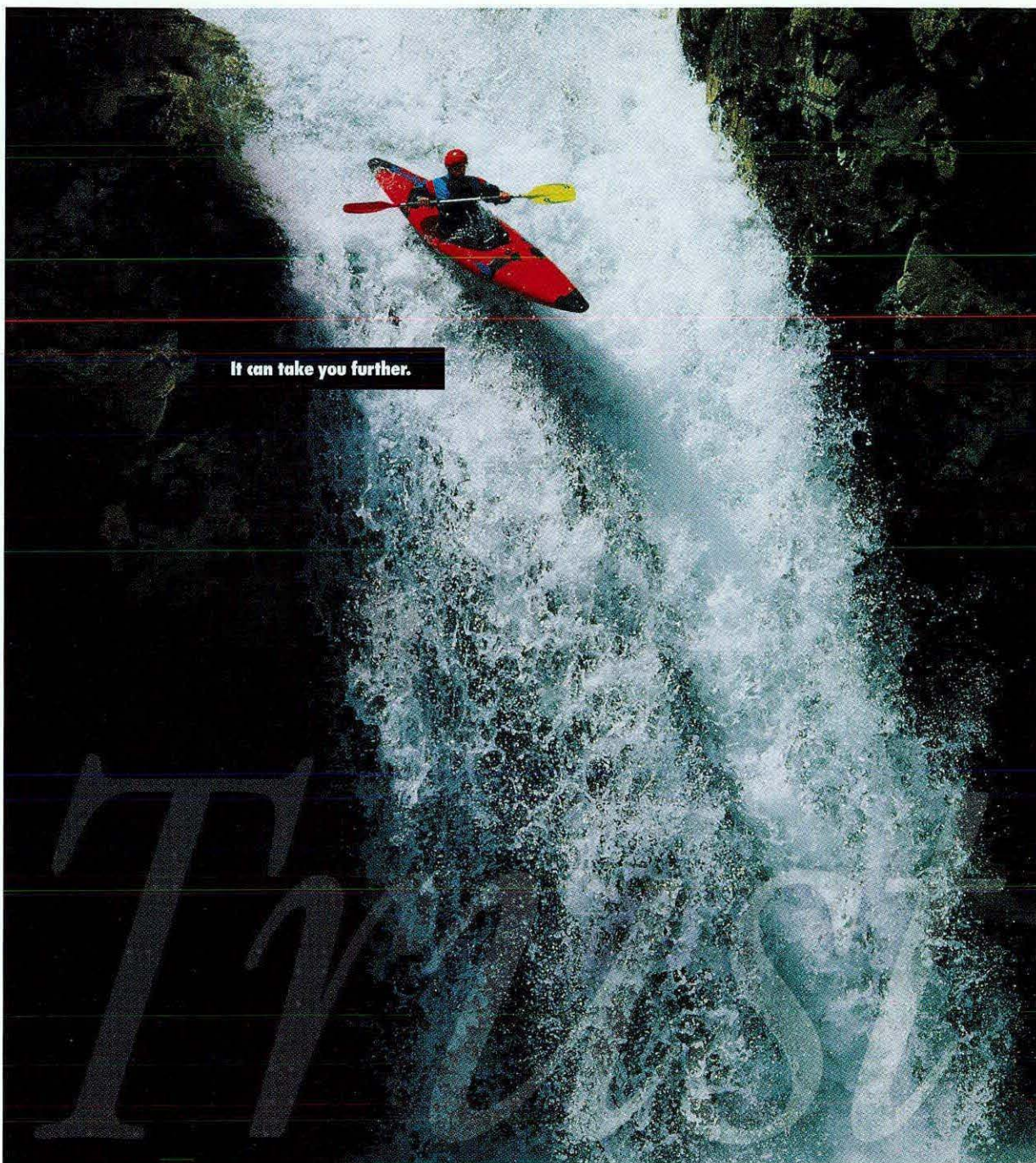
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