Washington State Bar News

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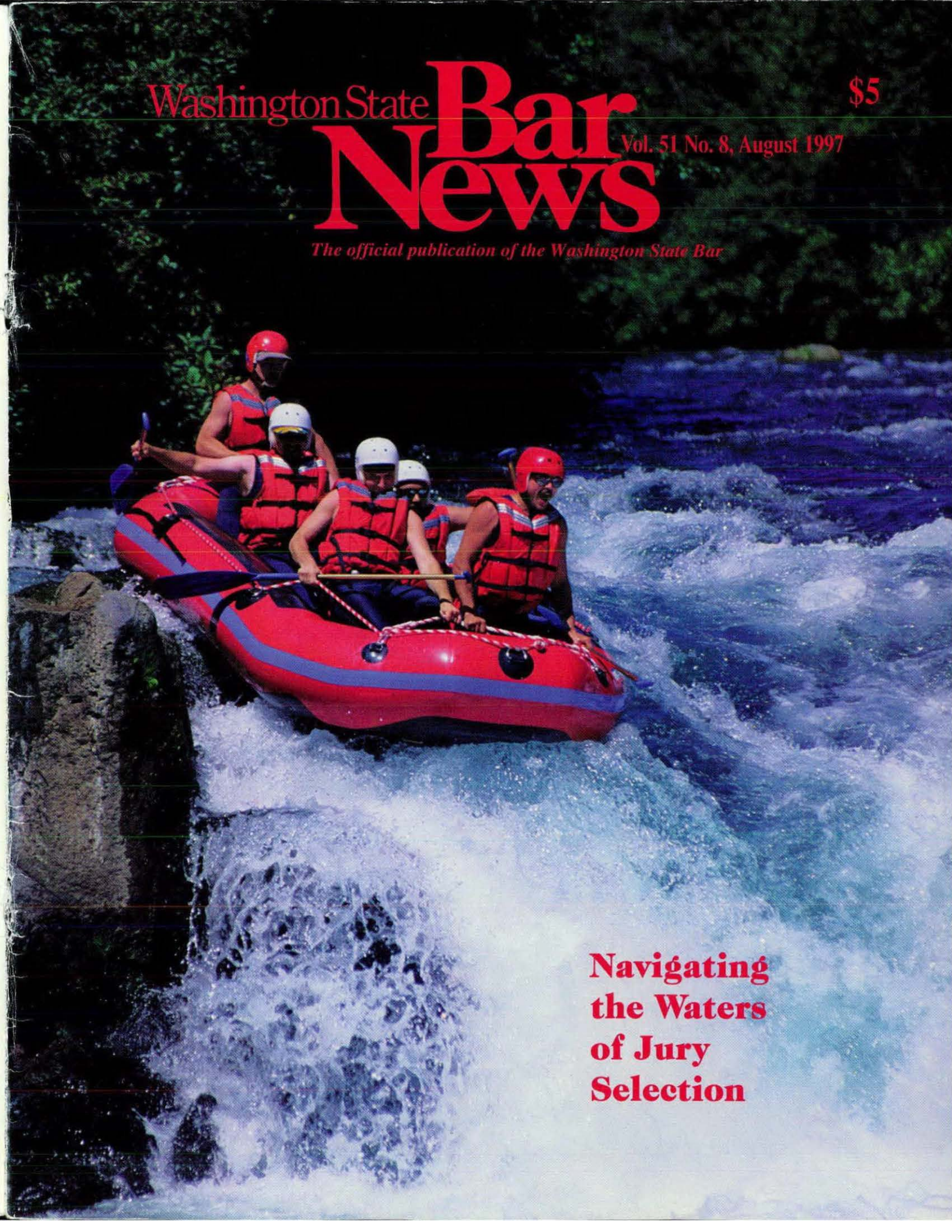
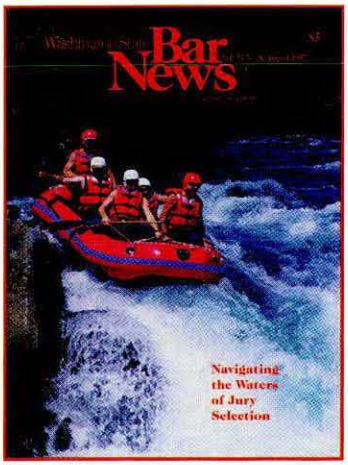
Vol. 51 No. 8, August 1997

The official publication of the Washington State Bar



Navigating the Waters of Jury Selection



Navigating the Waters of Jury Selection

BAR NEWS

SHERRIE BENNETT
Editor (206) 283-4015

BONNIE KAM
Production Supervisor (206) 727-8212

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

JACK YOUNG
Advertising Manager (206) 727-8260

DOREE ARMSTRONG
Editorial Assistant (206) 727-8214

ERIK SCHWAB
Communications Secretary (206) 727-8213

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ARTICLES

COLUMNS

DEPARTMENTS

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DENNIS P. HARWICK
Executive Director

BONNIE D. KAM
Director of Communications

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Digital Signature Comments

Editor:

After reading the article by Scott G. Warner on digital signatures in your June issue, I would like to take issue with his statements regarding his "persuasive arguments against the Act as proposed...." Mr. Warner states that persuasive arguments against the Act as proposed are (1) the Act did not include any requirement that the signer of an electronic document have an opportunity to view the entire document before signing; and (2) the Act did not address the issue of whether the document might be modified after the signer had reviewed but before signing. Mr. Warner further suggested that if the statute had incorporated language that made it clear that the signer, and anyone else relying on the digital message, (1) had viewed the message in plain text before signing; (2) signed the message with an affirmative act appropriate to the context; and (3) signed it prior to transformation, that the shortcomings in the Act would have been rectified.

Both the Legislative Task Force and the UCC Subcommittee, chaired by Mike Rodin, considered those issues but found them to be without merit. The technology that currently exists, and which has been established as minimal standards for a licensed certification authority to use for encryption of digital messages, will provide an opportunity for a person to review the entire document in plain text before signing and eliminates any risk that a document can be modified after review before verification or digital signature.

The Legislative Task Force and the UCC Subcommittee were very cognizant that when drafting legislation for evolving technology, it is extremely important to *not* restrict the development and use of evolving technology by legislative constraints, but to let the market place determine the adoption of the most secure digital encryption technology.

Considering the wide range of uses to which digital signatures will be put in the immediate future, the statutory and regulatory framework for digital signatures provides a level of security equal to if not greater than that currently in use for handwritten signatures.

This Act cannot be considered standing alone, but must be considered in light of recent technology changes that are taking place and which are being adopted both in commerce and by the state of Washington. One of those that is most relevant is the changes which were made to the Washington recording statute in 1996, which allowed electronic recording of documents with county auditors. This ability, coupled with the recognition by the Washington Electronic Authentication Act, that a digital signature has the same legal significance as a notarized

Readers are invited to submit letters of reasonable length to the editor. They should be typed on letterhead and signed. Due date is the 15th of the month for the second issue following. 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.

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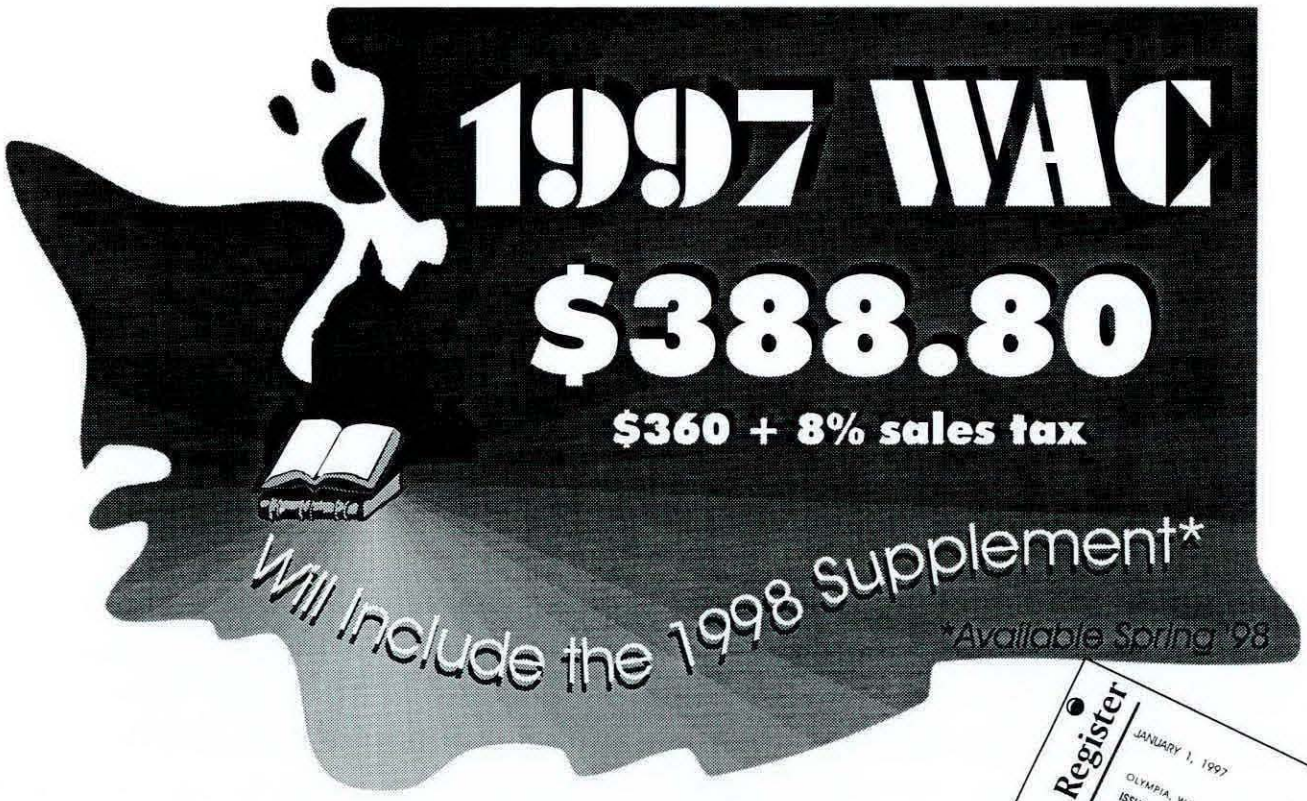

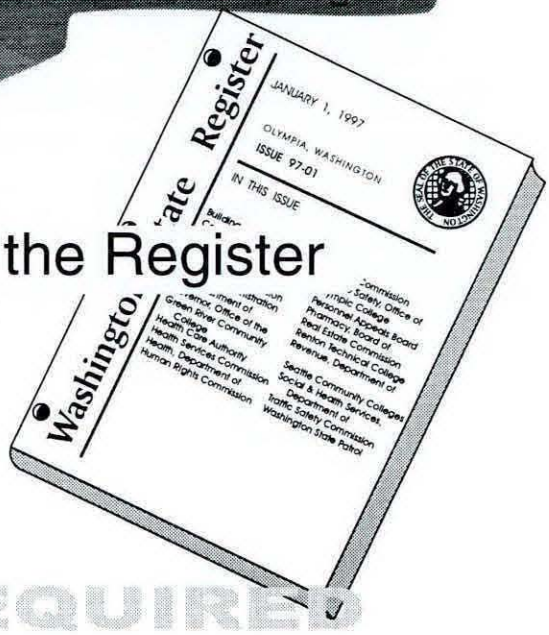

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changes in the law would alter joint and several liability and modify the present rule forbidding evidence in civil litigation of the injured plaintiff's lack of use of a seat belt. These changes would, I believe, be generally felt to reduce the filing of suits and/or reduce recoveries.

After the Board voted to oppose the legislation, Mr. Chambers wrote to the legislature asserting that these changes would create undesirable barriers for citizens of the state to access the courts. Mr. MacPherson thought that the Board should remain neutral on these issues since this type of legislation would be generally favored by the civil defense Bar and opposed by the civil plaintiff Bar.

My question: Do not Board members who represent plaintiffs on a contingent fee basis have an obvious conflict of interest in voting on making a recommendation on this type of legislation? These changes to the tort system would likely reduce, if not eliminate, recoveries by plaintiffs and thereby equally reduce or eliminate the attorney's fee. Defense attorneys also could have a conflict in that such legislation could reduce lawsuits and, thereby, their opportunities to represent defendants. I applaud and appreciate Mr. Chambers and others who practice primarily plaintiff and defendant civil litigation and devote considerable time to the necessary functioning of our State Bar, but should not these Board members recuse themselves from participating in voting on or recommending to the legislature legislation in which they have obvious or apparent financial interest?

THOMAS OWEN
Seattle

Separation of Marriage & State?

Editor:

Louisiana just became the first state to create a second option for marriage — a harder to break kind of marriage called "covenant marriage." (*New York Times*, 6-23-97). This legislation was sponsored by Christian groups and is a good thing because it allows a second marriage contract choice. Couples can opt for the current no-fault marriage — where later, there does not need to be a reason to get a divorce — or opt for this new, more binding marriage contract — where a reason is later needed in order to get a divorce.

This expansion from one to two choices is good. But couples should have even more than two choices of marriage contracts. In a marriage market — one with a separation of church and state — freedom of contract based on consent and the rules of contract law would control. Each couple could just draw up its own individualized marriage contract or grab one from the stationery store.

A choice between marriage contracts forces couple to evaluate the legal consequences of their potential marriage. This can be awkward, sort of like fiancees

contemplating pre-nups. Yet we don't criticize wider choice in a free society because the choices might confuse or bedazzle us, or make us feel awkward of self-conscious.

Yet the freedom of contract guaranteed by common law ("common law" refers to the thousands of individual court decisions dating back to 17th-century England through today which create a body of case law as opposed to statutory, legislature-made law) really doesn't exist in marriage today because American marriages do not occur in a free market where until today only one type of government-sanctified marriage contract was legally recognized (although other forms of marriage can be recognized religiously and culturally by private, non-governmental institutions.).

But better yet to have a separation of marriage and state where any couple, or other combination of people, could be free to contract with each other on any mutually agreeable terms. In other words, no government-issued marriage license would be necessary; government would be out of the business of marriage. No tax breaks, no subsidies, no formal government recognition. Government neutral and silent on marriage. Let contract law rather than government regulations rule here.

Yet, critics argue, this would allow for gay marriage and polygamy. True, but why not? Freedom of contract should reign. Gay and polygamous marriages should be legal as private, non-governmental contract options. Absent coercion, fraud, incapacity, underage, criminal conspiracy or other traditional common-law contract defenses that can justify breaking promises (or prevent a court from enforcing such promises), such alternative relationships should remain free of government regulation. Again, as long as they are based on consent and are fair under the well-established rules of contract law.

It can be argued that having children creates an "externality" that markets and contract law can't adequately capture (since kids may be abandoned necessitating that others be forced to care for them) such that regulation of contracts regarding having kids could be justified — even under libertarian law and economic models of analysis. But let's free up marriage contracts before we tackle contracts regarding kids.

JEFF JARED
Kirkland

HB 1804, F16 1820 and SB 5733

Editor:

I have just had the opportunity to review the letter to the *Bar News* (June 1997, page 7) written by James E. MacPherson, the secretary of the Washington Defense Trial Lawyers, regarding legislation proposed by the so-called Liability Reform Coalition (LRC). Mr. MacPherson takes the Bar Association and, particularly President Tom Chambers, to task regarding steps for lobbying against this legislation.

In his letter, Mr. MacPherson states, "Also, there was no input from other sections of the Bar." The purpose of this letter is to advise Mr. MacPherson and all members of the Bar Association that that is incorrect. I serve as the chairperson of the Executive Committee of the Litigation Section of the Washington State Bar Association. Our section is the largest section of the Bar, representing more than 3,000 members. Our Board is composed of litigators representing a cross-section of the entire spectrum of litigation within the state. Our Board includes several

members who do nothing but defense work, as well as several members who do nothing but plaintiff work. The remaining members of the Board work both sides of the courtroom, and also handle commercial litigation, antitrust matters, dissolutions and federal Indian law.

The legislation in question was the subject of much debate at our regularly scheduled meetings, as well as several conference calls. Ultimately, our Board voted unanimously to oppose this legislation. The basis for our opposition is much the same as that contained in Tom Chambers' letter to chairs Roach and Sheahan, printed in the June *Bar News*. The Board basically felt that there were issues of both access to justice and fairness to the citizens of the state involved and that those issues were not fairly dealt with in the legislation.

Suffice it to say that Mr. MacPherson is simply wrong when he indicates that no other section of the Bar Association supported the Board's actions. The Litigation Section did so unanimously.

TIM WEAVER
Yakima

Washington Courts Historical Society

Editor:

At our request, the Washington Supreme Court has established a committee to develop a Washington Courts Historical Society, to be incorporated as a nonprofit corporation with Section 501(c) tax-exempt status with the Internal Revenue Service. This historical society would raise funds for the purpose of advancing the history of Washington's judicial system, the Temple of Justice and the Washington State Bar Association.

We are very interested in your readers' thoughts as to possible objectives for this historical society. In specific, we would appreciate their thoughts about any archival materials, historical objects or historical/educational activities that could be funded by an historical society.

Thank you in advance for your assistance regarding such possible activities for an historical society.

PHILIP A. TALMADGE
GERRY L. ALEXANDER
Olympia

"Payment or Pavement"?

Editor:

In the July 1997 *Bar News*, Bruce D. Maclean labeled Republicans as "Nazis." I suppose he did so based upon their backing of the "you don't pay, you don't play" treatment of the student loan question. How dare Mr. Maclean use the label of 'Nazi" in his defense of a morally indefensible position? It is time that he and his socialist, left-wing, Commie, pinko, tax-and-spend liberal Democrats and fellow travelers learned that to pay back a debt is the moral and legally right thing to do. For a lawyer not to honor his or her promise to repay a loan is an act of moral turpitude which should result in suspension if not outright disbarment. Come to think about it, I am not sure that a lawyer or doctor who isn't earning enough to make the modest student loan payments should be practicing anyway. Perhaps, as a collateral benefit, the "payment or pavement" policy would also assist in reducing the incidence of malpractice. And the bleat goes on.

EARL W. HENSLEY III
Wenatchee

Oppenheim Reply

Editor:

I do not personally know Mr. Payseno, and I have never met him. I find it difficult to understand why he would write such a vicious, inaccurate attack. What is his argument? Oppenheim is a bum, so don't print what he writes? My hospital privileges were never terminated in 1976, and in fact, my license was reinstated in 1991. Nevertheless, there is no question that I had a difficult time in medicine, but I have changed and learned from what errors I have made. Recently, I presented my full case to the WSBA character and fitness committee. I was denied by that committee on that application, but I am optimistic about the future.

No matter how I struggled to rehabilitate and to rectify matters, people with Mr. Payseno's prejudices prevented me from an active career in medicine. I struggled 12 years and left medicine in 1992 after 18 years in medical practice. I have since graduated law school and received an LL.M in Health Law. I have published and written widely and have not received such excoriating remarks in other places. Recently, I won a prestigious national essay contest and will be publishing a 500-page treatise on the medical record as evidence with a major national law publisher. So far as I know, I am the only person in the state of Washington to achieve these academic distinctions.

Now, to the specifics. Whether one calls incident reports by that name or by some name which confuses the identity of the incident report, it is still an incident report. I suspect readers can consider what Mr. Payseno writes to be his view of matters. My article reflects my experience over nearly 25 years in medical-negligence litigation. While a "Quality Management Memo," if it is the product of peer review, may come under the Health Care Quality Management Act, an incident report which is an investigative report of an incident and is not peer review, is indeed discoverable. It is no secret to members of the Bar that the defense and plaintiff sides see this issue differently.

As a litigation tactic, medical-negligence defense attorneys try to create an impermeable wall to discovery of incident reports. The plaintiffs argue that the report is a business document, discoverable under Fed.R.Evid. 801(6), and the defense argues HCQIA privilege. The defense attorneys make a fortune over this argument. Mr. Payseno should read Bernard Reams, *The Health Care Quality Improvement Act of 1986: A Legislative History of Publ L. 99-66* (1990) to better understand that these reports are discoverable. This is no defect with my article.

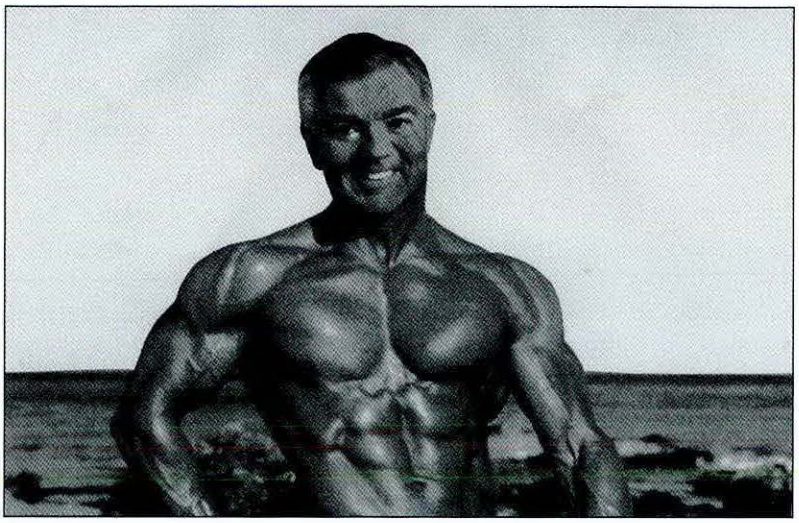
In general, physicians and health care providers are truthful and write records which accurately reflect medical care rendered. I made that clear in the article. Unless that were true, the system would collapse. When litigation ensues or where there is a bad result, providers even doctor their records. I wrote my LL.M. thesis on the topic of spoliation of evidence in medical-negligence litigation. The defense lawyers deny that spoliation of evidence occurs because if they knew about it, they could not ethically represent the client!

Finally, I spoke with my attorney, who spoke with Mr. Welden, and I received word back from my attorney that I did not need to make any particular mention of anything to Ms. Bennett. Must I forever introduce myself with a paragraph of past problems? I did not represent myself as either a licensed attorney or physician in my article. I made no particular representations about myself other than what was contained in the article. Attorneys in two other states have enjoyed my article without such an acid response. I submit that at some time people should recognize my efforts to change and that that time is upon us.

ELLIOTT B. OPPENHEIM
Newcastle

A Conversation Between Father and Son

An Almost-true Story



by **Tom Chambers**
WSBA President

Act III, Scene 3

A man in his early 50s, sitting at his kitchen table, with three-ring binders open and strewn about the table. Enters a young man in his early 20s with a full, well-groomed beard, shoulder-length dishwater blond hair that is pony-tailed with a rubber band under a well-worn Notre Dame baseball cap, wearing blue-collar work clothes and boots.

SON: Hiya Pops, how's it goin'?

FATHER: Hey T.J., what are you up to — making another raid on Mom's pantry?

SON: No, believe it or not, we have so much food that it goes bad, and we have to throw it away. But I'll take a beer if you can spare one.

FATHER: Sure go ahead. How's school going?

SON: Just got the grades Friday, one A and one B. I'm still not sure how many hours to take next quarter.

FATHER: Go for it and take a chance. Christopher Columbus did.

SON: Yeah, and Columbus is dead; he died penniless. Bill Gates dropped out of college, and he's a billionaire.

FATHER: (Just shakes his head.)

SON: Hey Pops, you're about through with your term as president; did you get everything done that you intended?

FATHER: Actually, the Bar is doing really well and going in the right direction. Mostly what I did was shepherd along good programs and give a decent funeral for some dying ones.

SON: Mind if I have another beer?

FATHER: Help yourself. We've really made great strides improving our disciplinary program. I hope to have the final rules adopted by the Supreme Court during my term. We also have one of the most open and inclusive bars in the nation. I also worked really hard to increase diversity.

SON: Hey! Coco Puffs! I haven't had Coco Puffs since I moved out. Do you mind, Dad?

FATHER: Help yourself. I believe in open dialogue, and I think that helped increase dialogue with the Supreme Court, minority bars, access-to-justice community, and a host of potential political allies. Are you pouring beer on your Coco Puffs?

SON: Got the idea from you. Remember when you poured bourbon on your corn flakes?

FATHER: I didn't think that I had told you about that!

SON: You didn't; you told Jolie, and Jolie told me.

FATHER: Oh anyway, the Bar is doing great, and we'll have terrific leadership next year.

SON: Come on, Dad, you're never satisfied with anything! What challenges do you see ahead for the Bar? By the way, do you mind if I have another beer?

FATHER: Go ahead. Well, I am concerned that we are going to slip backwards in the area of diversity. Affirmative action seems to be under attack everywhere.

SON: Some of the fellows at work aren't very keen on affirmative action.

FATHER: I know, but it's really important in our profession. Ideally, the ethnic mix of lawyers would exactly match the ethnic mix of the state's population. Ethnic minorities don't trust a system in which their culture and values are not fairly represented. Corporate clients are demanding diversity too. Another challenge is to match the lawyers we have with the unmet needs of middle and low-income residents. It's not that we have too many lawyers, it's that we are not matching the talent with the needs.

SON: Wow, chocolate chip ice cream. Do you mind if I have some?

FATHER: Ugh! A beer float! Where did you ever learn to drink beer and eat ice cream?

SON: From watching you.

FATHER: Then there's the dead horse lying in our living room.

SON: What?

FATHER: That's what I call the specialization issue. You see, in medicine, a GP wouldn't attempt to do brain surgery, but the Bar Association gives the same license to everyone.

SON: Nice try, Pops, but I don't see you as a brain surgeon.

FATHER: Wait! Think about it for a moment: if lawyers bungle cases, it could cost clients their fortune, their freedom, and in some cases, their lives. We keep ignoring the dead horse lying in the living room, but I'm afraid that after a while it's going to smell so bad we are going to regret pretending that it wasn't there.

SON: Got your point. What's the solution?

FATHER: Well for openers, we could offer skills training courses. The Young Lawyers offer a great Trial Advocacy Program. We could require that lawyers pass a specific skills-training program before going into court or handling a particular kind of case. You know, I haven't tried a criminal case in 20 years, and if I were to accept a criminal case, I should be required to take a three-day training course. The Bar should provide the course at nominal cost.

SON: Sounds good to me. You know, you're out of beer, Coco Puffs, and chocolate chip ice cream.

FATHER: Why am I not surprised?

SON: Tell Mom I stopped by.

FATHER: She'll know.

The End

Note: What about the picture? I've always wondered what I would look like with a great body. Have you wondered about how you would look?

MCLE Comity — An Idea Whose Time Has Arrived!

Dennis P. Harwick

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

A couple of years ago I wrote a column called "Regionalization of Some Bar Activities: A Good Idea or Another Trilateral Commission Plot?" Other than being a ridiculously long title, it was actually the beginning of something — a "Regionalization of Bar Activities" group that met periodically for a year or so to identify, discuss, and act on ideas that might make life easier for those lawyers who hold licenses to practice law in more than one northwest state.

We settled on simplifying CLE reporting requirements as our first challenge. Although our initial discussions focused on "reciprocity," it soon became clear that pure reciprocity was loaded with too many thorny political issues. As a practical matter, you can get almost everything offered in one state accredited in another state anyway, i.e., legitimate CLE courses you take in Idaho, Utah, Oregon, or even Hawaii will probably get credit from the Washington State MCLE Board. So we shifted our focus to "comity" — the concept that compliance in one state should be accepted as compliance in another state.

Lo and Behold! We did it! We got the four states participating in this group to approve comity regulations! On May 12, 1997, the Supreme Court of Washington entered an order approving a new provision in Washington's MCLE regulations, to-wit:

Regulation 118: Out-of-state Compliance

a) An active member whose principal office for the practice of law is not in the State of Washington may comply with these rules by filing a compliance report as required by APR 11.6(a) and Regulation 109 in which the member certifies that the member is subject to the CLE requirements of that jurisdiction and that the member has complied with the CLE requirements of that jurisdiction during the member's reporting period, providing that the Board has determined that the requirements established by these rules are substantially met by the requirements of the other jurisdiction.

b) The Board has determined that the CLE requirements in Washington are substantially met by the CLE requirements of the following other jurisdictions: Oregon, Idaho, and Utah.

c) This regulation shall apply to compliance reports required to be filed after June 30, 1997.

Realizing that there is some bureaucratic regulatory speak in there, let me translate:

> Guess what? If you are licensed to practice law in Washington, but have your principal office in Oregon, Idaho, or Utah, just worry about meeting the CLE requirements in that state, i.e., if you have a valid "CLE driver's license" in Oregon, Idaho, or Utah, you can just file a form confirming that with the Washington State Bar Association when it's your year to report CLE compliance to the WSBA.

That's it. It's that simple. It's not really reciprocity, just MCLE comity — an idea whose time has arrived!

Reflections on the Yugoslav War Crimes

by **Andrew Mann**

Suppose a war were going on in which horrible abuses had occurred and were still happening. You have been asked to prosecute those responsible. What do you do when: the very legitimacy of your court is challenged; there are no universally accepted definitions of many of the crimes under investigation such as inhuman acts, rape and torture; and you do not have access to the crime scenes?

Welcome to the world of Yugoslav war crimes. Creating any criminal prosecution and judicial system from scratch is hard. Making it reflect the diversity of the world's legal systems is even more difficult. Add pressure for immediate results due to the ongoing nature of the conflict and mounting financial difficulties for the UN which is responsible for funding, and you have an idea of the daunting problems facing those seeking justice for the victims through the establishment of the International Criminal Tribunal for the former Yugoslavia (ICTY).

A Difficult Birth [1]

The war resulting from the dissolution of Yugoslavia has been the scene of some of the most brutal acts to occur in Europe since the Second World War. In November 1991, more than 200 men were taken from Vukovar Hospital in Croatia and murdered at a farm in Ovcara. The medieval town of Dubrovnik was senselessly shelled even though it was essentially defenseless and served no military purpose. More than 150 Serbs disappeared from their homes around Gospic near the central coast of Croatia in December 1991. Then in August 1992, the news media broke the story of the notorious "detention" camps in Bosnia. [2] The accompanying pictures of skeletal prisoners brought back memories of Nazi concentration camps.

Reports of other human rights abuses began to attract attention. Non-governmental organizations, such as Amnesty International and Human Rights Watch Helsinki, took statements from rape victims and witnesses of mass murder. A special investigation team from the European Community estimated that up to 20,000 Muslim women in Bosnia had been raped, raising the specter of the use of rape as an instrument, rather than an incident, of war. Governments began providing reports from its representatives on the scene and from refugees to the U.N. in response to Resolution 771 (1992) that called for substantiated information relating to the violations of humanitarian law in the former Yugoslavia. The Security Council established a five-person Commission of Experts to examine this information. After analyzing more than 65,000 pieces of information, conducting field trips and organizing specialized studies, the Commission found overwhelming evidence of massive violations of international humanitarian law including willful killings, ethnic cleansing, rapes, destruction of cultural and religious property and mass murder.[3]

On May 25, 1993, the U. N. Security Council responded to these outrages and, acting under Chapter VII of the UN Charter, created the first international criminal tribunal since World War II.[4] The International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, later shortened to the ICTY, was born with an ambitious agenda. Its statute gave it jurisdiction over grave breaches of the 1949 Geneva Conventions, violations of the laws or customs of war, genocide and crimes against humanity.[5] Although the Nuremberg and Tokyo Tribunals served as precedents, there was no existing mechanism for investigating international crimes and prosecuting perpetrators. A new *ad hoc* tribunal had to be built.

The U.N. General Assembly elected eleven judges for the Tribunal on September 17, 1993, from 41 candidates. With only one judge permitted from an individual country, the eleven represented both civil and common law systems (or as the Tribunal calls them — inquisitorial and adversarial systems) from around the world — Australia, Canada, China, Costa Rica, Egypt, France, Italy, Malaysia, Nigeria, Pakistan and the U.S. They were sworn in on November 17 and immediately began their work, choosing Prof. Antonio Cassese, a noted Italian human rights and international law authority, to be President of the Tribunal. Rules of Procedure and Evidence were drafted,

then adopted by the judges in February 1994.[6] The stage was set, but where was the Prosecutor without whom there could be no investigation?

The search for a Prosecutor took longer than anyone suspected. Numerous candidates were suggested, but no one achieved the necessary consensus of the Security Council for a variety of reasons. Some felt the Prosecutor should not be from a Western or NATO country. One country refused to approve a candidate from a rival neighbor state. Another vetoed consideration of two of its nationals since they were members of the opposition

party. Finally, in October 1993, the Venezuelan Attorney General, Ramon Escobar-Salom, was offered the post. After expressing interest initially, he surprised the U.N. by declining the offer in February. Prior to withdrawing, however, he suggested naming as deputy prosecutor Graham Blewitt, the head of the Australian war crimes unit. U.N. Secretary-General Boutros Boutros-Ghali agreed, making Blewitt acting deputy prosecutor — the *de facto* head of the office in the absence of a Prosecutor. Without a budget and uncertain about the hiring practices to be applied to the ICTY, Mr. Blewitt appealed to countries for personnel and services to jump start the Office of the Prosecutor upon his arrival in The Hague.

The Pieces Begin to Fall Into Place

Reacting to Blewitt's appeal, Congress authorized the President to provide up to $25 million from previously appropriated funds to support the ICTY. [7] President Clinton directed the FBI, USAID and the Departments of State, Justice and Defense to draw down on their appropriations and detail a total of 21 Americans to the Office of the Prosecutor. Ultimately, Denmark, Finland, the Netherlands, Norway, Sweden and the U.K. joined the U.S. and donated personnel, called Experts on Mission, to the Tribunal.

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Despite considerable administrative obstacles, [8] Blewitt focused on the need to start investigations promptly. Investigators, analysts and attorneys began arriving in The Hague. Seminars were conducted to provide everyone with background information in Serbo-Croatian, Yugoslav history and the current conflict, international humanitarian law, previous war crimes prosecution efforts and the work and findings of the Commission of Experts. Working groups were set up to define the elements of the crimes over which the Tribunal had jurisdiction, to develop investigation standards such as how to handle exhibits and prepare witness statements, to prepare international requests for assistance, and to identify potential targets for investigation.

Judge Richard J. Goldstone of South Africa was named Prosecutor on July 8, 1994. He enunciated a two-prong strategy for the Office of the Prosecutor: seeking indictments against those who had personally participated in war crimes and holding accountable the political and military leadership that "knew or had reason to know of serious violations of international humanitarian law and failed to take action to prevent those violations, or to punish those who committed them." [9] All the pieces were now in place to move forward.

The Investigations

Investigations were conducted under severely limiting conditions. The war was continuing in Bosnia, making travel to the region dangerous or impossible. Almost a third of Croatia and more than 60% of Bosnia were controlled by the Serbs. Not all of the parties in the region were cooperating with the Tribunal. The Serbs in particular questioned the validity of the Tribunal and refused to provide information about events or access to witnesses and sights within the territory they held. In fact, Judge Goldstsone noted that the lack of cooperation by the Serb authorities in Belgrade, Knin (Croatia) and Pale (Bosnia) hindered the prosecution's efforts to investigate allegations of crimes committed against Serb victims.[10] Lack of access to crimes scenes was particularly problematic. For example, a witness might describe the layout of a prison, but investigators would not be able to visit the alleged crime scene, making collection of forensic and corroborrative evidence difficult. The magnitude of the crimes meant there were often multiple perpetrators, dozens of victims and scores of witnesses, many of whom had relocated around the world. "Yugoslav" refugees had been resettled from the U.S. to Malaysia to Pakistan to Sweden. Germany, itself, was home to more than 350,000 refugees. Each of the countries where witnesses and victims were located had to be approached for cooperation in order for ICTY investigators to operate within its jurisdiction. Questions such as the participation of local officials in taking witness statements or the correct procedure for removing physical evidence had to be resolved. In addition, the Tribunal has no independent power to arrest or search and seize evidence. Again, individual countries have to provide that assistance to the ICTY.

One of the first areas investigated by

the Office of the Prosecutor was the Prijedor region in northwest Bosnia, the subject of an extensive study by the Commission of Experts.[11] Before the war, Prijedor was an *opstina*, an administrative unit similar to a county, with more than 112,000 inhabitants, approximately 44% Muslim, 42% Serb, 6% Croat and 8% other. By mid-1995, it was estimated that less than 2,000 non-Serbs still lived in Prijedor — a terrible example of ethnic cleansing.[12] Starting in May 1992, Serb forces shelled Muslim areas in the city of Prijedor, forcing the residents to flee. Muslims and Croats were subsequently rounded up from throughout the area and sent to local prison camps, the most notorious of which were Omarska, Keraterm and Trnopolje. At these camps, prisoners were fed starvation rations once a day. Male and female prisoners were beaten, tortured, raped and sexually assaulted. Many were killed. Building on the information collected by the Commission of Experts, a team of 20 investigators, attorneys and analysts from the Office of the Prosecutor traveled to 12 countries over five months to examine evidence and interview victims and witnesses. This effort eventually resulted in the indictments of 21 individuals for crimes at Omarska[13] and 13 persons for atrocities Keraterm.[14]

Indictments — The Pace Quickens

On November 4, 1994, the Tribunal's first indictment was announced. Dragan Nikolic, commander of the Susica camp in eastern Bosnia, was indicted for grave breaches of the 1949 Geneva Conventions, violations of the laws or customs of war and crimes against humanity.[15] Among other allegations, he was charged with personally killing eight prisoners and torturing seven others, or in his capacity as a superior, permitting others to do so, as well as unlawfully imprisoning more than 500 civilians. Four days later, the Prosecutor asked the court to request the German Government to defer its prosecution of suspected Bosnia war criminal Dusan Tadic, whom the Germans held in pre-indictment custody because the ICTY was also investigating him. The first genocide indictment was handed down on February 13, 1995, against Zeljko Meakic, the Omarska camp commander. He was charged with complicity in the killing of

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non-Serbs with the intent of destroying in whole or in part the Bosnian Muslim and Bosnian Croat people as national, ethnic or religious groups. Twenty other individuals, including Tadic, were also indicted that day for the murders, rapes, tortures and other horrors at Omarska.

The Serb leaders in Bosnia and Croatia were indicted on July 24, 1995. Milan Martic, president of the self-proclaimed Serb Republic of Croatia, was charged with violating the laws or customs of war by ordering or allowing an attack on civilians in May 1995 with the firing of cluster bombs into the central part of Zagreb in retaliation for Croatian military action.[16] Radovan Karadzic, leader of the Bosnian Serbs, and Ratko Mladic, the Bosnian Serb military commander, were charged with genocide and crimes against humanity for the ethnic cleansing, detention camps, shelling of civilians, destruction of sacred sites, sniping of civilians during the seige of Sarajevo and other atrocities perpetrated against the civilian population of Bosnia. Karadzic and Mladic were indicted again in November for genocide following the fall of Srebrenica when several thousand Muslim men were executed and buried in mass graves.[18]

The three Yugoslav Army officers directly responsible for the Vukovar Hospital mass murders were also indicted in November, four years after the crime.[19] Not all of the Tribunal's indictees have been Serbs, however. The Bosnian Croats involved with the ethnic cleansing of the Lasva Valley in central Bosnia, including the vice president of the local Croatian community and the regional military commander, were charged on October 3 with grave breaches of the Geneva Conventions and violations of the laws or customs of war.[21] During that "campaign," the village of Ahmici was destroyed and its inhabitants massacred. Of the 89 bodies recovered, most were of women, children and elderly people.[21] The Bosnian Muslim deputy commander of the Celebici camp in southern Bosnia and the regional military commander were indicted along with others involved with the camp's operation for crimes against humanity, grave breaches and violations of the laws of war in March 1996.[22] The Bosnian Serb inmates at Celebici had been subjected to murder, torture, rape

and inhumane treatment. By September 1996, 17 indictments had been issued charging 74 individuals with a catalogue of war crimes.

Meanwhile, the Office of the Prosecutor has grown to more than 170 individuals from more than 25 countries. Investigations continue, and with the cease-fire brought about by the Dayton Peace Accords, the ICTY has greater access to crime sites and witnesses. Even the local Serb authorities are now showing more cooperation with the Tribunal than before (though they are still not arresting and handing over indicted individuals in the areas they control).

Trials & Legal Issues

In spite of these impressive achievements, many will not consider the Tribunal a success until it conducts trials and convicts those responsible for the conflict and its abuses, especially the political and military leadership — perhaps expecting a second Nuremberg. The ICTY's first trial commenced May 7, 1996. The defendant, Dusan Tadic, a bar owner and karate teacher in Prijedor, is charged with murder, torture, abuse and inhumane acts, beatings and sexual assault at Omarska and in the Prijedor area during mid/late-1992. In one of the most gruesome episodes of the war, he is alleged to have ordered one Omarska inmate to sexually mutilate another by biting off the other inmate's testicles. More than 100 witnesses are expected to be called during trial, more than 70 have already been called by the Prosecution and up to 50 are anticipated for the defense. The defense began presenting its case on September 10 and the trial is expected to wrap up sometime this fall. Trials of the "Celebici" defendants and the regional military commander of the Bosnian Croat forces involved in the Lasva Valley are expected to follow into the new year. The Tribunal has already received a guilty plea from one of the participants in the Srebrenica massacre.[23] Meanwhile, public presentations of the evidence supporting the individual indictments with witness testimony, Rule 61 hearings, have been and are still being held, resulting in international arrest warrants of the indictees.

As might be expected, the Tadic defense team launched an attack on the Tribunal's legitimacy, claiming, among other arguments, (1) the U.N. Charter did not give the Security Council power to create a judicial tribunal; (2) Tadic was more appropriately tried in Germany or Bosnia and national courts should have primacy over the Tribunal; and (3) the absence of an armed conflict in Omarska at the time of his alleged crimes meant the Tribunal lacked subject matter jurisdiction — in effect, there could not be war crimes if there was no war. The Appeals Chamber of the Tribunal considered these arguments in its October 2, 1995, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction.[24]

The Appeals Chamber found the Tribunal had been lawfully established by the Security Council. Article 39 of the U.N. Charter (Chapter VII) provided: "The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security."[25] The Chamber determined that an armed conflict had been taking place in the former Yugoslavia and this constituted a "threat to peace," under the settled practice of the Security Council, making the application of Article 39 appropriate. The Security Council then had broad discretion in deciding what course of action was best to take under Article 41 to address the situation. This included establishing a judicial tribunal, even though that was not expressly stated in Article 41.

The Chamber also found the Bosnian and German Governments had not only consented to the jurisdiction but had approved and collaborated with the ICTY in the case. Since the crimes covered by the Tribunal's jurisdiction had "a universal nature," the Chamber decided the Tribunal should have primacy over national courts. Finally, the defendant argued that the crimes he was alleged to have committed occurred at a time when there was not armed conflict in the Prijedor area — the conflict there was simply the assumption of political power by the Bosnian Serbs. In perhaps the most significant portion of its decision, the Appeals Chamber held:

> [A]n armed conflict exists whenever there is a resort to armed forces

between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, *international humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there.*[26]

The jurisdiction of the Tribunal was judicially approved at last, and the Prosecutor did not now have to establish the existence of fighting at every location during the time frame of every indictment.

The Appeals Chamber's decision on jurisdiction, however, did not answer all of the legal questions before the Office of the Prosecutor. For example, the Statute was silent on whether lesser-included crimes were automatically covered in a more serious crime. Did an allegation of murder — perhaps supported by a single witness and without a corpse or other forensic evidence, making proof difficult — cover manslaughter? Similarly, genocide is generally considered a type of a crime against humanity. If the Prosecutor failed to prove genocide in a case, but met all of the elements of a crime against humanity which had not been charged, would the defendant go free or could the Court convict him/her of the crime against humanity? The Office of the Prosecutor with its indictments of multiple counts appears to be taking a conservative position and is charging individuals under each possible crime, not relying upon the lesser-included crime concept to cover an incident. Other questions such as the admissibility of hearsay, the accused's right of confrontation versus a witness' need for confidentiality due to the ongoing nature of the conflict, the standard to be applied for indictments, and the Prosecutor's authority to extend immunity to prosecutors, have had to be addressed.

The issue of rape presented a special problem. There was evidence in the Yugoslav conflict of the "massive, organized and systematic detention and rape of women."[27] There were also documented examples of male rape.[28] If the Prosecutor relied upon the traditional definition of rape — nonconsensual, forcible vaginal penetration by a penis — building cases against perpetrators would be difficult with conviction problematic. Many victims would be unwilling to come forward if consent was a defense and many of the attacks would not be covered by such a restrictive definition. The Prosecutor opted for a more modern, gender neutral definition: rape is the forcible sexual penetration of another person or forcing another person to sexually penetrate another. Sexual penetration is defined to include the penetration, however slight, of any orifice of the body by a penis. Sexual penetration into the vulva or anus is not limited to the penis. Consent is not an issue.[29] The Court appears to have accepted this definition and prosecution of individuals on charges of rape continues.

Another Nuremberg?

As the first international criminal tribunal since World War II, the ICTY is often compared with the International Military Tribunal at Nuremberg, admittedly a hard act to follow. Nuremberg was established as a military court by the victorious Allied powers as part of a political solution for the defeat of Germany. The Tribunal had a staff in excess of 2,000 people with more than 100 prosecutors. There were four Chief Prosecutors, one from each of the chief Allies (France, the U.K., the U.S. and the U.S.S.R.). Likewise, the judicial panel consisted of a judge and alternate from each of the Allies. Four crimes were within the jurisdiction of the Tribunal: conspiracy to carry out aggressive war; crimes against peace; war crimes and crimes against humanity (atrocities against civilians). The maximum punishment was death and there was no right of appeal. Twelve of these initial defendants were sentenced to death, seven were sentenced to various terms of imprisonment and three were acquited. Twelve subsequent trials involving 185 high ranking Nazi officials and military leaders were conducted later, continuing through 1949. Lower level

officials were tried in national and special denazification courts. In one of its most controversial decisions, the Tribunal also heard evidence against organizations: the Nazi Party leadership, the SS, the Gestapo, the SD (security police), the SA (a paramilitary organization), the Reich Cabinet and the General Staff and High Command of the Armed Forces and found certain levels of the Nazi Party leadership, the Gestapo, the SS and the SD guilty of being criminal organizations.[30]

Like Nuremberg, the ICTY recognizes individual criminal responsibility and provides for the right of a fair trial for all defendants. ICTY proceedings are conducted before a judicial panel — there is no provision for a jury. Nuremberg did not allow an individual's official position to shield him from criminal responsibility or to mitigate his punishment. The ICTY Statute carries a similar prohibition.[31] The defense of superior orders is not available at the ICTY but may be considered for mitigation of punishment.[32] The same was true at Nuremberg. Crimes against humanity and violations of the laws or customs of war are within the ICTY's jurisdiction as they were at Nuremberg.

The Nuremberg Tribunal, however, focused only on major war criminals while the ICTY, a non-military court established by the world community, is investigating and prosecuting minor figures as well as more senior political and military leaders. The ICTY has only one Prosecutor. The ICTY does not have the power to arrest and has only a handful of its accused in custody while the Nuremberg Tribunal could rely upon the occupation forces to arrest its accused and had most of them in custody prior to indictment. The ICTY does not permit trials *in absentia*, there is a right to appeal and the maximum penalty is life imprisonment. The prosecutors at Nuremberg relied heavily upon documentary evidence. In its proceedings to date, the ICTY has relied primarily upon witness testimony. Nuremberg's jurisdiction extended to criminal organizations. The ICTY has jurisdiction only over natural persons.[33] Clearly, the ICTY is not Nuremberg. It can look to that experience for guidance, but the ICTY must blaze its own path.

For What Purpose?

It may be too early to determine whether the Tribunal has been "successful," but it is appropriate to ask whether it justifies such attention and resources. U.S. Permanent Representative to the U.N. Ambassador Albright offered five reasons why the ICTY is important: (1) the magnitude of the war crimes committed in the former Yugoslavia demanded an international legal response; (2) the threat of punishment for war crimes could save lives; (3) the tribunal would make peace in Bosnia easier by replacing collective guilt for the atrocities with individual responsibility; (4) the tribunal could deter potential aggressors; and (5) it strengthened international law. Tribunal President Cassese has echoed similar themes: international justice must discourage further crimes; those suspected of crimes must be brought to justice; and international legal action promotes reconciliation by replacing collective guilt.[35]

The real explanation, however, might be found in the words of Justice Robert Jackson, U.S. Chief Prosecutor at Nuremberg: "The wrongs we seek to condemn and punish have been so calculated, so malignant, and so devastating that civilization cannot tolerate their being ignored because it cannot survive their be

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Endnotes

[1] *See generally* Roy Gutman, *A Witness to Genocide* (1993); Ed Vulliamy, *Seasons in Hell: Understanding Bosnia's War* (1994).

[2] Letter from the Secretary-General to the Pres. of the Security Council transmitting the Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992), U.N. Doc. S/1994/674 (1994) (hereinafter Final Report). *See also* Interim Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992), Annex I, U.N. Doc. S/25274 (1993) (hereinafter Interim Report).

[3] Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., U.N. Doc. S/Res/827 (1993).

[4] Statute of the International Tribunal, Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808, U.N. SCOR, 48th Sess., Annex, arts. 2, 3, 4 & 5, U.N. Doc. S/25704 (1993) (hereinafter ICTY Statute).

[5] Rules of Procedure and Evidence of the International Tribunal, U.N. Doc. IT/32 (March 14, 1994), *adopted* Feb. 11, 1994, *entered into force* March 14, 1994, *reprinted in* 33 I.L.M. 484 (1994) (hereinafter Rules of Procedure and Evidence).

[6] Sec. 548(e) of the FY-94 Foreign Operations Appropriations Act, Pub. L. No. 103-87, 107 Stat. 960 (1993).

[7] The first contingent of American "experts" arrived in The Hague, Netherlands at the end of May 1994. There were then less than 12 staff members in the Prosecutor's Office; offices and the courtroom — within a wing of an insurance building — were under construction; the few phones and computers available had to be shared in a large open space; and there was no library or computerized research facilities. The UN had not yet finalized a budget for the ICTY which complicated spending decisions. When an interim operating budget was approved, funds for translators (the ICTY has two official working languages — English and French — while most of the witnesses speak Serbo-Croatian) and travel were limited.

[8] ICTY press release by the Prosecutor (Feb. 13, 1995).

[9] ICTY press release by the Prosecutor (July 25, 1995). *See also* Letter from Antonio Cassese, Pres. of the ICTY, to the Pres. of the Security Council (July 11, 1996).

[10] Annex V, *Final Report*, *supra* note 2.

[11] *Prosecutor v. Karadzic*, U.N. Doc. IT-95-5-I, Annex A, at D224 (July 24, 1995).

[12] *Prosecutor v. Meakic*, U.N. Doc. IT-95-4-I (Feb. 13, 1995); Prosecutor v. Tadic, U.N. Doc. IT-94-1-I (Feb. 13, 1995). The indictment against Tadic was subsequently amended twice, on Aug. 25, 1995, and Dec. 14, 1995. The text of the final amended indictment is contained at *Prosecutor v. Tadic*, U.N. Doc. IT-94-1-T, at 7562-7570.

[13] *Prosecutor v. Sikirica*, U.N. Doc. IT-95-8-I (July 19, 1995).

[14] *Prosecutor v. Nikolic*, U.N. Doc. IT-94-2-I (Nov. 4, 1994).

[15] *Prosecutor v. Martic*, U.N. Doc. IT-95-11-I (July 24, 1995).

[16] *Prosecutor v. Karadzic*, U.N. Doc. IT-95-5-I (July 25, 1995).

[17] *Prosecutor v. Karadzic*, U.N. Doc. IT-95-18-I (Nov. 15, 1995).

[18] *Prosecutor v. Mrksic*, U.N. Doc. IT-95-13-I (Nov. 7, 1995).

[19] Prosecutor v. Kordic, U.N. Doc. IT-95-14-I (Oct. 3, 1995).

[20] Human Rights Watch Helsinki, *Bosnia-Hercegovina: Abuses by Bosnian Croats and Muslim Forces in Central and Southwestern Bosnia-Hercegovina*, Sept. 1993, Vol. 5, No. 18, at 3.

[21] *Prosecutor v. Delalic*, U.N. Doc. IT-96-21-I (March 20, 1996).

[22] *Prosecutor v. Erdemovic*, U.N. Doc. IT-96-22-I (May 22, 1996).

[23] *Prosecutor v. Tadic*, U.N. Doc. IT-94-1-AR72 (Oct. 2, 1995).

[24] U.N. Charter art. 39.

[25] Tadic, *supra* note 24, at para. 70, at 6452. (Emphasis added.)

[26] *See* Final Report and Interim Report, *supra* note 2.

[27] *See* Final Report, *supra* note 2; *Sexually Abused Men in Prison Camps Feel Condemned to Silence*, AP (Jan. 29, 1996).

[28] Prosecutor's Pre-Trial Brief, *Prosecutor v. Tadic*, U.N. Doc. IT-94-I-T, at 7843 (April 10, 1996). *See also* Rules of Procedure and Evidence 96, *as amended*.

[29] For more information on the Nuremberg Tribunal, *see* Tedford Taylor, *The Anatomy of the Nuremberg Trials* (1992); Joseph Persico, *Nuremberg: Infamy on Trial* (1994).

[30] ICTY Statute art 7, para. 2.

[31] *Id.* at para. 4.

[32] For a more detailed comparison of the two Tribunals, see ICTY Bulletin No. 5/6 (May 24, 1996).

[33] Address by Amb. Madeleine K. Albright, U.S. Permanent Representative to the U.N., at the U.S. Holocaust Memorial Museum (April 12, 1994), *in* Dep't. St. Dispatch, April 18, 1994, Vol. 5, No. 16, at 210-211.

[34] Address by Antonio Cassese, Pres. of ICTY, to the UN General Assembly (Nov. 14, 1994), *reprinted in ICTY 1994 Yearbook*.

[35] Opening Statement of Justice Robert Jackson, U.S. Chief Prosecutor, to the International Military Tribunal at Nuremberg (November 20, 1945), in 2 *Trial of the Major War Criminals Before the International Military Tribunal* 98-99 (1947).

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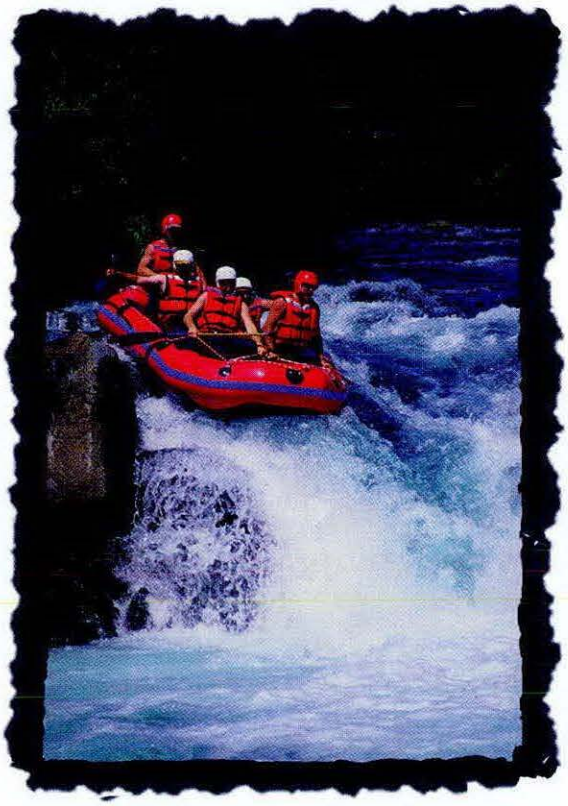
***Andrew Mann**, a U.S. Department of State Foreign Service Officer, is currently a Pearson Fellow at the Jackson School of International Studies, University of Washington, teaching courses in human rights, international law and the Yugoslav conflict. From May 1994-1996, he served as an Expert on Mission in the Office of the Prosecutor, International Criminal Tribunal for the former Yugoslavia (ICTY). The views expressed here are his alone and do not necessarily reflect those of the U.S. Government, the Office of the Prosecutor or the U.N.*

For a description of the creation of the ICTY, see Iain Guest, On Trial: The United Nations, War Crimes and the Former Yugoslavia *(1995) (unpublished manuscript with the Center for Policy Analysis and Research on Refugee Issues).*

Navigating the Waters of Jury Selection



"Why do personal prejudices constitute a just cause of challenges? Solely because the individual who is under their influence is presumed to have a bias on his mind which will prevent an impartial decision of the case, according to the testimony. He may declare that notwithstanding these prejudices he is determined to listen to the evidence, and be governed by it, but the law will not trust him. . . . He will listen with more favor to that testimony which confirms, than to that which would change his opinion."

Justice John Marshall, 1807

by Commissioner **Patricia Hall Clark**

Voir dire and the right to an impartial jury is intricately woven into the fabric of the American justice system.[1] There are two competing, yet often unacknowledged, purposes of jury selection. The probative function, the only function recognized under the law, is designed to elicit information from jurors that would allow the attorneys to formulate their "for cause" and peremptory challenges.

The questioning process for the probative function is conducted to ensure that the final panel includes only impartial jurors. But every attorney who has ever picked a jury or prepared a case for jury trial understands that the second function, called the "didactic function," may be the most crucial for the ultimate outcome of the case. It is through this function that attorneys get their first opportunity to begin getting their case in front of the jury.

The Purposes of Voir Dire

Advocates are therefore advised to take full adversary advantage of the examination. For example, one jury selection manual for criminal defense lawyers lists the following twelve purposes of voir dire:

1. To move the jury as a group;
2. To discover prejudice;
3. To eliminate extreme positions;
4. To discover "friendly" jurors;
5. To exercise "educated" peremptories;
6. To cause jurors to face their own prejudices;
7. To teach jurors the law of the case;
8. To teach jurors the important facts of the case;
9. To expose jurors to damaging facts in the case;
10. To develop personal relationships between lawyers and jurors:
11. To expose opposing counsel; and
12. To prepare for summation. [2]

The purposes set out in this list clearly demonstrate that the advocate's emphasis is on the didactic function. But the courts are increasingly focused on the more limited probative function. The tension between these two functions is played out daily in courtrooms where the judge wants to focus on topics that have potential for developing valid challenges while trial attorneys want to accomplish all twelve of the goals set out above.[3] A search of recent literature reveals that this tension is generating a lively discussion about the value of continuing the voir dire process and, if continued, who should handle or control the inquiry.

This same tension and increasingly crowded dockets prompted Washington courts to adopt a variation of the traditional struck jury selection method in an effort to retain attorney-driven voir dire, yet streamline the process. In the next decade, successful trial lawyers (civil and criminal) must learn to strike a balance between the probative and didactic functions while still providing the client with vigorous representation. To perform that balancing act, the attorney should first know what tools are available in the voir dire marketplace, how to prepare a case for voir dire, how to elicit information and provide information to the panel, and what to do with the information/answers you get from jurors.

The Struck Jury System

Struck jury selection is a relatively new method of selecting a jury using a talk show format. Although new to Washington, this method has been used for a long time in other jurisdictions. It is essentially a simultaneous voir dire of the entire panel, not just those in the box.

Judges like the struck jury selection method because it controls the amount of time the attorneys spend on voir dire, makes more efficient use of the Court's time, and allows a more accurate estimate of the time which needs to be allotted to jury selection.

With the struck jury selection system, the entire jury panel is sworn in at once. The clerk randomly draws the jurors' numbers and seats them in the jury box and on the benches. The jurors are given new numbers, for example, 1 through 30. The Court then addresses general questions to the entire panel. The jurors respond, giving their new numbers. Each attorney then has an agreed amount of time to address questions to the entire panel.

The total time allotted for voir dire is usually divided into four segments. If the parties have agreed upon two hours of voir dire, for example, the Plaintiff questions for 30 minutes, then the Defendant has 30 minutes, etc. During their allotted time, an attorney may address questions to any member of the panel. When the questioning is completed, each side exercises its challenges. This works differently depending upon the judge and the agreement of counsel. Some judges require "for cause" challenges out of the presence of the jurors; some allow these challenges in the presence of the jurors. Alternating challenges, the next numbered juror may move into the vacant seat in the box. Some judges do not allow any jurors to move into the box until all challenges have been used.

The court rules and the law governing jury selection are not altered by use of the struck jury selection process. Some judges, however, allow greater latitude in questioning. Additionally, the system allows the attorneys to elicit more information from jurors. With the spotlight removed from individual jurors, they feel less intimidated about expressing their opinions. Attorneys can also see how the group interacts: who the talkers are, who has strong opinions, and how jurors handle disagreement. Further, attorneys are able to establish a rapport with the panel and have the opportunity to take charge and set the tone of voir dire. It is also an excellent opportunity to establish your credibility and professionalism.

Tips

Some tips for using the struck jury selection method include:

1. Be prepared. Know the strengths and weaknesses of your case. As you become more comfortable with the method, you will be able to play off of those aspects during voir dire. You have to know the theme of your case in order to project it to jurors.

2. Organize. Develop a method for keeping track of the information you are getting from the jurors. And do your math: Remember to add the number of "for cause" challenges. Count through the panel to the last possible juror who could be seated if all the challenges were used. Be sure to talk to each of these people.

3. Use open-ended questions and encourage jurors to interact with each other. You can use the process to exploit the weaknesses and strengths of your case and translate legal concepts into everyday experiences.

4. Remember the basics of jury selection. Never embarrass a juror; if it happens inadvertently, immediately apologize. Never laugh at a juror, although it is okay to laugh at yourself or with a juror. And avoid relying on stereotypes based on race or ethnicity.

"Be prepared . . . Organize . . . Use open-ended questions . . . Never embarrass a juror . . ."

Successful use of the struck jury selection process should leave you feeling energized, not lulled to sleep like the traditional method.

After all, how many times can you ask, "What kind of books do you read?" or "What is your favorite TV program?"

◆

Endnotes:

[1]The right to conduct voir dire was one of the many underlying issues of the Colonists' revolt against the British Crown. One of the complaints against British rule in the colonies was that during criminal trials of political opponents "the policy of the Crown [was] to secure jurors favorable to the Crown . . . and to deny defendants an effective opportunity to ferret out biased jurors." Gutman, "The Attorney Conducted Voir Dire, a Constitutional Right," 39 *Brooklyn Law Review*, 290, 294 (1972).

After the American Revolution, the voir dire procedure returned to the colonial system, which allowed attorneys to question jurors for bias and prejudice. See, e.g., *U.S. v. Burr*, 25 F. Case 49 (C. C. Va.

1807) (No. 14692g) (lengthy discussion of voir dire). Over time, the process has become increasingly sophisticated, not because lawyers have become more attuned to human nature or because law schools are focusing more resources on teaching jury selection, but because the most significant changes are being generated by non-legal professionals.

From civil rights and feminism to Vietnam and Watergate, the 1960s and early 1970s brought dramatic changes on American culture. Few outside the world of litigation realize that those changes reached into courtrooms and altered jury selection. Traditionally, lawyers relied on their questions and self-created questionnaires to determine a potential juror's prejudice and the extent and intensity of those prejudices. But things are changing. Increasingly, even in ordinary cases, litigators turn more and more to jury consultants who "use a variety of tools in studying juror behavior . . . including community attitude assessments, focus groups, trials, simulations, pretrial investigations, supplemental jur[ies]." "Jury Consultants in Voir Dire," *Law & Psychology Review*, Vol. 14:167, 176; Roberts, "Using Consultants in Your Trial Practice," *The Trial Practice Newsletter*, March 1988.

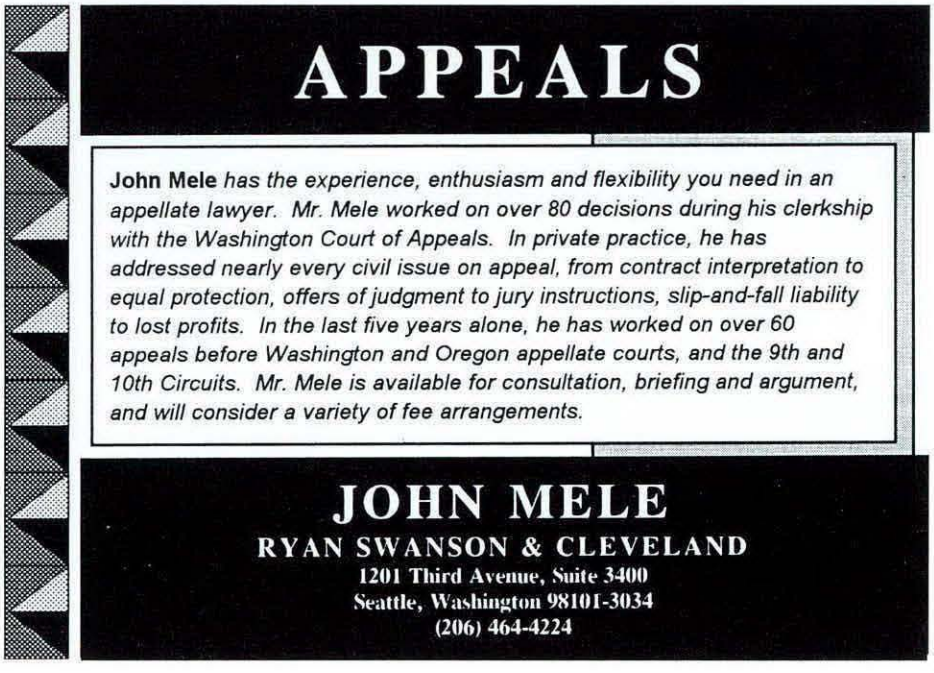
[2]Otto G. Obermaier, *Judge Conducted Voir Dire*, Litigation and Administrative Practice Course Handbook Series — Litigation (Practicing Law Institute, 1987).

[3]In the Fall of 1970, jury science made its first appearance when J. Edgar Hoover was locked in a battle with an anti-war group called the "East Coast Conspiracy to Save Lives" led by two well-known Catholic priests, Philip and Daniel Berrigan. When the Berrigans were indicted and set for trial, the defense team was very concerned that the highly political and somewhat violent nature of the allegations against the Berrigans would preclude them from selecting an impartial jury panel. Anti-war activist and sociologist Jay Shulman believed the "scales of justice were by no means balanced in this case." 31 *Am. Criminal Law Review* 1225 (1994). Using his knowledge of human behavior and group dynamics, Shulman developed first his composite of the ideal juror and second the voir dire tools to determine who in the venire fit that ideal. Ultimately, the jury hung on all of the most serious charges. As word spread about the success, modern jury science and jury consultation were born. Now it is a multi-million dollar a year industry that if not controlled may permanently take litigation out of the hands of lawyers.

Consultants, with some justification, tout the results they obtain by developing and utilizing some combination of the following tools to enhance the likelihood of impaneling a favorable jury:

1. Community Attitude Surveys: A consultant develops and administers a questionnaire which is designed to measure or determine the opinion of the community from which a jury will be drawn.
2. Focus Groups: Small groups are selected that reflect the potential jury panel. Attorneys present theories, openings, closings and trial issues to this group to test how the focus group reacts.
3. Mock Juries: A small group of citizens is selected based on their demographic similarity with the impaneled jury. Attorneys often present the essentials of the entire trial to this group and have them deliberate to a verdict.
4. Shadow Juries: This group of "juror wannabes" actually sit in the courtroom during the trial. They are available for immediate consultation about the impact of the daily events of the trial.
5. Galvanic Skin Response Machines: One highly paid consultant actually attaches these probes to the mock or shadow juror to determine of they are responding truthfully to the questions.
6. Trial strategists: Several jury consultants are actively involved in every aspect of the trial from developing a winning case theory to preparing the witness for testimony.

The use of jury consultants, already commonplace in high profile cases, is occurring more frequently with run-of-the-mill litigation. It will be a factor in effective jury selection in the next century.



Prior to being appointed as a Constitutional Court Commissioner for King County Superior Court, ***Patricia Hall Clark*** *spent six years as a deputy prosecutor in King County and two years teaching as a clinical law professor at Seattle University.*

Summer Solstice, 1997, in Yakima

The Board of Governors met in Yakima over the June 20-21, Summer Solstice weekend, a meeting held concurrently with the Access to Justice Conference and the Bar Leaders' Conference. The siting of all three events at one location at the same time allowed for a cross-pollination of ideas and networking opportunities for all involved.

ACCESS TO JUSTICE PROJECTS

Members of the Board appeared to reach a zenith of interest and a nadir of action around issues affecting Access to Justice projects. Susan Daniel presented an extensive report on the proposed WSBA "Tele-Lawyer" hotline, designed to provide low-cost legal services by telephone to the lower-middle-income public. The service would cost three dollars per minute or $25 for 15 minutes, and be provided by WSBA members. The Board inquired as to the specific nature of the WSBA responsibility to promote the hotline. Of obvious concern to several Board members was whether the Bar Association would be expected to provide costly marketing promotions, and whether a failure to commit WSBA funds to such promotions would be what Governor Theiler referred to as a "deal-breaker." Daniel suggested several inexpensive methods of promotion which might be appropriate: word-of-mouth advertising, sharing the costs of training personnel, marketing tools such as printed Rolodex cards, etc.

Judith Andrews of the King County Bar Association brought to the Board's attention several concerns, including coordination of Tele-Lawyer with local bar programs, coordination of Tele-Lawyer with the CLEAR program and quality control concerns. Governor Crossland, finding the malpractice insurance issue to be significant, suggested that the Board should deal with all the issues "comprehensively, not piecemeal." The Board passed a resolution (proposed by Governors Powell and Whitson) stating that the Board approved the Tele-Lawyer concept in general, but would form an ad hoc committee (to include local bar representatives, Board members and representatives of the Access to Justice community) to look at ways of resolving the remaining financial and turf issues and report back to the Board in October.

Carroll Gray presented a proposed revision of the pro bono service rule, RPC 6.1, recommended by the Pro Bono and Legal Aid Committee, which recommended that every Washington lawyer render at least 30 hours of pro bono services each year, and would allow for voluntary reporting of pro bono hours on members' annual dues statement. Lawyers rendering a minimum of 50 hours of pro bono service each year would receive a recognition award for such service from the WSBA. Governor Theiler praised the proposed rule as a "good tool for setting up a culture where lawyer peers expect pro bono services and candidates for judicial positions are questioned as to the extent of their pro bono work." Governor Crossland wondered aloud as to whether there would be a financial impact as a result of adding voluntary reporting procedures. Governor Whitson noted that pro bono service should be done without the expectation of an award, clearly not approving the concept of recognition awards.

Governor Lee, who was unable to attend the meeting in person, wrote other Board members about his concerns: "Each governor can find members in their district who are struggling financially, emotionally, spiritually and in other ways. To add an additional responsibility onto their plate doesn't make sense. To those lawyers who are challenged and struggling, how would this benefit them, the profession and the citizens of Washington?" Joan Fairbanks, WSBA Access to Justice Manager, reported that states in which voluntary reporting has been implemented have seen an increase of attorneys doing pro bono work. Paul Stritmatter of the Access to Justice Board urged the Board to adopt the rule, stating that lawyers have a special privilege in practicing law, and that to make the judicial system available to everyone, lawyers as a group must encourage volunteerism. He then went on to suggest that "the number one motivator of volunteerism is recognition." After Governor Ehrlichman suggested a rewrite of the rule which eliminated both the minimum suggested hours of pro bono service and recognition awards, Governor Theiler tabled further discussion, and the pro bono rule amendments orbited into history.

A bright light on the Access to Justice horizon in front of the Board was a report by Yvette War Bonnet on the work of the Pro Bono and Legal Aid Committee. The Committee is developing a page on the WSBA website which will bring the opportunity to disseminate substantive legal information to legal service providers around the state.

TRADE NAME RULE BROADENED

The Board did, however, adopt the recommendation of the Rules of Professional Conduct Committee to amend RPC 7.5 (a) to allow lawyers to use trade names as long as they are truthful and not misleading. The RPC Committee felt that the expansion of multi-state law firms into Washington from states which allow trade names, the expanding law and application of lawyer advertising and commercial free speech and the inherent inconsistency and unfairness of the former rule mandated the amendment of the rule.

INSURANCE COVERAGE REVISITED

WSBA insurance broker Dennis Westover reported on existing and proposed insurance coverage specifics. The Board voted unanimously to increase the Board's umbrella limit by an additional $1 million and increase D&O coverage to $5 million. Governor Perey commended Westover for obtaining better coverage at a lower price over the past two years.

COURT RULES COMMITTEE SHINES

Joel Delman reported on the work of the Court Rules and Procedures Committee during the 1996-1997 year, which focused primarily on the Rules of Appellate Procedure (RAP) and the Rules for Appeal of Decisions of Courts of Limited Jurisdiction (RALJ). In addition, the Committee worked hard on suggested changes to GR 9 (the rule on rulemaking), a proposed new GR 20 (on the handling of exhibits) and proposed changes to the Infraction Rules to accommodate computerized parking tickets. The Committee has scheduled a meeting on June 30 to

review several RAP proposals that it has not had time to address and to discuss proposed new or amended rules relating to capital cases published by the state Supreme Court this year.

DISCIPLINE COMMITTEE REPORT

The Board adopted a proposal by Governor Ehrlichman to create for a one-year trial term a Discipline Coordinating Subcommittee consisting of three members to assist the Board in performance of its oversight role in the cleanup of the backlog of disciplinary cases. This committee will review the status of disciplinary cases, meet with ODC staff and the Disciplinary Board to determine the cause of delays and report to the Disciplinary Committee, Chief Disciplinary Counsel and the Disciplinary Board Chair and Vice-chair.

IMPLEMENTATION OF JUDICIAL INFORMATION SERVICES RULES

Court of Appeals Judge Kenneth Grosse reported to the Board on the consolidating of court information databases. As requests for information regarding court files increase, there is more concern regarding privacy issues and the tension between constitutional liberties and privacy expectations. At this point, the databases only provide information which could be accessed if requesters physically went to courthouses and manually found the information.

HOUSE COUNSEL/ EMERITUS RULE

The Board unanimously adopted changes to the house counsel rule presented by former WSBA President Ron Gould and Theresa Szeliga. The rule will allow lawyers admitted to other state bars to practice law exclusively as in-house counsel in Washington without having to take the Washington bar exam.

The Board also adopted an emeritus counsel rule which would allow retired members of other state bars to practice in Washington as emeritus counsel to qualified legal services providers without having to take the Washington bar exam.

LASER PROJECT CONTINUES SKYROCKET

The Board passed a resolution presented by Marla Elliott to continue to provide in-kind support to the LASER Project, including the use of Association facilities. The resolution also included a promise to continue to encourage the efforts of WSBA members as LASER Project leaders, volunteers working in schools and with children and as financial contributors to the LASER project.

COMMUNICATIONS AD HOC COMMITTEE FORMED

The Board voted to "sunset" the Bench-Bar-Press Committee and rename the Public Relations Committee the "Professionalism Committee" to more accurately reflect their focus on client relations in recent years. A one-year ad hoc committee was formed in an effort to establish a statewide integrated communications plan.

BAR NEWS
AD HOC COMMITTEE FORMED

After a presentation by Carol Angel, special projects editor for the *Washington Journal*, the Board voted unanimously to form an ad hoc committee to develop a more specific proposal for a stand-alone publication format similar to the present format of the *Bar News*.

BUDGET AND AUDIT COMMITTEE REPORT

Governor Williams led the review of the Year-to-date Financial Report, available through April 1997, and requested input regarding the fourth draft of the Fiscal Year 1998 proposed WSBA budget.

AMERICAN BAR ASSOCIATION DELEGATE REPORT

Tom Fitzpatrick lambasted media reports of the annual ABA convention as being "not accurate" and urged the Board to be more specific as to reporting expectations of the Board when appointing delegates to the ABA. The Board suggested that Fitzpatrick draft reporting requirement guidelines and report back to the Board.

The Board voted to appoint Governor Whitson as an ABA Delegate to serve for two years, with the understanding that the issue of appointment will be revisited next year.

Reminder:

WSBA Annual Meeting
September 12
2 PM
WSBA offices
2101 4th Avenue
4th Floor
Seattle

For more information:
(206) 727-8244

FYI... State Bar Highlights

Anne Erickson, left, wife of the late Joseph P. Erickson, of Kennewick, accepted his Award of Merit at the Annual Awards Luncheon in Yakima on June 21. With her are their children, Kristen, John and Matt (not shown). Joseph Erickson was honored for his efforts in helping the Bar "make the technological leap into the 21st Century" with the bulletin board system and Computerization of Law Division. He also helped establish the Bar's General Practice Section.

Twenty-two members of the WSBA hit the 50-years of practice mark, and were awarded certificates at the Annual Awards Luncheon. From left to right: Samuel Westley Peach; Philip S. Brooke, Jr.; Douglas A. Wilson; Paul Edward Sinnitt; Charles Ford Warner; Kenneth J. Selander; John Strother Moore, Jr.; Kenneth A. MacDonald; Lyle R. Schneider; Hon. Willard A. Zellmer; Margaret Gaskill Sandelin; Hon. Sidney C. Volinn; WSBA President Tom Chambers. Those not present: Gordon S. Clinton; Hon. Glenn E. Correa; Hon. Marshall Forrest; Lewis Z. Griswold; Stanley N. Kasperson; Arlie G. Masters; Leon Thomas Noble; William P. Roach; Richard Stephen White; Frederick E. Woeppel.

Specially Priced WSBA CLE Program for Admittees of 1994-1997

WSBA CLE, in conjunction with the Law Practice Management Section, is producing a unique program only for lawyers who were admitted to the Washington bar from 1994 to 1997. *Winning Strategies for the Successful Private Practitioner* will be held on September 19 at the Crowne Plaza in Seattle.

It's unique in its subject — a complete review of not only a successful style of practice, but every strategy a new private practitioner would need to set up a successful practice in any city, in any part of the state, and in any field of law.

It's unique in its pricing — just $35 for a full-day, 6.75 CLE credit course. All attendees will also receive coupons for substantial savings on CLE seminars, desk-books, audio/video tapes and coursebooks.

It's also unique in its presentation, because in addition to the live seminar in Seattle, the program will be presented via a live interactive TV broadcast to lawyers in Vancouver, Spokane and Pasco. Live videoconferencing means that participants at each site can see, hear and participate with the faculty and attendees at the other sites as well.

"It's the next best thing to being there," according to CLE Director Tom Russell.

This combination of format, topic and audience is not only unique for this state, it's the first of its kind in the nation, Russell says.

For further details, call Jerrie Bennett at (206) 727-8211. ◆

WSBA Annual Business Meeting Slated for September 12

The Annual Business Meeting of the Washington State Bar Association will be held at 2 p.m. Friday, September 12 at the Bar offices at 2101 Fourth Avenue — Fourth Floor, in downtown Seattle.

President Tom Chambers will pass the gavel to President-elect Mary Fairhurst, and resolutions that have been filed will be discussed and voted upon. Two resolutions on reciprocity were filed and the entire text published on page 29 of the July 1997 *Bar News*. Written responses and comments to the proposed resolutions should be sent to the attention of the WSBA Executive Director, 2101 Fourth Avenue — Fourth Floor, Seattle, WA 98121-2330, by August 29, 1997. The WSBA Resolutions Committee will consider the resolutions on September 4 to make a recommendation to those attending the Annual Business Meeting. ◆

How Many Lawyers Does it Take to Sit For the Bar Exam?

By the time you read this, nearly 1,000 potential lawyers will have taken the Washington State Bar Exam at the Meydenbauer Center in Bellevue. As of July 17, 991 people had registered to sit for the July 29-31 exam, the largest number ever. The previous record was 962 applicants in 1993.

After this issue of *Bar News* went to press, applicants still had time to transfer to another exam at a later date, so the 991 number may have been reduced slightly.

Averaging the pass rate for the last two years at 76.2 percent, we can expect another 755 lawyers to enter our ranks in a few months. The names of all new admittess will be printed in the November issue of *Bar News*.

The winter bar exam will be February 24-26, 1998, at the Meydenbauer Center in Bellevue. ◆

At its mid-year meeting in Chelan on May 8-10, the WSBA Young Lawyers Division collected donations for the Lake Chelan Food Bank as part of their Mid-Year Service Project. Kristin Hickman Ollenbrook, WYLD Southwest Washington District Trustee, reports that mid-year attendees donated $215 to the food bank.

1998 ADR Directory to be published

The WSBA ADR Section and the Mediation Consortium of Washington State will publish the 1998 edition of the "Directory of Arbitrators, Mediators, & other Dispute Resolution Providers" for Washington State. The Directory will serve three main goals: to provide consumers with relevant, useful and up-to-date information; to provide a resource for networking and cross referrals by ADR providers; and to educate the public about ADR services. This year, it will also incorporate the listings in the Eastern Washington Directory of Mediators and will add a new geographic index. This edition will replace and update the 1997 directory that was distributed to law libraries and courts throughout the state.

Organizations or individuals can choose to be listed as either Mediators, Arbitrators or other service providers (training, consulting, etc.), or may be listed under more than one category. A form and entry fee will be required for each entry. New this year is the option for organizations to include their members in the geographic index. The entry fee will be used to defray the cost of publication and distribution to the courts and law libraries.

Individuals and organizations desiring to be included in the Directory must complete an entry form which can be obtained by sending your request with a self-addressed stamped envelope to: Sheri Borgford, WSBA Sections Liaison, 2101 4th Avenue — Fourth Floor, Seattle, WA 98121-2330. ◆

The Office of the Administrator for the Courts announces that the Pattern Forms Committee has released the 1997 updates to the Domestic Relations Forms. For an order form, contact Bradley J. Hillis at (360) 357-2128, or brad.hillis@courts.wa.gov

LASER Gets Board of Governors Support

The WSBA Board of Governors, at its June 21 Access to Justice Conference, unanimously passed a resolution in support of the LASER Project (Lawyers and Students Engaged in Resolution). In this resolution, the governors recognize the valuable work of the LASER Project and resolve to continue to assist LASER through in-kind support. The Board of Governors urges WSBA members to become involved by becoming volunteers and financial contributors to the LASER Project.

LASER's Board of Directors is always looking for ways to make the program more accessible and understandable to the student population it serves. In keeping with this goal, they are now offering a board seat to 18-year-old Kristine Wolfla. This ambitious young woman served two years as a peer mediator with LASER at Ballard High School and wrote a report on Peer Mediation detailing why she thinks it works so well. She delivered an oral presentation of her report for the Sullivan Leadership Scholarship Competition. She received Seattle University's Presidential Scholarship, worth $42,000.

Wolfla plans to attend Seattle University this fall and create a peer mediation program. Wolfla has asked the board to give her some time to consider their offer of a board position, citing concerns about not having the time to commit to the position while striving toward her other goals.

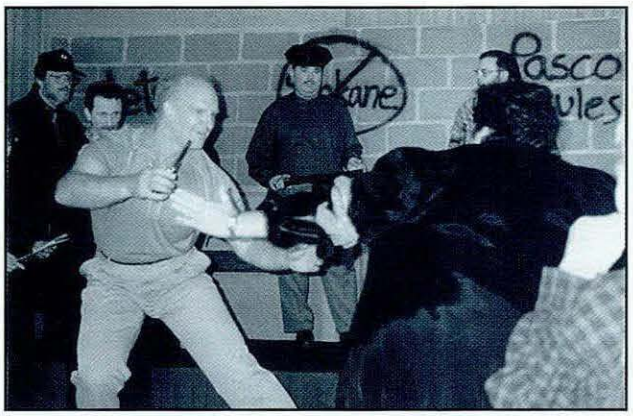
Wolfla is the first student ever offered a position on the board. In her report Wolfla said, "This program (LASER) has significantly reduced the tension among students, resolved numerous disputes, and prevented acts of aggression and violence. Because I have been a peer mediator for two years, I have seen the positive effects of this program, and I hope to expand its influence by proposing a service project for Seattle University that is related to peer mediation."

Continued on page 36

Access to Justice and WSBA Bar Leaders Conferences Held Jointly in Yakima

Partnerships for Justice, Washington state's second annual Access to Justice Conference, was June 20-22 in Yakima. Nearly 200 people attended the event, which provides the only opportunity for all the members of this state's Access to Justice Network to gather in one place for training, networking and planning for equal justice.

Participants included four members of the Washington State Supreme Court, judges from the federal, state appellate, superior and municipal court benches, members of the WSBA Board of Governors, local/minority & specialty bar associations presidents, private attorneys, representatives from specialized legal services providers, Northwest Justice Project staff and board, Columbia Legal Services staff and board, Access to Justice Board, Equal Justice Coalition, volunteer attorney programs, law schools, LAW Fund staff and board, Legal Foundation of Washington staff and board, courthouse facilitators and court clerks, court reporters, paralegals, members of the ADR community and representatives from state agencies.



The Conference was held in conjunction with the Bar Leaders Conference, the WSBA Board of Governors meeting, and the WSBA Annual Awards Luncheon.

The Conference opened with the reading of a proclamation from Governor Gary Locke declaring June 20-22, 1997, as Equal Justice Weekend. The Moderately Talented (Yet Plucky) Repertory Theatre of Justice returned this year with its rendition of *East Side Story*, which pitted the JETS (judges from West of the mountains) against the SHARKS (community service providers from East of the mountains) for control of the state's limited resources for equal justice. Despite the best efforts of Paul Stritmatter and his able assistant Officer Krupke, to maintain order, a "righteous rumble" broke out on stage. Fortunately, the good fairies of funding (left over from last year's play, *The Wizard of Lawz)*, intervened to restore order and instruct the two gangs that they must work together to achieve justice for all. John McKay, the new President of the Legal Services Corporation and former chair of Washington state's Equal Justice Coalition, gave the keynote address.

Conference workshops included welfare reform, defined task representation in family law ("unbundling" legal services), resources for the pro se litigant, educating the public, professionalism, the role of the bar in ensuring equal access, technology, funding, and community partnerships. During the plenary session, participants from the Access to Justice and Bar Leaders Conferences met with others from their regions of the state to discuss the most pressing needs and to develop recommendations for action. Saturday's finale was a barbecue at Hyatt Vineyards Winery in Zillah withentertainment by *Clallam County*, "Seattle's Slowest Rising Folk Group."

The ATJ conference concluded with a wrap-up session during which participants reviewed the status of the 1996 Access to Justice Conference Recommendations and adopted additional recommendations devel-

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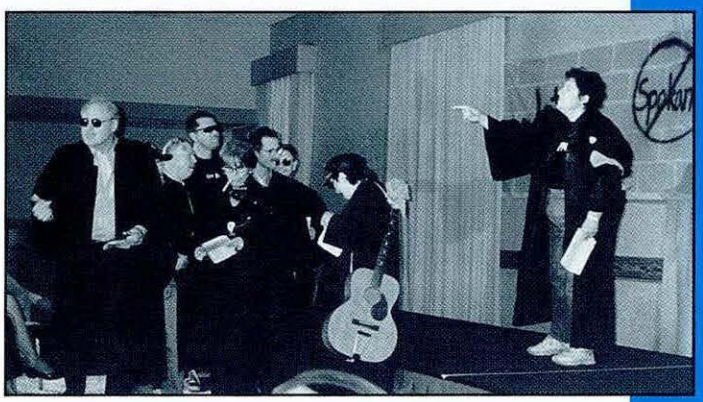

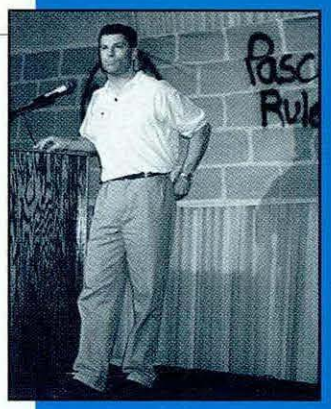

(Above): John McKay, the new president of the national Legal Services Corporation, gives the keynote address.

(Left): Vince Brown, staff attorney at Northwest Justice Project and a member of the SHARKS, rumbles with Lisa Brodoff, clinical professor at Seattle University, while Officer Krupke (actually WSBA Executive Director Dennis P. Harwick) watches over the fray.

(Below): Brodoff tells her fellow JETS to "sit tall."

Children's SSI Training

The National Center for Youth Law and the Washington State Access to Justice Network will conduct a legal training on the new Children's SSI eligibility rules on Wednesday, September 10 at Seattle Center. CLE approval is pending. There is no charge for the training, but attorneys who attend will be expected to represent at least one child whose SSI benefits have been terminated. For more information, call Dinnen Cleary at Columbia Legal Services, (425) 259-3421, ext. 209.

Usury Rate

The average coupon equivalent yield from the first auction of 26-week treasury bills in July 1997 is 5.12%. **The maximum allowable interest rate permissible for August 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 appear on page 32 of the June 1997 *Bar News*.

Conference — *Continued from page 35*

oped at the workshops and plenary. The 1997 Access to Justice Report will be published and distributed in the fall.

Conference expenses for participants were kept to a minimum because of generous financial support from: Anderson Hunter; Bogle & Gates; Cable, Langenbach, Kinerk, Bauer & Leshner; Columbia Legal Services; Davidson, Czeisler, Kilpatric & Zeno; Davies Pearson; Davis Wright Tremaine; Garvey, Schubert & Barer; Graham & James/Riddell Williams; Helsell Fetterman; Julian C. Dewell; Legal Foundation of Washington; Perkins Coie; Preston Gates & Ellis; Short Cressman & Burgess; Stritmatter Kessler; Theiler Douglas Drachler & McKee; and the Washington State Bar Association.

The 1998 Access to Justice Conference will be held April 3-5 at Campbell's Resort in Chelan. ◆

Building Blocks for Bar Leaders

"One of the best bar leaders conferences ever." — "A must for every vice president or incoming president."

The 1997 WSBA Bar Leaders Conference was held in conjunction with the Access to Justice Conference in Yakima. Approximately 50 county, specialty and minority bar leaders from around the state gathered to network, gather ideas and discuss issues that affect their bar associations. A record number of specialty and minority bars were represented: Loren Miller Bar, Minority Association of Eastern Washington, Washington LEGALS, Washington State Trial Lawyers, Washington Association of Criminal Defense Lawyers, Asian Bar, Washington Women Lawyers, Northwest Indian Bar, Hispanic Bar, Federal Bar and Government Lawyers Bar. The successful attendance was due, in part, to scholarships available to bar associations. The WSBA Board of Governors set aside a portion of the Bar Leaders Conference budget for bar associations who would not be able to attend the conference without some financial assistance.

Topics covered on Saturday included recruitment, dues, joining multiple organizations, diversity, CLE seminars, fundraising, judicial qualifications/evaluations, elections, committees and relations with the public and media. The WSBA Board of Governors joined the bar leaders for informal discussions about plans and goals for bar associations as well as resources available at the WSBA. On Sunday the group heard presentations from WSBA staff Barrie Althoff and Barbara Harper regarding the WSBA grievance process and Lawyers' Assistance Program.

Bar leaders joined the Access to Justice Conference for a plenary session, "Building Partnerships - Sharing Resources," the WSBA Annual Awards Luncheon and the Saturday evening barbecue at Hyatt Vineyards Winery.

The 1998 Bar Leaders Conference is also schedule for April 3-5 at Campbell's Resort in Chelan. ◆

LASER — *Continued from page 34*

Wolfla's report concludes, "Because conflict is a natural and expected occurrence in schools, it would seem only natural for schools to have a way to deal with conflict among students. Currently the only real solutions high schools offer are detention, suspension and expulsion. Peer mediation is a much more effective system, because it seeks to deal with and resolve problems rather than merely dismiss them...By recognizing and acknowledging that young people are competent to participate in the resolution of their own disputes, it encourages students' growth and gives students skills that are basic to all learning...It can improve the school climate and even reduce violence among youth."

LASER is sponsoring another free mediation training in late August for lawyers interested in working with local school peer mediation programs. Marla Elliott, LASER Project Coordinator, is applying for this training to receive 12 CLE credits, in keeping with what was awarded for the last training. Additionally, LASER is trying to raise $10,000 to train student mediators in 13 Washington schools in the 1997-98 school year. Tax-deductible contributions can be sent to Elliott at the address below. Checks should be made out to The LASER Foundation.

For more information on how you can become involved, contact Marla Elliott, LASER Project Coordinator, at PO Box 40100, Olympia, WA 98501; (360) 664-2476. ◆

Fee Arbitration to be Mandatory When Requested By a Client

- **Supreme Court Has Authorized Program Development**
- **Board of Governors Considering Operating Rules**
- **Comments Invited**

by **Barbara Harper,** *Director of the Lawyer Assistance Department and* **Randy Beitel**, *Disciplinary Counsel*

Based on the recommendations of both the ABA, who evaluated our discipline system in 1993, and the Joint Task Force on Lawyer Discipline between the Washington Supreme Court and the WSBA, the Supreme Court has ordered General Rule 12(b) amended, providing that the Bar Association may "Maintain a program, pursuant to court rule, requiring members to submit fee disputes to arbitration." The new program will replace the current WSBA Fee Arbitration Program, in which participation is voluntary. Currently, 55% of the time the lawyer declines to arbitrate fee disputes, leaving those clients frustrated, with few options other than waiting for the lawyer to bring suit or dealing with a collection agency. Under the new program, fee arbitration will continue to be voluntary for the client, but the lawyer's participation will be mandatory when requested by the client, thus assuring a client with a fee dispute of an expeditious resolution of the dispute in a forum where it will not be necessary to hire another lawyer to challenge the fees of the previous lawyer.

The Arbitration Committee of the Alternative Dispute Resolution Section has developed a proposed court rule and set of regulations to implement this new program. These are based on the ABA Model Rules for Fee Arbitration and the fee arbitration rules of the Alaska Bar Association, where a mandatory fee arbitration program has been in operation for more than ten years. Various procedures have also been adapted from the Superior Court Mandatory Arbitration Rules and the American Arbitration Association's rules. The Board of Governors will begin their review of the proposed operating rule and regulations at their August 8-9 meeting in Vancouver and will take final action at their September 11-12 meeting in Seattle on a recommendation to the Supreme Court for adoption of the proposed rule and approval of the proposed regulations. The mandatory program will not replace the current voluntary program until the effective date of the Supreme Court's action on the proposed rule and regulations.

The proposed rule and regulations provide for arbitration of all disputes concerning fees charged for professional services or costs. Excepted are disputes where the fee has been determined by statute,

rule, order or decision, as well as disputes where the client seeks affirmative relief against the lawyer for damages based on alleged malpractice or professional misconduct.

Under the proposal, any written fee agreement must include a notice to the client of the availability of fee arbitration. Any summons in an action by a lawyer for recovery of fees from a client must include a notice that arbitration is available through the Bar Association and that if it is requested within 20 days of service, the action will be stayed pending the arbitration. No bond or surety will be required for the client to participate in fee arbitration, as that has been a source of client frustration with our current arbitration program.

The proposal encourages informal resolution of fee disputes, and holds fee arbitration proceedings in abeyance if the lawyer and client agree to mediation. Also authorized by the Supreme Court and under development by the Mediation Committee of the ADR Section is a new WSBA Mediation Program which will be available for mediation of a variety of disputes between lawyers and clients, including fee disputes.

Those fee disputes not resolved by mediation or other informal means will have an arbitrator selected by a system similar to that used in King County Superior Court Mandatory Arbitration. Both the lawyer and the client will be charged an administrative fee which, depending on the amount in dispute, will vary from $50 to $250. Most matters will be heard by a single arbitrator, who will be a lawyer. Matters involving larger amounts of fees in dispute will be heard by a three-person panel on which a non-lawyer will sit. The proposed rules provide for a simplified and expeditious resolution of the dispute.

The proposal allows a lawyer and client to jointly petition, and if they both agree, to include malpractice claims in the arbitration. Lawyers disputing apportionment of a joint fee will also be able to submit such a dispute to arbitration, if both agree.

The arbitrators will base their decisions on the Rules of Professional Conduct, in particular RPC 1.5, setting forth the factors to be considered in determining the reasonableness of a fee. Under the proposal, the arbitrator in determining the reasonableness of a fee may consider the relative merit and quality of the professional services. In the absence of a written fee agreement, the lawyer will bear the burden of proof by clear and convincing evidence of all facts, including the competency of the work and the absence of

neglect or delay, and will be entitled to no more than the reasonable value of services for the work completed, or if the failure to complete the work was caused by the client, for the work performed.

The arbitrator's award may be confirmed in the superior court under RCW 7.04.150, and may be modified, corrected or vacated only under the limited grounds provided by RCW 7.04.160 through 180. No *de novo* appeal to superior court is provided.

A lawyer's failure to cooperate with fee arbitration will be grounds for discipline. Arbitrators will also be authorized to make a report to disciplinary counsel when they conclude that a lawyer's violation of the Rules of Professional Conduct raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer.

Interested parties are invited to share their views on this proposal with their local Governor, or with Peter Ehrlichman, Chair of the Board of Governors Discipline Committee, C/O the WSBA, 2101 4th Ave., 4th Floor, Seattle, WA 98121-2330. Copies of the proposed operating rule and regulations will be available after the Board of Governors' August 9 meeting and may be obtained by contacting the WSBA Communications Department at (206) 727-8203. Comments on the proposed rules and regulations should be received no later than August 28.

Endnotes

[1] "Report On the Washington Lawyer Regulation System," *American Bar Association Standing Committee on Professional Discipline*, September 1993, Recommendation 14.1, pp. 31-33.

[2] "Redefining Lawyer Discipline in Washington: A Multifaceted Approach," *Washington State Bar News*, August 1995, pp. 15-19.

[3] In 1996, out of 131 matters ready for fee arbitration as the result of a request by clients, 72 were dismissed because the lawyer declined to arbitrate or would arbitrate only if the client posted a bond.

WSBA Annual Meeting

September 12, 2 p.m.
WSBA Offices: 2101 4th Avenue, 4th Floor, Seattle
For more information: (206) 727-8244

. . . mainly for the laughs

Commissioner's Office
Temple of Justice
Olympia, WA 98544-0929
February 20, 1997

Dear Editors:

I have worked my way cautiously but thoroughly through Cindy Lehr's lead article in the Winter 1997 *CQ*, and I was duly impressed by its erudition. But *CQ* is going to have to lighten up a bit, at least occasionally, if it wants to stay off my ever-growing stack of ABA and Judges' journals.

Personally, there are days when I stay in this work mainly for the laughs. Hereinbelow, therefore, is a selection from my private stock, put aside during nearly 18 years of this work.

First, of course, is criminal law. Some convictions are plainly for life-threatening crimes. For example, I've seen appellants who were convicted of "Carrying a Weapon in a Motor Vehicle While Loaded." They were, indeed. Another was "cited for the infraction of Failure to Drive Right of Center into the Cascade District Court," no doubt causing the spectators to scatter wildly. Still another, perhaps for a more appreciative audience, was convicted for "exposing breasts while table dancing in Federal Way District Court."

Some of the excitement necessarily happens prior to trial. Such as the initial stop in which "the officer upholstered their guns and covered the occupants of the vehicle." Or the small fire, "which was distinguished quickly." Sometimes it is difficult to discern the underlying facts, as where "it was not even substantiated that the victim was stabbed by the evidence presented at trial."

Police interrogation can also raise perplexing issues. One recent defendant argued at some length that his statements to authorities "should be secluded because they resulted from a testodial investigation." I would certainly hope so! This was not, however, the same defendant who complained that the alleged assault victim had "only received a kick in the groings."

Trial presents its own problems. The defense issues a "subpenia ducess-takem." Trial counsel fails to move "for the suppression of excuplatory evidence." There may be other evidentiary hazards: "It is obvious that the defence could not call a dead man to testify at the trial, as it would of been futile to try to get him to say anything." Deliberations are impeded by "juror irregularity." But "suffice it to point out that the truth is always prejudicial," so many defendants are convicted, and few find any relief in a "motion for a rest of judgment."

By this point, even a defendant who is "genuinely recalcitrant" is likely to be suffering from "geographical incapacitation" and to be requesting the court to "appoint me a Star War or Larger attorney." A lawyer, that is, who can argue that violations of various rights "resulted in irreversible error," and that the appellant "is entitled to a full monopoly of his due process rights." But by the time we see the case (as a a prosecutor recently wrote), "the parties have fired their last salvos at one another in an effort to wrest justice from the scaled claws of life's improbabilities." Whew.

Not all oddities occur on the criminal side. One civil litigant gave his marital status as "Married, Disillusionment in progress." So what else is new? Another declared that "the supercilious bond issued by Safeco Insurance Company is hereby exonerated." Safeco, for one, certainly hopes so. Other litigants complain of arguments that "exonerate sheer form over substance" (where is Safeco when we need it) or violate "the Doctrine of 'Reducticio and Absurdum.'" It all makes one wish for a simple case of "adverse domination" or violation of SEPA, the "State Environmental Police Act." In the end, of course, it may simply appear "that plaintiffs are hung in their own petard and are on the horns of a dilemna." Ouch. But if you find the right precedent, "it's unique, in that you probably don't find cases on all fours hardly at all."

Yours for more "orbiting dicta,"

Geoff Crooks.

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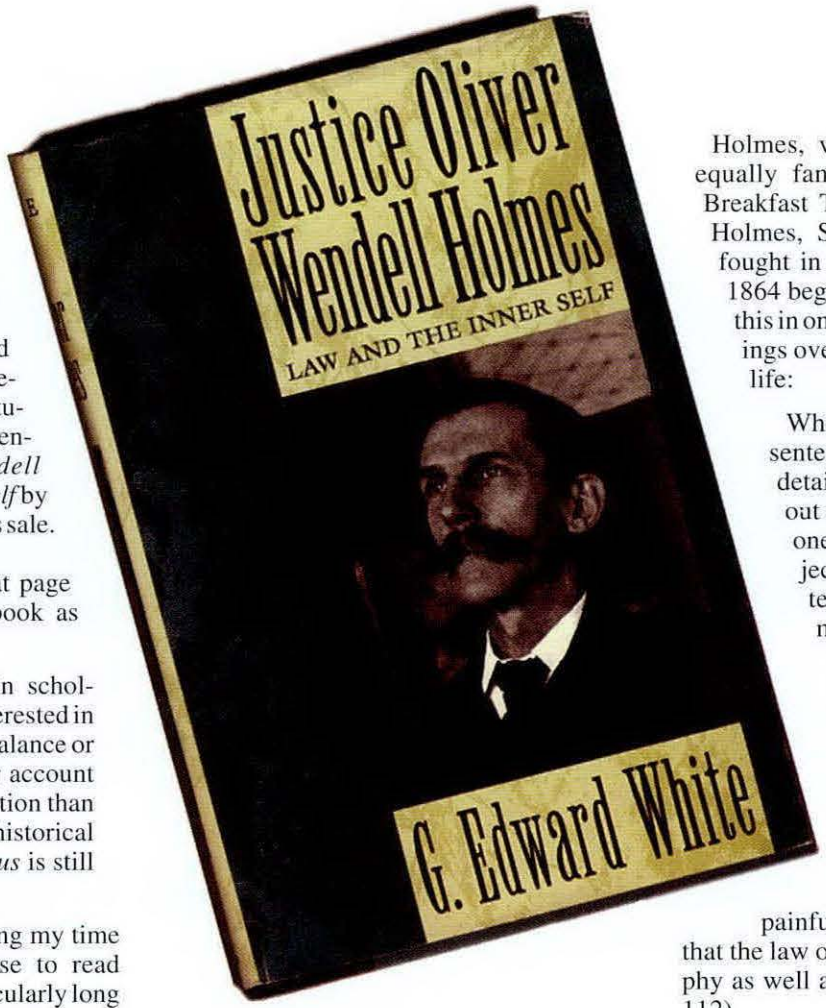
Justice Oliver Wendell Holmes: Law and the Inner Self

by **G. Edward White [488 pages, 1993, Oxford Press, 198 Madison Ave., New York, NY 10016-4314; (800) 451-7556; also available through local bookstores.]**

reviewed by
Phillip De Turk



One of my favorite books of the '50s was *Yankee From Olympus,* which was written in 1944 by Catherine Drinker Bowen.

It was my intention to reread this book and then write a review of it. Fortunately, or fortuitously, I espied another book entitled *Justice Oliver Wendell Holmes: Law and the Inner Self* by G. Edward White at a Border's sale. So I bought it and read it.

Mr. White, in a footnote at page 564, discusses the Bowen book as follows:

> "created consternation in scholarly circles . . . was more interested in dramatic narrative than in balance or accuracy, and much of her account better deserves the label fiction than history . . . as a kind of historical novel, *Yankee from Olympus* is still good reading."

So there. Instead of spending my time on historical fiction, I chose to read White's opus. While not particularly long as such books go, its 488 pages of text are each filled with over 45 lines of type. There is a lot of material about the Justice both before and during his 30-year tenure on the Supreme Court:

> When Holmes arrived on the Court in late 1902 Melville Fuller was Chief Justice, and John Marshall Harlan, David J. Brewer, Henry B. Brown, Edward D. White, George Siras, Rufus W. Beckham, and Joseph P. McKenna were Associate Justices. By 1917, only White and McKenna remained on the Court, and by 1925 Holmes, who had been sixty-one years old on taking the oath of office, was the only remaining member of the 1903 Court still in service. In the course of his career Holmes was to sit with sixteen other judges . . . : (pages 313-314.)

Holmes, whose father was the equally famous Autocrat of the Breakfast Table, Oliver Wendell Holmes, Sr., attended Harvard, fought in the Civil War, and in 1864 began law school. He said this in one of his numerous writings over the span of a 94-year life:

> When I began, the law presented itself as a ragbag of details . . . It was not without anguish that one asked oneself whether the subject was worthy of the interest of an intelligent man. (page 87)

Later, in a letter to Ralph Waldo Emerson, the future Justice had this to say about his experience with the law:

> I have learned, after a laborious and somewhat painful period of probation, that the law opens a way to philosophy as well as anything else. (page 112)

Following a less-than-successful period as a private attorney, Holmes had an opportunity to become a professor at his old Harvard Law School, which he undertook after much soul searching. Prior to this, he had written much about the law, which is detailingly discussed in this biography. For instance, the author spends almost 50 pages reviewing and explaining Holmes' seminal work, *The Common Law.*

When he joined the Harvard faculty, the other four full-time professors who serviced the 139 students were Langdell, Ames, Thayer and Gray. Holmes resigned his position in the first year to take a juristic position with the Massachusetts Supreme Court, where he served for almost 20 years, from 1882 until 1902.

In 1885, Holmes elucidated about the profession of law when he was invited to address Harvard undergraduates:

> Of course the law is not the place for the artist or the poet. The law is the calling of thinkers . . . a man may live greatly in the law as well as elsewhere . . . that there as well as elsewhere he may wreck himself upon life, may drink the bitter cup of heroism, may wear his heart out after the unattainable . . . . (page 211)

The true value of this opus for the average attorney who may do some appellate work lies in the review of the multitude of cases in which Justice Holmes was involved while on the United States Supreme Court. Chapter Nine details many of the more important decisions from 1903-1916, or before Frankfurter and company began to seek and enjoy the friendship of Holmes.

The author explains that his subject was a prodigious worker volunteering to take on many cases so that the final opinion would be penned by him. Because Oliver became friends with Melville Fuller, the Chief Justice, who was his temperamental opposite, he was able to glean the opportunities to be given the opinions to write when both Fuller and he were in the majority.

One of the examples of how Holmes thought in his first 15 years on the Court is contained at page 318, where the case of *Vicksburg v. Waterworks Co.*, 202 U.S. 453 (1906) is discussed. Our hero wrote up justifications for deciding the case either way, for the franchisor and the city. So he is described as ". . . flippant and jobbist in his approach to the work of being a judge."

Holmes' first opinion was *Otis v. Parker,* 187 U.S. 606 (1902), which involved the constitutionality of a California statute wherein the sale of stock on margin was challenged. In this case, he outlined a philosophy that he followed throughout his time on the Court:

> While the courts may exercise a judgment of their own, it by no means is true that every law is void which may seem to the judges who pass upon it excessive . . . Otherwise, a constitution . . . would become the partisan of a particular set of ethical or economic opinions.

"This was not an easy book to read, yet . . . it provided an insight to the Supreme Court seldom realized by most of us."

When Louis Brandeis was appointed a justice in 1916, he, too, became a particular friend of Justice Holmes. This was the beginning of the title of "progressive Judge" being applied to Holmes. Later, Frankfurter, who while an intimate of Holmes throughout this period as a Harvard Law Professor did not gain the bench until after Holmes' departure.

Many of the more famous opinions written by the Justice, especially after 1916, which period is covered in chapters 11 and 12, involve dissents: *Tyson & Brother v. Banton*, 273 U.S. 418 (1927), involving the right of a state to control theater ticket prices; his free speech decisions, one of which was the Abrams "Clear and Present Danger" opinion, 250 U.S. 619 and the determination in *Buck v. Bell*, 274 U.S. 20 (1927), concerning the right of an entity to order sterilization in the situation where a woman is mentally defective. Considered by some people who think of Holmes as champion of civil liberties as his worst decision, the justice ruled in favor of Virginia's attempt at finding this conduct was for the betterment of the individual and society:

> We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence. It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are unfit from continuing their kind . . . .

Likewise renowned, if only in the use of a portion of the opinion, was *Schenck v. United States,* 249 U.S. 47 (1919), in which our esteemed justice pointed out that

> the character of an act depends upon the circumstances . . . free speech would not protect a man in falsely shouting 'fire' in a theater and causing a panic . . . .

When Holmes died on February 23, 1935, he left a sizable estate for the times: $568,000, including his house on Eye Street in D.C. (valued at $54,000). In today's money, he was worth almost $5,000,000. He left some money to relatives (he had no children), $25,000 to the Harvard Law School, and a similar sum to Boston Museum of Fine Arts. The balance, about $200,000, was left to the United States, where it remained in the Treasury Department for more than 20 years without any interest, so that a suitable tribute could be effectuated.

It was decided that a history of the Supreme Court should be undertaken to be called the "Oliver Wendell Holmes Devise History." At present, only nine of the eleven projected volumes have been completed. As some scholar stated, "the sorry history of the fund . . . constitutes a disservice to Holmes' memory and a powerful argument against emulating his generous gesture."

This was not an easy book to read. It took time and effort over a four-month period. Yet, upon concluding it, I found that it provided an insight into the Supreme Court seldom realized by most of us. It is filled with history from the days before the Civil War right up to the present as Holmes' bequest to his government is still being spent in order to articulate a suitable history of an area in which he bestowed so much of his life.

Puyallup attorney ***Phillip De Turk*** *frequently reviews legal classics for the* Bar News.

Sailing to Byzantium, Tahiti or Beyond: Leaving the Practice of Law

by **Barrie Althoff**
WSBA Chief Disciplinary Counsel

Rare is the lawyer who has not many a time muttered, "There ought to be an easier way to make a living," and who has not had repeated visions of sailing off to an exotic destination, either a fabled city or a remote island, but always free of laws, lawyers, clients, deadlines, unpaid billings, telephones, and disciplinary counsel.

This article outlines some ethical obligations to consider, and suggests some practical steps to take, before voluntarily leaving the practice of law, so that disciplinary counsel do not pursue you.[1] Since parts of the discussion also apply when you leave the practice involuntarily (for example, by death, disability or disciplinary action), this article also touches briefly on those situations. The article is mostly directed to sole practitioners, their families, and their office staff, since law partners and corporate and governmental lawyers usually have the support of their continuing partners/colleagues and staff when leaving the practice and can routinely meet many of the obligations outlined below.

Plan Ahead

Rule 1.2(a) of Washington's Rules of Professional Conduct ("RPCs") states that your client determines the scope of your legal representation. By closing your law practice you are radically changing that scope, and terminating your attorney-client relationships, with all your active clients. Washington's RPC 1.15 (based on Rule 1.16 of the ABA's Model Rules of Professional Conduct) outlines some obligations that arise when you terminate your representation.

RPC 1.15(a) requires you to terminate your representation of a client in various situations, including where your physical or mental condition materially impairs your ability to represent your client. Otherwise, RPC 1.15(b) generally permits you to withdraw from a representation without your client's consent only where doing so can be accomplished without material adverse effect on the interests of your client, or where there is "other good cause," or in certain other situations. The sudden, or even long-standing, need to sail off to a remote island is unlikely to be viewed as "other good cause."

Unless each of your clients agrees to your terminating your attorney-client relationship, you will need, in most cases, to plan the closure of your practice far enough in advance so that you can finish your representation of each client before you close the practice.[2] In most cases this will mean a gradual and orderly closure over at least several months during which you complete representation of your existing clients, and do not undertake representation of any new clients unless you explain your plans and they consent. It should not be a sudden abandonment of your clients.[3]

RPC 1.15(d) requires you, when terminating a representation of a client, to protect your client's interests by mitigating any harm he or she may incur as a result of the termination. The rule requires you to "take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled, and refunding any advance payment of fee that has not been earned." The balance of this article discusses each of these obligations.

Give Reasonable Notice of Your Plans to Close Your Practice

You must give your clients clear and unequivocal advance notice of your plans to close your practice and of the date of your withdrawal from representation. It would be wise to do so in writing even though RPC 1.15(d) does not require written notice.[4] You should send the notices to your clients' last known addresses, and, if some notices are returned as undeliverable, make reasonable efforts to find the clients and document your efforts. Your notice must be given to all "active" clients for whom you are still performing, or are supposed to be performing, services. Depending on the extent and duration of your clientele, you may also want to give notice to past clients, especially since it gives you an excellent opportunity to have them retrieve their files.

Where your termination is voluntary or by reason of your death, you (or your estate) do not need to tell your clients why you are terminating your practice, although it is permissible. When your termination is involuntary, however, Rule 8.1(a) of the Rules for Lawyer Discipline requires you to advise your clients of the reason for your inability to act as their lawyer.[5]

If your clients consent to your withdrawal and the withdrawal is permissible under applicable court rules, you should also file appropriate notices of intent to withdraw with each court or tribunal in which you have matters pending; remember, however, that where you are closing your practice voluntarily, under RPC 1.15(c) you must continue a representation, notwithstanding good cause for termination, if ordered to do so by the court or tribunal.

You should also notify opposing counsel, witnesses, and interested parties, and make closing arrangements with your staff, insurers, accountants, bankers, lenders, landlords, professional associations, publishers, suppliers, utilities, messengers, court reporters, equipment-lessors, taxing authorities, and so on. Make sure you arrange for your mail and parcel deliveries to be forwarded, and, especially at the beginning, make sure you immediately examine forwarded items since they are likely to contain matters relating to your former clients that must be immediately forwarded to the clients

or their new counsel. Make sure you consult your malpractice and other insurers to assure that you have appropriate coverage for claims and liabilities that may arise from your prior services.

If you are remaining an active member of the WSBA and are moving out of state, Admission to Practice Rule 5(e) and WSBA Bylaw II.A.1.b require you to file with the WSBA the name and address of an agent within Washington to receive service of process or of any other document required to be served or permitted by statute or court rule to be served or delivered to a resident lawyer. If you are remaining a member of the WSBA (whether active or inactive), WSBA Bylaw II.B. also requires you to keep the WSBA informed of any change in your office or residence addresses. If you are planning on going on inactive status, or resigning your membership with the WSBA, allow time to do so; if there are any unresolved disciplinary grievances against you, or any anticipated in the near future, however, you will generally not be permitted to resign your WSBA membership. If you are admitted in other jurisdictions, you will generally also want to give similar notices to, and make similar provisions with, each of them.

Allow Time for Your Clients to Retain New Counsel

You should send your notice of intent to close your practice to your clients sufficiently far in advance to allow your clients ample time and opportunity to find new counsel to take over the representation.[6] Depending on the nature and complexity of their cases, and the resources and temperament of your clients, the time necessary may vary by client.

Authorities differ on whether you are obligated to assist your client find replacement counsel for your clients. It seems likely you are obligated to do so where your client would suffer prejudice if new counsel is not obtained immediately. At the least, you should impress on your client the importance of retaining a new lawyer, and, if you recommend replacement counsel, you should do so with great care since the client is likely to look to you, or blame you, if matters do not work out well with new counsel.

You must also allow reasonable time to transition the case to new counsel and assist him or her to retrieve files, talk to you and to understand the case. It is not altogether clear, however, what you must or may tell new counsel regarding your client. See, Note, "Fraud, Withdrawal & Disclosure: What to Tell the Lawyer Who Steps Into My Shoes," 34 *Santa Clara L. Rev.* 1237 (1994). If you are considering closing your practice, you should not be accepting any new clients unless you expect to be able to complete the representation prior to the closure.[7]

Surrender Client Papers and Property

When closing your practice you do not want a garage or basement full of original client files to haunt you or to have to periodically spend uncompensated hours rummaging for files. If you have not already done so, separate files relating to pending or current client matters from those that relate to completed representations. RPC 1.15(d) requires you to "take steps to the extent reasonably practicable to protect a client's interests, such as . . . surrendering papers and property to which the client is entitled." The rule goes on to provide, however, that you "may retain papers relating to the client to the extent permitted by other law." Generally, all files belong to the client and the client is entitled to them, especially where the client would be harmed by not having them. You may charge the client for the cost of delivering client files to the client, but if you want to keep copies of the files (for example, because you believe there may be a future claim against you), you must bear the cost of copying them yourself and not pass it on to your client. See *WSBA Formal Opinion 181*. Although you may have a right to retain certain client files, and may even have an attorney's lien on them, if you are closing down your practice you would be wise to simply deliver all client files and write off any uncollected fees or costs as merely another cost of getting on with your life.

When notifying your clients of your practice closure, give them a reasonable opportunity to retrieve their files and any of their property which you have. If after notice your clients do not retrieve them, you may be able to destroy some of the files and property if they relate to completed representations, although you may be obligated to retain, or arrange for others to retain for you, original wills, deeds, and other documents. You should make every reasonable effort to assure that such documents, and especially wills, are returned to your clients or that they are readily accessible by your clients. If the files or property relate to an ongoing representation, you must continue to maintain them for a reasonable period thereafter, and in these cases repeated written notices to the client to retrieve them are warranted. The files should be maintained at a location reasonably accessible to your clients, and if they are not, you must bear

the extra cost of providing reasonable access to them by your clients. There is no specified time period for which you must retain your files, but it would generally be advisable to retain them at least until the statute of limitations expires for any malpractice claims that might be brought against you. You may want to consult with your malpractice insurer for guidance.

If you are selling your practice, or arranging for someone to take over your practice, or otherwise arranging for someone other than your clients to take custody of your client files, take care to comply with the prohibition of RPC 1.6(a) against revealing confidences or secrets of your clients. Whoever takes over the files has a continuing obligation to maintain their confidentiality, and, if the person is not a lawyer, you have an obligation to train and supervise them to assure that the confidentiality of the files is preserved. This obligation continues even after you have closed your practice. While generally you may reveal the names of your clients to your potential successor (thus permitting, for example, conflicts checks), you cannot reveal their confidences and secrets unless your clients consent. If considering selling your practice, see *WSBA Formal Opinion 192* (1996).

Refund Any Advance Payment of Fees That Have Not Been Earned

When terminating your representation, you must refund to your clients any advance payment of fees that you have not earned. More broadly, you need to review your fee agreements with your clients to make sure that you are entitled to the fees and costs you claim, and to verify that your fees are reasonable as required by RPC 1.5. You also need to thoroughly examine each of your trust and IOLTA accounts and distribute the funds as appropriate and close the accounts, giving proper statements of account activities to your clients and, if appropriate, to the taxing authorities.

You are entitled to collect any reasonable, but unpaid, fees for work you have already performed. To determine what is reasonable, you may need to examine the factors listed in RPC 1.5. The amount of any fee to which you are entitled will be affected by the reason for the termination. For example, where the termination is simply due to your retirement from practice, you would normally be entitled to the fee agreed to with your client. If your termination of representation is due to your failure to recognize an obvious conflict of interest, however, you may not be entitled to any fees at all. In some cases, then, you may have to adjust or refund fees in order to mitigate the harm to your client. Where your fee is a contingent fee, and you are not completing the representation, you may still be entitled to a fee on the basis of a quantum meruit recovery or other equitable measure. See *Ross v. Scannell*, 97 Wn.2d 598 (1982). If you wind down your practice in an orderly fashion, however, in most cases you will be entitled to your fees as earned.

Consider Seeking Appointment of a Custodian to Protect Client Interests

Sometimes a lawyer terminates his or her practice with little or no advance notice or preparation. This may occur, for example, when a lawyer suddenly dies or becomes disabled, or where a suspended or disbarred lawyer fails to take the steps required of him or her under the RLDs, or where a lawyer simply disappears. RLD 8.6 in these cases permits the chairperson of the WSBA Disciplinary Board to appoint a lawyer (usually referred to as a "custodian") to protect the clients' interests, *unless* a partner, personal representative or other responsible person appears to be properly protecting those interests. In most situations the lawyer's partner(s), personal representative, family or office staff do in fact look after and protect the interests of the lawyer's clients, and it is only in the rare situations (for example, a wholly unexpected death, disability or disappearance) wherein a custodian is appropriate.

The appointment of a custodian may be made on motion of the WSBA or any interested party. Custodians are usually lawyer volunteers from the same community as the lawyer needing the custodian. Customarily, as a service to the bar, custodians serve without charge (other than reimbursement for out-of-pocket expenses). In some cases, however, the WSBA is authorized to recover costs.

Custodians are authorized to take possession of necessary files and records and take such action as seems indicated to protect the clients' interests or as otherwise required under the RLDs. This can include, for example, assuming control of trust accounts, IOLTA accounts, and other financial affairs of the lawyer, including taking possession of check registers and related documents, and distributing the funds from the accounts. Under RLD 8.6(a), banks or other persons honoring the authority of the custodian are exonerated from any liability resulting

from their having done so. Additionally, under RLD 12.11(a), the custodian is exonerated from liability for his or her actions so long as those actions were taken in good faith.

The appointment of a custodian is appropriate only where there is no other responsible person to protect the clients' interests when you are no longer able to do so, and then only in the circumstances specified in the rule. If in one of those circumstances you are asked to help close a lawyer's practice or distribute his or her client files, you may want to seek appointment of yourself as a custodian. If you act as custodian, it is not appropriate for you to act at the same time as replacement counsel. Thus, if you are interested in gaining new clients, you should not act as a custodian. If in helping a terminating lawyer you decide, with the clients' consent, to take over some matters as replacement counsel, determine whether you are doing so as lawyer for the terminating lawyer, as custodian for that lawyer, or as replacement lawyer, since you may have differing and conflicting fiduciary (or quasi-fiduciary) relationships and responsibilities with each different role.

When a Lawyer Dies

When a lawyer dies, his or her partners, office staff, or personal representative usually protect the clients' interests. If you are a sole practitioner, you may want to arrange in advance with another sole practitioner in your community in whom you have confidence to look after each other's clients (or at least assist your surviving staff, spouse and personal representatives in doing so) in case either of you has a sudden disability, death or disappearance. Your families and staff should know of the arrangement. If your practice termination is imminent, you would also want to notify your clients of the role this lawyer is to play. If the arrangement does not work out, however, your family and staff may still be able to seek appointment of a formal custodian.

The use of a formal custodian may have adverse consequences to you or to your estate, if the custodian, in reviewing the status of client matters and in distributing client files and property, discovers evidence of malfeasance on your part, whether in the form of malpractice, trust account violations, unreasonable or improper fees or billings, or of other ethical violations. Since the role of a formal custodian appointed under RLD 8.6(a) is to protect the interests of the clients, and since any replacement counsel has a similar duty, such discovery may lead to claims against you or your estate.[8]

Conclusion

Most of us will never sail off to that fabled city or remote island. All of us, however, inevitably will someday terminate our representation of all of our clients. By planning ahead, we can handle the closure of our practices — whether voluntary or involuntary — efficiently and in the best interests of our clients, ourselves, our families and our staff.

Endnotes

[1] This article assumes that if you are voluntarily leaving the practice of law, you are doing so as a considered decision and not merely as the spontaneous and natural reaction to a series of bad days/weeks/months at the office. The WSBA Lawyers' Assistance Program, (206) 727-8268, may be able to help you in making this decision.

[2] As to the sale of a law practice, see paragraph III.H of *WSBA Formal Opinion 192* (1996).

[3] Each year the WSBA Office of Disciplinary Counsel handles a number of cases where a lawyer has simply disappeared and abandoned his or her practice without prior notice to, or provision for, clients, family, or others.

[4] RPC 1.4 requires you to keep your clients reasonably informed about the status of a matter, and thus also requires you to notify them of your intent to terminate your representation. Likewise, RPC 1.2 requires the lawyer to abide by a client's decisions concerning the scope of the representation, and thus, once representation is undertaken, it is not up to the lawyer alone to unilaterally terminate a representation.

[5] Involuntary terminations of practice result from, for example, being disbarred or suspended for more than 60 days from practice, or being suspended for nonpayment of bar dues or for noncompliance with continuing legal education requirements, or being suspended on an interim basis for conviction of a crime. In these cases, you must undertake the stated actions for terminating your representation, and RLD 8.2 also prohibits you thereafter from accepting any new retainers, giving any legal advice, or acting as a lawyer. If you are requested to do so, RLD 8.2 requires you to provide without charge information to your clients' new lawyers about the facts and status of their cases. In involuntary terminations, if your clients are involved in litigation or administrative proceedings, you must also advise them to seek the prompt substitution of another lawyer (and if they do not do so within ten days, to yourself notify the court or agency of your inability to act), and to provide to your clients (or their new counsel) their files regardless of any possible lien you may have on the files. If you are terminating your representation due to being transferred to disability inactive status, then you, or your guardian, must give the same notices, except that the notices need not refer to your disability.

[6] In addition to RPC 1.15(d)'s notice requirement, RPC 1.3's requirement that you act with reasonable diligence in representing a client also requires you to notify clients sufficiently in advance so as not to harm their interests.

[7] RPC 1.7(b) prohibits you from representing a client if the representation may be materially limited by your own interests unless, among other things, your informed client consents in writing to the conflict.

[8] Such discovery of possible ethical breaches by a living lawyer might also in some cases be reportable to the WSBA Office of Disciplinary Counsel for possible disciplinary action.

Office of Disciplinary Counsel Notices

Suspended

Spokane lawyer Ronald David Kappelman (WSBA No. 12565, admitted 1982) has been suspended for two years starting April 7, 1997, pursuant to a order entered by the Supreme Court on that date. The court also ordered the suspension be followed by two years of probation, during which he must comply with his criminal probation. The discipline is based upon his 1994 conviction in the United States District Court for the Eastern District of Washington on three felony counts of distribution of cocaine.

On three separate occasions, Kappelman arranged to purchase cocaine from an undercover informant. Kappelman was arrested on August 17, 1994. On September 19, 1994, he pleaded guilty to three felony counts of distribution of cocaine to his wife. Based upon Kappelman's conviction, and pursuant to RLD 3.1, on October 6, 1994, the Washington Supreme Court entered an interim order of suspending Kappelman from the practice of law pending the final outcome of disciplinary proceedings.

After a two-day disciplinary hearing in January 1996, the Hearing Officer recommended dismissal of the disciplinary charges. On appeal by the Association, the Disciplinary Board ordered the Hearing Officer's Findings, Conclusions and Recommendation stricken and adopted its own. The Board concluded Kappelman's conduct violated RLD 1.1(a) (disregard for the rule of law) and RLD 1.1(c) (violation of lawyer's oath) and recommended a sanction of two year suspension from practice. Three board members dissented, recommending disbarment.

On review by the Supreme court, Kappelman argued that he should be

granted credit on the suspension for the two years he had been suspended on an interim basis. After briefing on that issue, the Supreme Court rejected that argument and approved the two year suspension starting on entry of the Supreme Court's order, April 7, 1997.

Respondent was represented by Carl Maxey. The hearing officer was Thomas J. Heye of Richland. The Bar Association was represented by Disciplinary Counsel David Cluxton, Mark Lough and, on appeal, by Disciplinary Counsel Anne I. Seidel.

◆

Seattle lawyer Charles L. Smith (WSBA No. 5357, admitted October 1973) has been ordered suspended from the practice of law for a period of 60 days pursuant to a stipulation approved by the Supreme Court on May 8, 1997. The discipline is based upon Smith's neglect of a civil matter, which resulted in the dismissal of his client's lawsuit after the statute of limitations had passed, in violation of RPC 1.3 and RPC 3.2. The discipline is also based upon Smith's failure to timely inform his client of scheduled depositions and interrogatories requiring the client's response, failure to respond to his client's requests for information, and failure to inform his client about the dismissal of the lawsuit, in violation of RPC 1.3, RPC 1.4, RPC 3.2, and RPC 3.4(d).

In 1988, Smith agreed to represent the injured passenger of a car that was struck by another vehicle. Following some failed attempts to settle the client's claim, Smith filed a lawsuit in King County Superior Court on November 5, 1990, three years to the day after the accident.

Smith received a copy of the King County Superior Court case schedule, which required a Confirmation of Joinder of Parties, Claims, and Defenses to be filed by April 15, 1991; however, none was filed. On May 9, 1991, the court issued an Order to Appear for Failure to Follow Civil Case Schedule/Order of Dismissal. The order set an appearance date of June 13, 1991, and stated that if the parties failed to appear, the case would be dismissed without further notice. Neither Smith nor defense counsel appeared at the hearing. Therefore, an order was entered dismissing the action on June 13, 1991. Smith did not learn of the dismissal until November 1992, at which time he attempted to note the case for trial. The Court Clerk's office advised Smith that due to the June 13 order, it was necessary to bring a motion to vacate the dismissal and reinstate the case before attempting to note the case for trial. Smith observed court calendars during which such motions were argued, but he did not file any motions because he believed it would be futile. Nor did Smith inform his client that the lawsuit had been dismissed. In Spring 1993, the client wrote to Smith asking him for information regarding the case; however, Smith did not respond. It was not until the client hired another lawyer that the client learned the suit had been dismissed.

Prior to the dismissal of the case, Smith also failed to timely inform his client of deposition notices and interrogatories and delayed the discovery process by repeatedly seeking continuances from opposing counsel over the course of a year.

Lawyer Charles L. Smith represented himself. The Bar Association was represented by Marsha A. Matsumoto.

Disbarred

Lawyer F. Brian Adae (WSBA No. 8256, admitted June 1978) was ordered disbarred effective May 8, 1997, by order of the Washington State Supreme Court.

The discipline imposed was reciprocal to Adae's disbarment by the Rhode Island State Supreme Court on June 19, 1996, and by the Supreme Judicial Court for the Commonwealth of Massachusetts on September 26, 1996. Adae did not respond to the Washington State Supreme Court's order issued pursuant to Rule 12.6 of the Rules for Lawyer Discipline which directed him to inform the court of any claim that the imposition of identical discipline in this state would be unwarranted and, if so, the reasons therefor. Adae's consent to disbarment in the State of Rhode Island occurred simultaneously with Adae's plea of *nolo contendere* to a felony criminal charge of embezzlement involving funds delivered to Adae by a client.

◆

Lawyer Michael S. Manning (WSBA No. 9486, admitted October 1979) was ordered disbarred effective June 11, 1997, by order of the Washington Supreme Court.

The discipline imposed was reciprocal to Manning's disbarment by the Supreme Court of the State of Arizona for conduct described in a report by that court's Disciplinary Commission. The Disciplinary Commission found that Manning's misconduct arose from a partnership formed by Manning with non-lawyers to practice bankruptcy law. Manning was charged with accepting fees from clients, then failing to diligently and promptly represent them or respond to their requests for information. In operating the partnership, Manning shared legal fees with non-lawyers, failed to adequately supervise non-lawyer subordinates, and assisted non-lawyers in the unauthorized practice of law. Manning later abandoned the practice of law without informing his clients. He failed to respond to the Arizona State Bar's inquiries.

Manning did not respond to the Washington State Supreme Court's order issued pursuant to Rule 12.6 of the Rules for Lawyer Discipline which directed him to inform the court of any claim that the imposition of identical discipline in this state would be unwarranted and, if so, the reasons therefor. The Bar Association was represented by Disciplinary Counsel Felice P. Congalton.

✣ ✣ ✣

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.

August

1 **How to Identify, Meet & Enforce the Rights of Persons with Disabilities**
Seattle
By WSBA CLE (206) 727-8202
7 CLE credits (incl. 0.5 ethics)

5 **Understanding & Analyzing Financial Statements**
Seattle
By National Center for Continuing Education (904) 561-3506
6.5 CLE credits (incl. 2.5 ethics)

7 **Tax Aspects of Divorce in Washington**
Seattle
By NBI (715) 835-8525
7.75 CLE credits (incl. 1 ethics)

7 **Washington/Federal Estate & Gift Tax Workshop**
Seattle
By PES (715) 833-5296
7.25 CLE credits

8 **Essentials of Advising the Small Business**
Spokane
Also in Seattle 8/14
also as via• CLE
By WSBA CLE & WYLD (206) 727-8202
6.5 CLE credits (incl. 1.25 ethics)

8-9 **WSBA Board of Governors Meeting**
Vancouver
(206) 727-8244

11 **Legal Foundation of Washington Public Meeting & Opportunity to Comment**
Seattle
(206) 624-2536

12 **Property Tax Law in Washington**
Seattle
By NBI (715) 835-8525
7.25 CLE credits (incl. 1 ethics)

13 **Estate Planner's Guide: Estate Planning with Will Substitutes**
(moderated video replay)
Olympia
By WSBA (206) 727-8202
6 CLE credits

21 **Current Washington State Taxation Issues**
Bellevue
By Lorman Business Center (715) 833-3940
6.5 CLE credits

22 **Best of WSTLA: Pre-trial Advocacy**
Best of WSTLA: Appeal
Seattle
By WSTLA (206) 464-1011

22 **ADR from the Advocate's Perspective** (AM) **& ADR Skills Training** (PM)
Seattle
By WSBA CLE & ADR Section (206) 727-8202
4 CLE credits, incl. 1.5 ethics a.m.; 3 or 4 CLE credits p.m.

26 **Deposition Skills Training**
Seattle
By NITA (219) 239-7770
18.25 CLE credits
(incl. 2.25 ethics)

27 **Counseling the Small-business Client in Washington**
Seattle
By NBI (715) 835-8525
7.25 CLE credits (incl. 1 ethics)

September

10 **Best of WSTLA: Damages & Opening/Closing Statements**
Seattle
By WSTLA (206) 464-1011
CLE credits TBA

10 **Anatomy of a Computer: PCs From the Inside Out — How to Use Them in the Practice of Law**
Seattle
By KCBA & Lexis-Nexis
(206) 340-2572
6 CLE credits pending

11 **Current Issues in Commercial Real Estate Leases in Washington**
Seattle
By NBI (715) 835-8525
6.5 CLE credits (incl. 1 ethics)

11-12 **WSBA Board of Governors Meeting**
Seattle
(206) 727-8244

12 WSBA Annual Meeting (206) 727-8244

12 **New Probate & Estate Planning Related Legislation** (AM)
Funding, Distribution & Tax Workshop for Estate Planners (PM)
Seattle
Also in Spokane on 9/18
By WSBA CLE & RPPT Section (206) 727-8202
6.5 CLE credits

16 **Communication in the Courtroom**
Tacoma
Also in Bellingham 7/1, Seattle 7/17, Olympia 7/18
By Carl Grant (206) 364-5298
6.5 CLE credits

17 **Drug Prosecution Training Program**
Leavenworth
By WAPA (360) 753-2175
16 CLE credits (incl. 2 ethics)

17 **What's New and What Works for Contract Lawyers**
Seattle
By Washington Contract Attorneys Group
(206) 224-4459

18 **Construction Law**
Seattle
By Law Seminars International
(206) 621-1938
13.5 CLE credits

19 **Winning Strategies for the Successful, Private Practitioner**
Seattle
Also *video conferencing to Spokane, Vancouver, & Tri-Cities*
Limited to '94-'97 admittees
By WSBA CLE & LPM Section
(206) 727-8202
6.5 CLE credits

19 **4th Annual Criminal Justice Institute**
Seattle
By WSBA CLE & Criminal Law Section (206) 727-8202
1 CLE credit *estimated*

23 **Health Law in Washington: the Legal Implications of Health Care Delivery Systems and Managed Care**
Seattle
By NBI (715) 835-8525
6.5 CLE credits

24 **Annual Insurance Law Basics**
Seattle
By WSTLA (206) 464-1011
CLE credits TBA

25 **How to Handle (and Avoid) Estate Planning/Probate Litigation**
Seattle
Also in Spokane 9/25
By WSBA CLE & RPPT Section (206) 7272-8202
6.75 CLE credits *estimated*

25 **Practice Essentials**
Seattle
Also in Spokane on 9/26
By WSBA CLE & YLD (206) 727-8202
6.25 CLE credits (incl. 1 ethics)

25 **Professionalism & the Press: Enhancing thePublic Image of Lawyers**
Seattle
By KCBA, (206) 340-2572
2 CLE ethics credits pending

26 **Public Procurement & Private Construction Law Section Midyear**
Seattle
By WSBA CLE & PP&PC Section (206) 727-8202
6.25 CLE credits

October

3 **Ethical Dilemmas for the Practicing Lawyer**
Tacoma
Also in Seattle on 10/17, Spokane on 10/31, Kennewick on 11/14, Mt. Vernon & Vancouver on 11/21
By WSBA CLE (206) 727-8202
3 or 6 CLE credits

8 **Valuing Closely Held Businesses: Theory, Practice, & Law**
Spokane
Also in Bellevue 10/10, Seattle 10/15
By Business Advisory Services (206) 223-5400
7.5 CLE credits

9 **Tom Chambers Seminar for the General Practitioner**
Seattle
Also in Spokane on 10/9
Vancouver on 10/9
Olympia on 10/9
Bellingham on 10/16
Tri-Cities on 10/24
By WSTLA (206) 464-1011
CLE credits TBA

10 **Community Property Law & Developments — The Impact on Your Practice**
Seattle
By WSBA CLE (206) 727-8202
5.75 CLE credits *estimated*

10 **Successful Law Practice Gems & Pactice Tips**
Seattle
By WSBA CLE (206) 727-8202
CLE credits TBA

16-18 **WSBA Board of Governors Meeting**
Walla Walla
(206) 727-8244

17 **Ethics/Bar Grievances**
Seattle
By WA Defense Trial Lawyers (206) 233-2930
CLE credits TBA

17 **Tort Law Update**
Seattle
By WSTLA (206) 464-1011
CLE credits TBA

20 **Interest-based Mediation— The Process: Philosophies, Proficiency & Procedures**
Spokane
By Fulcrum Institute (509) 838-2799
36.5 CLE credits (incl. 1 ethics)

22 **Women of WSTLA Retreat**
Alderbrook
By WSTLA (206) 464-1011
CLE credits TBA

23 **Pretrial Discovery & Accessing Medical & Other Records**
Seattle
Also in Spokane on 10/30
By WSBA CLE (206) 727-8202
CLE credits TBA

23 **Protections Afforded by the Wage & Hour Laws** (AM)
Available Remedies & Proposals for Change (PM)
Seattle
By WSBA CLE (206) 727-8202
3 CLE credits each *estimated*

26 **Fundamentals of Personnel Law**
Tacoma
By Skillpath Seminars
6 CLE credits

In the September *Bar News*:
CLE Reporting Requirements for Group 3
(1984-1990 admittees
1993 admittees)

Including:
- Out-of-state lawyers — Comity
- Teaching credits

signature, now makes it possible for documents to be electronically created, digitally signed, electronically transmitted to a county auditor's office, and recorded.

Various governmental agencies are in the process of adopting electronic recording rules and regulations. The Washington Electronic Authentication Act facilitates the ability to conduct both commercial business and business with state agencies through the electronic media with adequate assurances that such transmissions will be at least as reliable as signed paper documents.

Irrespective of the nature of an attorney's practice, within the very near future every attorney will address issues relating to electronic recording, electronically created documents and digital signatures.

DONALD D. BUNDY
Yakima

Editor:

I was pleased to see that the *Bar News* published an article about the Washington Electronic Authentication Act, which creates a legal framework for the use of digital signatures. The Act will be implemented on January 1, 1998, and Washington lawyers need to learn about and understand the technology, benefits and risks of digital signatures.

Although the article adequately explains the Washington Act and digital signatures, the article contains a few inaccuracies and omissions. The articles states that it is necessary to obtain the subscriber's public key to "unlock" electronic messages. This may be confusing because it implies that a digitally signed electronic message is locked. Rather, a party who receives a digitally signed message (under the statute, a "relying party") can read the message; however, the relying party must obtain the subscriber's public key to verify that the subscriber actually signed the message, and that the message has not been altered since the subscriber signed the message. The relying party can obtain the subscriber's public key from the certificate that has been issued to the subscriber by a certification authority ("CA"). This certificate can be obtained either from the subscriber or from a public electronic database (under the statute called a "repository").

It should be clarified that the Act not only permits unlicensed CAs to transact business, the Act generally does not apply to unlicensed CAs. For example, a subscriber may register his public/private key pair with an unlicensed CA, not just licensed CAs. Also, the Act's "prerequisites to the issuance of a certificate" do not apply to an unlicensed CA.

The "suitable guarantee" does not limit the liability of the CA. The suitable guarantee, in the form of a bond or a letter of credit, provides a source of funds from which a relying party may recover if the licensed CA fails to satisfy the requirements of the Act identifying a subscriber. Although it was initially contemplated that the size of the suitable guarantee would be related to the cumulative reliance limit of certificates issued by a licensed CA, the WAC regulations as currently drafted will require a suitable guarantee in the range of $25,000-$60,000.

Finally, it is important to note the amendments to the Act specifically provide that parties may contractually agree to alter the Act's provisions. Thus, the Act is intended to provide uniform default rules for transactions involving digital signatures, but give parties the freedom of contract.

Over the past year, members of the Washington Digital Signature Implementation Task Force and the newly formed Committee of the Law of Commerce & Cyberspace helped draft amendments to the Washington Act, and most of these persons are now working with Linda Mackintosh, Director of the Corporations Division, Secretary of State of Washington, as she writes regulations to implement the Washington Act. For more information about digital signatures, the Washington Act, and the legal ramifications of digital signatures, readers should see Mike Rodin's article entitled "Digital Signatures — Get Ready 'Cause Here They Come," published in the Spring 1997 Newsletter of the Business Law Section of the Washington State Bar Association. Mike Rodin was a key player in the amendments to the Washington Electronic Authentication Act and is the chair of the Committee of the Law of Commerce & Cyberspace. The Washington Secretary of State also has a web page about digital signatures at http://www.wa.gov/sec/corps/digsig.htm.

TOM MELLING
Seattle

Board of Governors' Conflict of Interest?

Editor:

James MacPherson, Secretary of the Washington Defense Trial Lawyers, wrote in June 1997 of his concern that the Board of Governors through their President Tom Chambers recommended to the legislature that it reject legislation which would alter the tort system. Mr. Chambers is a past president of the Washington State Trial Lawyers Association. Specific

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Appeals

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

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Library for sale: Washington Practice, RCWA, Washington Digest 2d, all current and in excellent condition. Best offer for whole library or individual sets. (206) 277-1794.

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Downtown Seattle office-sharing: $150 per month. Also, full-time offices available on 32nd floor, 1001 4th Ave. Plaza. Close to courts. Furnished/unfurnished suites, short-term/long-term lease. Receptionist, legal word-processing, telephone answering, fax, law library, legal messenger and other services. (206) 624-9188.

Position Wanted

Japanese-speaking attorney seeks position with firm or corporation. Experience: four years, Washington practice; seven years, Army JAG (five-year residence in Japan includes three years as Army Attorney, Tokyo); LL.M., Japanese Law, UW; Graduate, one-year Arabic course, Defense Language Institute, Monterey, California. Also licensed in Illinois. Contact Lloyd Oaks, 1401 S. Union Ave., Tacoma, WA 98405, (253) 759-7092.

Position Available

Reply to WSBA* Bar News *Box Numbers at: WSBA* Bar News *Box___*, Bar News *Classifieds, 2101 Fourth Avenue — Fourth Floor, Seattle, WA 98121-2330.

Quality attorneys, law clerks and paralegals sought to fill temporary and permanent positions in law firms and companies throughout Washington. Please contact Legal Ease, L.L.C. at (206) 822-1157.

Insurance defense/contract city attorney: seven-person insurance defense/contract city attorney firm seeks an associate to prosecute misdemeanor offenses in District Court and assist in preparation of insurance defense litigation files. Time to be split approximately 50/50. Substantial courtroom time. Preference to those with at least one year prosecution experience. Competitive compensation and benefits. All responses confidential. Send résumé to Hiring Partner, PO Box 2965, Wenatchee, WA 98807.

Small interstate business law firm seeks attorney with entrepreneurial spirit for Everett office. Litigation or securities/transactional work for emerging companies. Send résumé to Box F-107, 16212 Bothell Way SE, Mill Creek, WA 98012.

Attorney jobs. Harvard Law School calls our publication "probably the most comprehensive source of nationwide and international job openings received by our office and should be the starting point of any job search by lawyers looking to change jobs." Each monthly issue contains 500-600 current public/private sector jobs. $45/three months. Contact: Legal Employment Report, 1010 Vermont Ave. NW, Ste. 408-WB, Washington, D.C. 20005. (800) 296-9611. Visa/MC/AMEX.

Assistant General Counsel for the Western Region of Catholic Health Initiatives in Tacoma, WA: responsible for providing general legal services as a practicing attorney to general acute care hospitals and nursing homes within Western Region facilities located in Idaho, Oregon and Washington. You will provide research, technical support and draft legal opinions; review and revise agreements and contracts; develop systems and procedures to improve efficiency; do transactional work; and assist in developing short- and long-term goals for Legal Department. Qualified candidates will have a JD degree from an accredited law school, be admitted to either the Idaho, Oregon, or Washington State Bar, and be eligible to practice law in one or more of those states. Must have a minimum of five years' experience, preferably in a health care environment. In-house experience preferred. Must demonstrate commitment to the Catholic health care ministry. Some travel will be required. CHI is a national Catholic health care system with 70 facilities nationwide, located in 25 states. CHI is a national leader in Catholic health care embracing a spirit of innovation, a legacy of care. For immediate consideration, please send or fax résumé to: St. Joseph Medical Center, Human Resources, 1717 South J St., PO Box 2197, Tacoma, WA 98401-2197. Job line: (253) 591-6623. Fax: (253) 591-6941. EOE.

Applications invited for U.S. Magistrate Judge position at Seattle, Washington. The United States District Court, Western District of Washington, announces the retirement of the Honorable Philip K. Sweigert from his position as full-time United States Magistrate Judge in Seattle, Washington, effective June 6, 1998. Applications are now being accepted for his successor in that position. The duties of the position are demanding and wide-ranging and will include: (1) the trial and disposition of civil cases upon consent of the litigants; (2) conduct of preliminary proceedings in felony cases; (3) trial and disposition at the Federal Courthouse in Tacoma of petty and misdemeanor cases arising from outlying government facilities such as Fort Lewis, Bangor Naval Submarine Base, Mt. Rainier National Park, Olympic National Park, and Bremerton Naval Shipyard; (4) trial and disposition at Seattle of other federal misdemeanor cases; (5) assisting District Judges in disposition of prisoner petitions and Social Security appeals; (6) conduct of various pretrial matters and evidentiary proceedings on reference from the Judges of the District Court. The basic jurisdiction of the United States Magistrate Judge is specified in 28 U.S.C. §636. To be qualified for appointment an applicant must: (1) be, and have been for at least five years, a member in good standing of the bar of the highest court of a state, the District of Columbia, the Commonwealth of Puerto Rico, or the Virgin Islands of the United States, and have been engaged in the active practice of law for a period of at least five years (with some substitutes authorized); (2) be competent to perform all the duties of the office; be of good moral character; be emotionally stable and mature; be committed to equal justice under the law; be in good health; be patient and courteous; and be capable of deliberation and decisiveness; (3) be less than seventy years old; and (4) not be related to an active Judge of the District Court. A Merit Selection Panel composed of attorneys and other members of the community will review all applicants and recommend to the Judges of the District Court in confidence the five persons whom it considers best qualified. The court will make the appointment, following an FBI full-field investigation and IRS tax check of the appointee. An affirmative effort will be made to give due consideration to all qualified candidates, including women and members of minority groups. The salary of the position is $122,912 per

annum. The term of office is eight years. Application forms and further information on the Magistrate Judge position may be obtained from the Clerk of the District Court: Bruce Rifkin, Clerk, 215 U.S. Courthouse, 1010 5th Ave., Seattle, WA 98104, (206) 553-5598; Janet Thornton, Deputy in Charge, 1717 Pacific Ave., Rm. 3100, Tacoma, WA 98402, (253) 593-6313. Applications must be submitted only by potential nominees personally and must be received no later than October 31, 1997. All applications will be kept confidential, unless the applicant consents to disclosure, and all applications will be examined only by members of the Merit Selection Panel and the Judges of the District Court. The Panel's deliberations will remain confidential.

General Counsel for Doyon, Limited, a corporation established under the terms of the Alaska Native Claims Settlement Act (ANCSA) located in Fairbanks, Alaska. Doyon's 12.5-million-acre land entitlement makes Doyon the largest private landowner in North America. Voting shares of stock are owned by nearly 14,000 shareholders, primarily Alaska Natives (Indian and Eskimo). Annual revenues of nearly $65 million derived from our portfolio of stock and financial investments, oilfield drilling, catering, real estate and tourism businesses, and natural resources exploration. Qualifications: JD degree from accredited law school. Admitted to practice in the State of Alaska or will be admitted within one year. A minimum of eight years of practicing business law with experience in corporate governance, transactions, and corporate liability. Strong writing skills and ability to communicate; cross-cultural communication skills a plus. Must be familiar with basic accounting principles. Previous experience in a supervisory capacity required, including the supervision of other lawyers. No record of discipline or pending charges with any Bar Association. Prefer experience in civil litigation and a working knowledge of ANCSA and public land and natural resource law. Doyon shareholders and Alaska Natives are especially encouraged to apply. For consideration send résumé, writing sample and three references, of which two must be clients or former employers, to: Doyon, Limited, PO Box 71228, Fairbanks, AK 99707 by August 29, 1997. For a detailed job description call (907) 459-2041.

Business litigator/business law practitioner opportunity. Established and successful AV business trial lawyer (25 years in practice) with full-time associate seeks one or more partners who have a partial or full independent clientele to practice together in a small, congenial firm located in downtown Seattle. We are seeking one or more motivated individuals to work with our clients as well as their own practice. Personable, creative and academically successful individuals who are also involved in bar, civic and community activities and have a minimum of five years of local practice experience are welcome to apply. Please direct your confidential reply to WSBA *Bar News* Box 531.

Vancouver School District: a fast-growing, progressive, award-winning district of 21,000 students and 2,500 employees seeks an exceptional attorney to advise the Board of Directors, superintendent, administrators, and principals. The legal counsel is responsible for providing guidance on matters involving school and family law, special education, personnel matters, contracts, insurance, bargaining unit issues, policies and regulations, and coordination of litigation issues with outside counsel. Applicants must have experience in the above areas and also be organized, detail-oriented, unflappable, and able to juggle multiple priorities. If you are a good communicator, team player, and problem solver with a can-do attitude, send your résumé, salary history, and cover letter to: Dennis Staehely, Human Resources Department, 605 N. Devine Rd., PO Box 8937, Vancouver, WA 98668-8937, or lboyd@vannet.k12.wa.us. Compensation is $72K to $75K, depending on qualifications, plus an excellent benefits package. The Vancouver School District is an equal opportunity employer.

Ater Wynne Hewitt Dodson & Skerritt, LLP, a Northwest regional law firm with 55 lawyers, is seeking an associate to join our growing Seattle office. Applicants should have at least two years' experience in a broad range of environmental matters, including hazardous waste cleanup and regulatory compliance, air and wastewater permitting, environmental issues in transactions, and environmental litigation. Some additional experience in corporate, commercial, and/or real estate transactions would be preferred. Candidates should have superior academic credentials and excellent analytical, research, and writing skills; major law firm experience is desirable. This is an exceptional opportunity for a talented individual interested in working on a variety of matters. Qualified applicants should send letter and résumé (no calls, please) to: Tom Kilbane, Ater Wynne Hewitt Dodson & Skerritt, LLP, 601 Union St., Ste. 5450, Seattle, WA 98101-2327.

Wolfstone, Panchot & Bloch, P.S. Inc., a 12-lawyer firm with business/real estate law practice, seeks associate to provide support in areas of both corporate, commercial, and real estate transactions and business/real estate litigation. Must be current member of WSBA. Send résumé, law school transcript and short legal research writing sample to Edwin G. Woodward, 801 2nd Ave., Ste. 1500, Seattle, WA 98104.

Spokane law firm seeking attorney with minimum of five years' experience in tax, estate planning and probate. Tax degree and WA license required. Please send résumé, references and salary requirements to Attorney Search, Box 281, 2525 E. 29th Ave., Ste. 10-B, Spokane, WA 99223.

Transactional attorney, Seattle: Bennett & Bigelow, P.S., a 20-lawyer firm concentrating in health care law, seeks a transactional associate with a minimum of two years' experience. Superior academic credentials and excellent writing skills are essential. Experience in tax, health care law and/or antitrust preferred but not essential. Please send résumé, law school transcript, references and writing sample to: Associate Hiring Coordinator, Bennett & Bigelow, P.S., 999 3rd Ave., Ste. 2150, Seattle, WA 98104.

Business litigation associate: Bellingham mid-size law firm is seeking associate with two years' litigation experience with an emphasis on business litigation. Real estate background desirable. Send résumé along with transcripts and writing samples to Personnel, PO Box 5226, Bellingham, WA 98227.

Employment law associate: Bellingham mid-size law firm seeking associate with two years' labor and employment law experience. Strong research and writing skills desirable. Send résumé along with transcripts and writing samples to Personnel, PO Box 5226, Bellingham, WA 98227.

Legal administrator: Williams, Kastner & Gibbs seeks quality individual to serve as Legal Administrator of the 70-lawyer firm. Applicants must have a solid background in business and financial management and administration. Applicants must also have excellent interpersonal

and communication skills. Please send cover letter and résumé to: Kristin Thom, PO Box 21926, Seattle, WA 98111-3926. All inquiries will be considered confidential.

AV-rated, six-lawyer Spokane/Coeur d'Alene law firm seeking aggressive, motivated associate with at least two years of civil litigation experience, preferably in the area of construction law. Top academic credentials required. Generous salary and benefits. Send résumé and references to: McCormick, Dunn & Black, P.S., 505 W. Riverside Ave., Ste. 200, Spokane, WA 99201.

Established Olympia law firm is seeking an aggressive, energetic associate with experience in domestic, criminal, probate and personal injury law. Research and writing skills are required. Excellent opportunity for growth and chance to build own practice. Salary negotiable. Reply with résumé and writing sample to WSBA *Bar News* Box 532.

Personal injury defense attorney: Bogle & Gates P.L.L.C. is pleased to announce an opportunity in its Seattle office for an experienced personal injury defense attorney to join our growing litigation practice. The successful candidate will have a minimum of six years' experience handling personal injury defense, and will have substantial experience in jury trials. Client, judicial and opposing counsel references are desired. We require outstanding academic credentials, excellent oral and written communication skills, and a dedication to providing the highest quality client service. In return, we offer an attractive compensation and benefits package and a professional work environment. Qualified individuals should submit a cover letter outlining their qualifications with a complete résumé, law school transcript, and legal writing sample to: Attorney Recruiting Manager, Bogle & Gates P.L.L.C., Two Union Square, 601 Union St., Ste. 4700, Seattle, WA 98101-2346. We are an EEO employer and encourage those from diverse backgrounds to apply. (No phone calls please.)

Associate position: Attorney with a minimum of three years' experience in a civil law firm setting sought for associate position available in defense litigation. Candidates should possess excellent oral, writing and research skills. Current Washington State Bar membership and basic computer literacy are strongly preferred. Please submit a résumé and a self-editedwriting sample to: Hiring Coordinator, Betts, Patterson & Mines, P.S., 12154th Ave., Ste. 800, Seattle, WA 98161-1090.

Rapidly growing, general statewide practice law firm in beautiful downtown Bellingham, WA, offers stockholder opportunity. Seeking conscientious, experienced attorney with existing client base. Capital contribution required. All inquiries strictly confidential. Please forward letter describing yourself, along with your résumé, to: Law Firm, 177 Telegraph Rd. #592, Bellingham, WA 98226.

Union Lawyer Referral Program: Public School Employees of Washington, a union representing 23,000 classified school employees in Washington State, is looking for union-friendly attorneys to accept referrals from its member lawyer referral program. The participant agrees to accept a 15% reduction in some fees in exchange for participation in the program. For further information and to sign up please call Pam at (800) 562-8448.

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Oregon accident? Unable to settle the case? Associate an experienced Oregon trial attorney to litigate the case and share the fee. OTLA member; references available. Zach Zabinsky (503) 223-8517.

Forensic engineer: board-certified forensic examiner specializing in fire reconstructions and accident analysis: autos/fires/P.I./product failure/construction defect. Ref: Martindale-Hubbell Law Directory, Best's Directory of Recommended Insurance Attorneys and Adjusters. Contact: John Caudron, M.S.S., BCFE (909) 598-8919.

Are your clients needing cash or monthly income? Seniors with home equity may be eligible for government-backed reverse mortgage loans. Call Seattle Mortgage Company (800) 643-6610 ext. 9.

Robert L. Mushen, M.D., Ophthalmologist, announces his availability for expert medical testimony (plaintiff or defense) and independent medical examinations. Over 20 years' experience in labor and professional liability cases. Curriculum vitae and references on request (509) 946-9661, fax (509) 946-9664.

Contract attorney: WA attorney, seven years' litigation experience, available for contract work in complex civil litigation, including product liability, toxic tort, commercial and construction defect. Law review editor, large firm experience, and LL.M. Bob (206) 323-2336.

Hate going to the library? Fraser Robinson Speir, attorney outsource firm, will research and draft memoranda/pleadings, write trial/appellate briefs. Pierce, Thurston, and south King Counties. $30/hr. (253) 564-3669, fax (253) 564-3552.

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WILL SEARCH

Francis FitzMaurice Redfield: died May 1981; will drawn up in 1976. Anyone having knowledge of the will please contact Mary M. Williams, 1005 Exchange St., Apt. 7, Astoria, OR 97103, (503) 325-3431.

Jean Baptiste Etcheverry: lost will; resident of Whatcom County, WA; born 5/17/34 in France; died 5/4/97. Contact Terrance G. Lewis (360) 734-6390.

MISCELLANEOUS

Roche Harbor: three waterfront lots remain. Facing west, perfect beach, dock for 50' boat. Ready to build. These are premium, from $380,000. Terms available. Represented by Pat O'Day at Orca Properties, Friday Harbor. (360) 378-4111.

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

Lump sums cash paid for remaining payments on seller-financed real estate contracts, notes & deeds of trust, notes & mortgages, business notes, insurance settlements, lottery winnings. Cascade Funding Inc. (800) 476-9644.

Newport, OR: one-bedroom cottage overlooking Yaquina Bay. Five minutes from Oregon Coast Aquarium, bayfront and beaches; $49/night; $294/week; (541) 265-8553.

Lopez Island: beautiful, contemporary NW-style Cape Cod, fully equipped guest house, garage/workshop, 291-foot waterfront, 2.21 sunny acres. Panoramic Rosario Straits/Mt. Baker view. Steps to beach, tennis. $569,000. Island House Realtors (360) 468-3366.

Honors & Awards

Issaquah District Court Judge **Mary Ann Ottinger** was recently selected Judge of the Year by the state professional organization of probation officers, the Misdemeanants and Corrections Association of Washington, for her role in helping people jailed throughout the state get equal access to publicly funded alcohol- and drug-treatment programs.

Frederick N. Halverson, of Halverson & Applegate in Yakima, **Edward F. Shea,** of Shea, Kuffel & Klashke, in Pasco, and **Paul L. Stritmatter,** of Stritmatter Kessler in Hoquiam, recently attained Life Fellow Status with The Fellows of the American Bar Foundation.

The Washington Association of Criminal Defense Lawyers recently presented Seattle attorney **John Midgley** with the 1997 William O. Douglas Award, given for extraordinary courage and commitment and outstanding achievement in the criminal justice system. WACDL also presented President's Awards to **Carole Grayson**, for her chairing of WACDL's editorial committee since 1987, to **Anna-Mari Sarkanen**, for her work as co-chair of WACDL's Amicus Committee, and to **Charles Dorn**, for his work as a member of WACDL's Lawyers' Assistance "Strike Force" Committee.

The Washington State Association of Municipal Attorneys (WSAMA) recently bestowed the Earnest Campbell Award for significant achievements and long-standing contributions to municipal law to **Robert Hauth** of Rainier, **Jerry F. King** of Vancouver, and **John D. Wallace** of Seattle.

Ruth Walsh, chair and namesake of the Walsh Commission, was presented with the 1997 Outstanding Achievement Award for a citizen volunteer at the Washington Council on Crime and Delinquency's 41st annual meeting in Seattle.

Thomas R. Chapman, of the Paine Hamblen firm in Spokane, has received the 1997 Evergreen Award at the annual conference of the Washington Self-Insurers Association.

CORPUS JURIS SPOKANUM?

It's the Spokane legal community's effort to sponsor, fund and build a house in partnership with Habitat for Humanity. Volunteers include lawyers, judges, paralegals, secretaries, courthouse personnel, law students, dispute resolution workers, probation officers, and private investigators. A thumb's up to this hard-working group as they pound away toward their goal.

SPOKANE COUNTY BAR AWARDS

Elsewhere in Spokane, the Spokane County Bar Association just presented the following awards:

Firm of the Year — **Hawkins & Guinn**; Attorney of the Year — **Alexander "Joe" Shogan, Jr.**; Government Attorney of the Year — **Lisa Simonsen;** Distinguished Service Award — **Jan Dyre** and **Scott Bridges;** Marathon Hours Awards — **Richard Kayne** and **Cheryl Mitchell;** Young Lawyer of the Year — **Uche Umuolo;** Family Law Attorney of the Year — **Jay Burnett;** Bankruptcy Law Attorney of the Year — **Lisa McBride;** Advice Clinic Attorney of the Year — **Marc Roecks**.

MARCHING INTO THE SECOND CENTURY

David Broom, of the Paine Hamblen firm, is the top pick to lead the Spokane Area Chamber of Commerce into the organization's 100th year. To be installed as President of the Chamber in September, Broom has been involved in Spokane civic activities for many years.

The Honorable Norma Huggins

NO BORED MEMBERS HERE

King County Superior Court Judge **Norma Huggins** was recently appointed to the Girl Scouts-Totem Council's Board of Directors Committee. She also co-chairs the Juvenile Justice Racial Disproportionality Work Group and is a member of the Gender and Justice Implementation Task Force.

The King County Bar Association has elected the following new officers and members of its Board of Trustees, effective July 1, 1997:

Daniel S. Gottlieb, president; **Linda J. Stout**, first vice-president; **Lucy Isaki**, second vice-president; **Judith Ramsayer**, secretary; **Kenneth Hart**, treasurer; and **Carl J. Carlson, Howard P. Pruzan** and **Mark B. Shepherd**, new Central District Trustees.

The Washington Chapter of American Academy of Matrimonial Lawyers has elected the following new officers for 1997: **Janet A. George,** president; **Mary Wechsler,** vice president; **Edward Lane,** secretary/treasurer; and **William I. Kinzel**, president ex officio. The board of managers includes **Martin S. Godsil, Mabry C. DeBuys and Kenneth Weber.**

Megan Muir has been elected to the board of the Young Lawyers' Division of the King County Bar Association.

GOLD E. LOCKS TRIAL?

Washington State Court of Appeals Judge **Philip Thompson** sat in the audience gallery while East Omak Elementary students tried Gold E. Locks for not being nice and breaking into the three bears' home. While the jury deliberated, Thompson spoke to fifth graders and answered questions about lawyering and the court system. The jury returned a verdict of not guilty, but ruled that Gold E. Locks had to fix a chair she broke and apologize to the bears.

THE MIGHTY PUCS

The Mighty PUCs (Practitioners Using Computers) are meeting monthly in Tacoma to commiserate over computer woes and learn new computer tricks. The July 15th meeting will feature the use of Internet and e-mail resources.

'TIS THE SEASON FOR JOINDER

Ray W. Kahler joins the Hoquiam firm of Stritmatter Kessler. **Gregory T. Costello** has joined Marten & Brown LLP. **Peter A. Wenzel**, formerly of the Silicon Valley, joins Graham & James LLP/Riddell Williams P.S. as an associate in its Intellectual Property Practice. **Michael T. Pfau, Annie T. Fitzsimmons and Sandra J. Rovai** have joined Gordon, Thomas, Honeywell, Malanca, Peterson & Daheim. In addition, **William L. Dixon** has been named an associate, and **Judge Donald H. Thompson** has been appointed Of Counsel to the firm.

A RAINES FROM SEATTLE?

Federal Office of Management and Budget director **Franklin Raines** is a WSBA member and graduate of Franklin High School in Seattle. He was the youngest person ever appointed to Boeing's board of directors, where he served until his recent Cabinet appointment.

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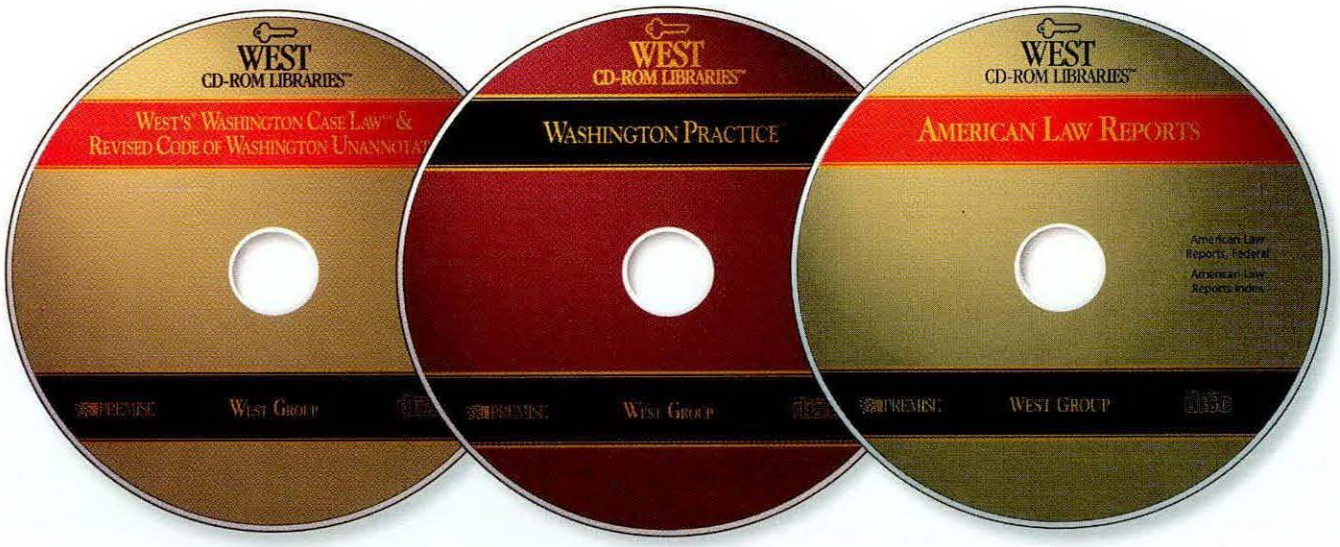

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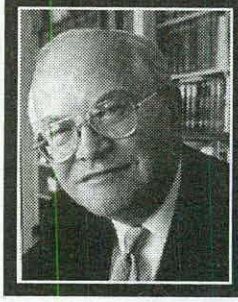
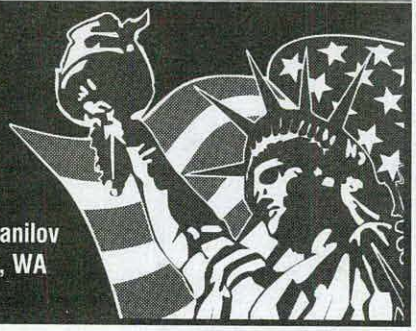
UNITED STATES IMMIGRATION NEWS



Dan P. Danilov
Seattle, WA



UNITED STA
IMMIGRATION

NO "APRIL FOOLS" JOKE
IMMIGRATION AND WELFARE LAW CHANGES EFFECTIVE A

Many major provisions of the 1996 immigration and welfare reform laws are slated to be implemented on or soon after April 1, 1997. The implementation of these provisions will have a profound impact not only on undocumented immigrants, but on U.S. citizens, legal immigrants, and refugees. Below is a quick summary of some of these changes.

NEW PENALTIES FOR THOSE WHO OVERSTAY THEIR VISAS OR ENTER WITHOUT INSPECTION

BARS TO RE-ENTRY

Anyone who remains in the U.S. unlawfully for 180 days after April 1, 1997, and leaves, will be barred from re-entering the U.S. for 3 years. Anyone who remains in the U.S. unlawfully for one year after April 1, 1997, and leaves, will be barred from re-entering for 10 years. Anyone who has been deported, and who later tries to re-enter without inspection will be barred from re-entering forever.

EXCEPTIONS

There are very few exceptions and waivers available for these bars.

VOIDING A VISA

Anyone who overstays a period of authorized stay, even for one day, will have his/her visa automatically voided, even if it was a multiple year, multiple entry visa. The person will be required to a apply for a new non-immigrant visa at the U.S. Consulate in his/her country of nationality.

SUMMARY EXCLUSION AND ASYLUM DEADLINES: NEW HURDLES FOR REFUGEES, BEGINNING APRIL 1st

ENTRY WITH FALSE DOCUMENTS

People who arrive at an airport or other port of entry without proper documents may be summarily excluded at the port of entry with no hearing, and sent home on the next plane.

SEEKING ASYLUM

Anyone who expresses a desire to seek asylum will be run through a rapid-fire screening process that cuts back sharply on traditional protections intended t
political persecution. Asylum-seekers will be sent to a det
an asylum officer within 48 hours where they must prove
The asylum-seeker must do this without the benefit of as
family members. If the immigration officer does not believ
be scheduled for a full hearing in front of an immigration j

APPEALS

The only appeal is an administrative review by an immig
within at most seven days. During this time, the refugee is
ficulty in receiving assistance in preparing a convincing ca

5-YEAR BAR

Anyone summarily excluded at a port of entry will be barr

NEW TIME DEADLINE ON ASYLUM APPLICATIONS

Anyone already in the U.S. who wants to apply for politica
entering the U.S. The one year period will begin being coun
ly in the U.S. will have until April 1, 1998 to apply. Those w
year from that actual date of entry to apply.

NO RELIEF FROM DEPORTATION IN CO

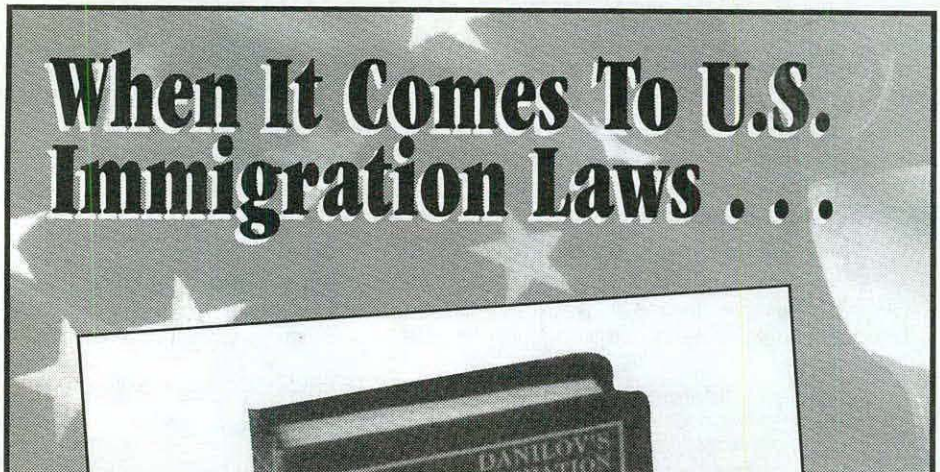
NO SECOND CHANCE FOR LONG-TIME LAWFUL PE

Anyone who has been convicted of a crime that is defin
immigration law will no longer be able to seek a waiver o
judge. The definition of "Aggravated Felony" has been e
crimes involving violence, and even many theft crimes. T
so that someone with a conviction twenty years ago that
now deportable without any possible relief.

HARDER TO GET HUMANITARIAN RELIEF FROM DE

As of April 1st, 1997, it will be harder for people found in

See "NO APR



INS ISSUES INTI
REGULATIONS

INS has issued its first substantial package of in
Illegal Immigration Reform and Immigrant Responsibili
deal with expedited and regular removal proceedings
detention. The regulations take effect on April 1, 1997

HIGHLIGHTS OF THE REGULATIONS

ASYLUM DEADLINE:

The one-year asylum filing deadline has been extended unti
"the one-year period shall be calculated from the date of th
April 1, 1998, whichever is later." 8 CFR 208,4(a), 8 CFR 2

EXCEPTIONS TO DEADLINE:

Those who can establish "changed circumstances" (country
stances relating to eligibility) may still apply for asylum after t

NO "APRIL FOOLS"

Continued From Previous Page.

that there are reasons why they should not be deported. In order to avoid deportation, they must now show that they have been continuously present in the U.S. for 10 years; that they are of good moral character; and that their deportation would cause "exceptional and extremely unusual hardship" to an American family member. The American relative must be either a U.S. citizen or lawful permanent resident (LPR). This is a tougher standard of proof than that required by the previous law. Under a "catch 22" part in the new law, anyone who was given a notice of deportation hearing will have their period of presence in the U.S. cut off as of the date of that notice, even though they may be here for several more years before the INS ever holds a deportation hearing.

NEW INCOME RESTRICTIONS ON IMMIGRANT SPONSORS

The INS is currently writing new regulations to implement provisions of the 1996 Act placing new requirements on immigrant sponsors. Those regulations are expected to be published within the next several weeks. Sixty days after those regulations are published, the following new requirements will apply:

NEW FINANCIAL REQUIREMENTS WILL KEEP AMERICAN FAMILIES SEPARATED

U.S. citizens and lawful permanent residents (LPRs) will be required to earn at least 125% of the poverty level in order to reunite with family members, even with their spouses and minor children. It is estimated that about three of every ten people who sponsored a family member to come to the U.S. in 1994 would fail to meet this new requirement.

NEW AFFIDAVITS OF SUPPORT BECOME LEGALLY ENFORCEABLE

U.s. citizens or LPRs who sponsor an immigrant relative to come to the U.S. will be required to sign a legally enforceable Affidavit of Support requiring the sponsor to promise to support the immigrant so the immigrant won't become a "public charge". This document makes the sponsor liable for the immigrant's use of benefits until the immigrant becomes a citizen, or until the immigrant works and pays taxes for at least 10 years. If the sponsor has found someone to co-sponsor the immigrant, the co-sponsor is jointly liable.

NEW RESTRICTIONS ON BENEFITS FOR LEGAL IMMIGRANTS

LEGAL IMMIGRANTS BEGIN TO BE CUT OFF FROM FOOD STAMPS

As of the date of enactment of the welfare law (8/22/96), newly arriving legal immigrants became ineligible for food stamps. Exemptions to this cutoff are granted to refugees for their first five years; veterans and active duty military personnel, their spouses, and unmarried children under 21; and immigrants who have worked in the U.S. at least 10 years. Legal immigrants who were already receiving food stamps when the welfare law was enacted, however, were allowed to keep them until at least April 1, 1997. Those people must still be cut off no later than August 22, 1997.

DISABLED AND ELDERLY LEGAL IMMIGRANTS WILL LOSE SSI BENEFITS

In August, 1997, many legal immigrants, including senior citizens and those who became disabled after entry, will be kicked off Supplemental Security Income (SSI), a cash assistance program that helps the elderly and disabled poor pay for basic necessities. These immigrants are precisely those who will be unable to make the move "from welfare to work."

NOTE: This information has been prepared by the **American Immigration Lawyers Association and National Immigration Forum**. It is made available by Dan P. Danilov, Esquire of the **LAW OFFICES OF DAN P. DANILOV** located at Suite 2303, One Union Square, Seattle, Washington 98101-3192. Telephone: (206) 624-6868 FAX: (206) 624-0812.

NEW REGULATIONS ON IIRAIRA

Continued From Previous Page

CREDIBLE FEAR PROCESS

Aliens, who during secondary inspection, indicate a fear or concern about returning home will be referred for a credible fear interview before an asylum officer to be conducted within 48 hours of arrival. Credible fear procedures and criteria are substantially the same a those included in the proposed regulation. 8 CFR 235.3.(b)(4).

MOTIONS TO REOPEN

The regulations codify several of the procedures established by the Executive Officer for Immigration Review ("EOIR") in 1996. Aliens may file only one Motion to Reopen a removal proceeding, generally within 90 days of an administratively final order of removal. This limitation of one motion does not apply to the INS. 8 CFR 3.2(c)(2).

DETENTION

Under the Transition Period Custody Rules ("TPCR") contained in Section 303(b)(3) of IIRAIRA, the implementation of the mandatory detention provisions is suspended until October 9, 1997. Under the TPCR, "lawfully admitted" criminal aliens (as well as unremovable criminal aliens) are eligible for release upon a showing of no danger to the community and no risk of flight. The regulations provide that where

Changes Affecting F-1 Stu
Under IIRAIRA

As of November 30, 1996, the Illegal Immigration Reform and I
1996 prohibited any alien from receiving an F-1 Student Visa if the ali
lic elementary school, Kindergarten through grade 8, or a publicly-f
Students in grades 9 through 12 must pay the unsubsidized, per capi
to be eligible for an F-1 Student Visa nd are limited to a period not t

Q Who is eligible to attend public schools and in the Untied States on an F-1

A The Immigration and Nationality Act defines the F-1 non-immigrant alien as
residence in a foreign country and who is a bona fide student coming tempora
to pursue a course of study at a recognized institution of education approved
foreign students.

The 1996 changes to the immigration law prohibit attendance at a public ele
adult education program, and restrict attendance at a public secondary sch
exceed one year while requiring reimbursement of the unsubsidized, per cap

ADJUSTMENT OF STATU RESIDENT UNDER S

Section 245 (i) of the Immigration and Nationality A their status while unlawfully present in the United Stat tain provisions of the new Illegal Immigration Refor 1996 (The '96 Act) become effective on April 1, 1997 cation for adjustment of status (Form I-485) on or be

Q Will aliens who entered the United States illegally be barre

A No, the Immigration and Naturalization Service has determ of status under section 245(i). However, the new law ma the United States.

Q Will aliens who have been unlawfully present in the Uni April 1, 1997?

A No, the new law makes aliens seeking to reenter the Unite the United States for certain periods of time after April 1 unlawfully present in the United States prior to April 1, 1997 v provision.

Under the new law, aliens who remain in the United States then depart from the United States will be inadmissible for th United States unlawfully for one year or more after April 1, 19 be inadmissible for 10 years.

Unlawful presence in the United States generally includes t unlawful entry. There are exceptions for persons under 18 yea lum applications, beneficiaries of Family Unity Protection, certa who have filed a timely application for change or extension v United States. INS or an immigration judge can also make an States is necessary to avoid extreme hardship to a citizen or pe

Q What will happen to adjustment applications if section 245

A Section 245(i) is a provision that allows certain aliens pr status. If Congress allows this provision to expire on S Section 245(l) applications, but may continue to adjust the st tion (Form I-485) prior to that date.

THE IMPACT OF THE 1996 IIRAIRA AC ACT- ADJUSTMENT OF ST

On September 30. 1996, President Clinton signed th Responsibility Act of 1996, Pub. L. 104-208, 110 Stat. 208 (eral new grounds of inadmissibility, including a new section 2 as amended (the "Act"). See Section 301(c)(1) of the IIRAIR effective April 1, 1997, except as otherwise provided in the A States without being admitted or paroled," will be deemed to b

Such persons are now, and will be after April 1,1997 in under Section 245(a) of the Act, since they have not, or will not into the United States.

Under Section 245(i)(l)(A) of the Act, which was not amende will continue to be specifically permitted to apply for adjustment

See "ADJUSTMENT OF STATUS

NATURALIZATION

Medical Mental Disability Waiver

On March 19, 1997, the Immigration & Naturalization Service published in the Federal Register the revised regulation defining "a physical or developmental disability or a mental impairment" that qualifies an applicant for an exemption to the history and English portions of the naturalization examination. The revised regulation,which is effective immediately, should make it substantially easier for individuals with cognitive disorders, including Alzheimer's disease, depressive conditions and posttraumatic stress disorder, to receive an exemption to the naturalization exam. While the revised regulation is final, the INS is soliciting comments and is especially interested in comments on the appeals process.

REQUIREMENTS FOR NATURALIZATION

Under current law, applicants for naturalization are required to demonstrate an understanding of the English language, including an ability to read, write and speak words in ordinary usage in the English language. Applicants are also required to demonstrate a knowledge and understanding of the fundamentals of history and of the principles and form of government of the United States. This new regulation implements the Immigration and Nationality Technical Corrections Act of 1994 (INTCA) which provides exceptions to the English language proficiency and the government knowledge requirements for naturalization for persons with "physical or developmental disabilities" or "mental impairments." This regulation does not change the exemption to the English

THE OATH REQUIREMENT

The new regulations do not change the statutory requirem a "meaningful oath" of allegiance. However, INS has indicate by new instructions that permit less formal means of asse depend on whether applicants can make a formal pledge, like stands every word in the oath. Instead applicants will be m verbal acknowledgment that they understand the consequen can accept a wide variety of signals from an applicant that he ing, but not limited to, a simple nod, eye blinking, or other si "no." If there are family members present INS officials may c determine how the applicant signals "yes" or "no." INS offi understand the substantive implications of their applicatio become citizens of the United States. In the past, there have the meaningful oath requirement was interpreted. INS officials be interpreted as a meaningful oath has been put in the age ly applied.

PROCEDURAL STEPS FOR GAINING AN EXEMPTION

Individuals seeking an exemption based on a disability o using the new Form N-648 at the same time as they submi

Adjustment of Status Under 245(i)

Continued From Previous Page.

To establish eligibility to adjust under Section 245(i) of the Act, most such persons must, among other things, pay a significant filing fee surcharge. See Section 245(i)(I) of the Act. In addition, as was the case prior to the enactment of IIRAIRA, all Section 245(i) adjustment applicants must continue to be "admissible" to the United States. See Section (i)(2)(A) of the Act.

QUESTION PRESENTED

Will aliens who are present in the United States after having entered without inspection continue to be eligible to apply for adjustment of status under Section 245(i) of the Act after April I, 1997, the effective date of new section 212(a)(6)(A) of the Act?

SUMMARY CONCLUSION

Yes. Under Section 235(i)(1)(A) of the Act, otherwise eligible aliens who entered this country without inspection and who seek to adjust status under Section 245(i) of the Act will continue to be admissible after April 1, 1997. Such persons therefore may continue to apply for adjustment of status under Section 245(i) of the Act through September 30, 1997. The Service should adjudicate to completion all such timely filed adjustment applications, even if a final decision on the application cannot be made until after the September 30, 1997 sunset date of Section 245(i) of the Act.

NOTE: This information has been prepared by the **INS** on March 2, 1997. It is made available by Dan P. Danilov, Esquire of the **LAW OFFICES OF DAN P. DANILOV** located at Suite 2303, One Union Square, Seattle, Washington 98101-3192. Telephone: (206) 624-6868 FAX: (206) 624-0812.

Latest News on Suspe Deportation Ca

Claudia Wilken, United States District Court Judg District Court of the Northern District of California, gra Temporary Restraining Order (TRO) to plaintiffs in Ba Reno, No. C97-0895. The TRO orders the Executive Review (EOIR) to restrain from enforcing the directive Judge Creppy and Board of Immigration Appeals C relating to suspension of deportation grants.

On February 13, 1997, Chief Judge Creppy and directed all Immigration Judges and members of the B suspensions of deportation. These directives were bas of the Illegal Immigration Reform and Immigrant Res (IIRAIRA) which provides that the . . ."Attorney Genera deportation and adjust the status under Section 244 Nationality Act of more than 4,000 aliens in any fisca 11, 1997, the EOIR had granted approximately 3,900 a sion of deportation for the fiscal year beginning Octob

In response to Chief Judge Creppy and BIA Chairma plaintiffs filed a Complaint for Declaratory and Inj Application for Temporary Restraining Order and Or preliminary injunction.

In her decision granting the TRO, Judge Wilken f established immediate and irreparable injury in that if and Schmidt continue to be followed, plaintiffs will like

Further, addressing the arguments presented by found the following:

1. The plaintiffs have raised serious questions as to whether Chi Chairman Schmidt exceeded their authority, and therefore, violated and the Administrative Procedure Act (APA).

2. The statutory language raises serious questions as to whether S number of suspensions of deportation which can be granted ea states that the Attorney General may not suspend the deportatio more than 4,000 aliens per fiscal year, and that the limit shall ap alien applied for such suspension and adjustment. Plaintiffs claim tion 309(c)(7) indicates that Congress intended to limit only the status following suspensions of deportation, and that suspensions nied by adjustments of status are not included in this number.

The Court ordered the EOIR to adjudicate plaintif pension of deportation under the current law and reg to the directives of Chief Judge Creppy and BIA Chai

A Show Cause hearing is scheduled before the Co At that time, plaintiffs' motion for provisional class c heard.

Naturalization Disability Waiver

Continued From previous page.

APPEALS

There is no separate appeals procedure for individuals seeking an exemption based on disability or impairment. Individuals whose application for an exemption is rejected may appeal immediately or may take the English and history exam and appeal based on the results of that test. Either way, they may raise the issue of their exemption application. The first level of appeal is a rehearing in front of an INS officer of equal or greater rank. The second level of appeal is in Federal district court. In cases where there is a denial of citizenship based on an applicant's inability to take a "meaningful oath," the INS is planning on holding decisions on these cases pending further guidance from Headquarters in April or May.

SITES FOR TESTING

Currently, most applicants undergo the history and English test at INS offices, although some District Offices have agreed to conduct testing off- site, at INS-approved outside testing organizations. This regulation continues to permit that practice and CJF strongly suggest that Federation-affiliated agencies with potential applicants call their local INS Office to see how such testing can be set up. This information will be made available to the public subsequently. We have been informed that INS officers have been trained and will be ready to begin adjudicating applications under the new standard starting March 20, 1997. If you have any questions regarding operations and practice in your local INS Office, please contact INS Regional Offices. If ical and laboratory diagnostic techniques may qualify if the condition affects or demonstrate the knowledge necessary to pass the naturalization examina

Q How does an individual apply for a waiver?

A Persons seeking an exemption should obtain the form N-648 from the I form as part of the naturalization application. The form N-648 is a medi out by any licensed medical doctor or Incensed clinical psychologist who is e cant's disability or impairment.

Q Where can I get the new form N-648?

A Forms may be obtained from the local INS Office or INS Forms Center, 870-FORM Forms may also be copied from the March I9th Federal Regi

Q What do I have to do if I have a naturalization application pending?

A Individuals with pending applications who have not submitted medical N-684 and have it completed by an authorized medical professional. T completed form N-684 with them to the interview. Individuals who already