VOL. 51 NO. 9

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Washington State BAR NEWS

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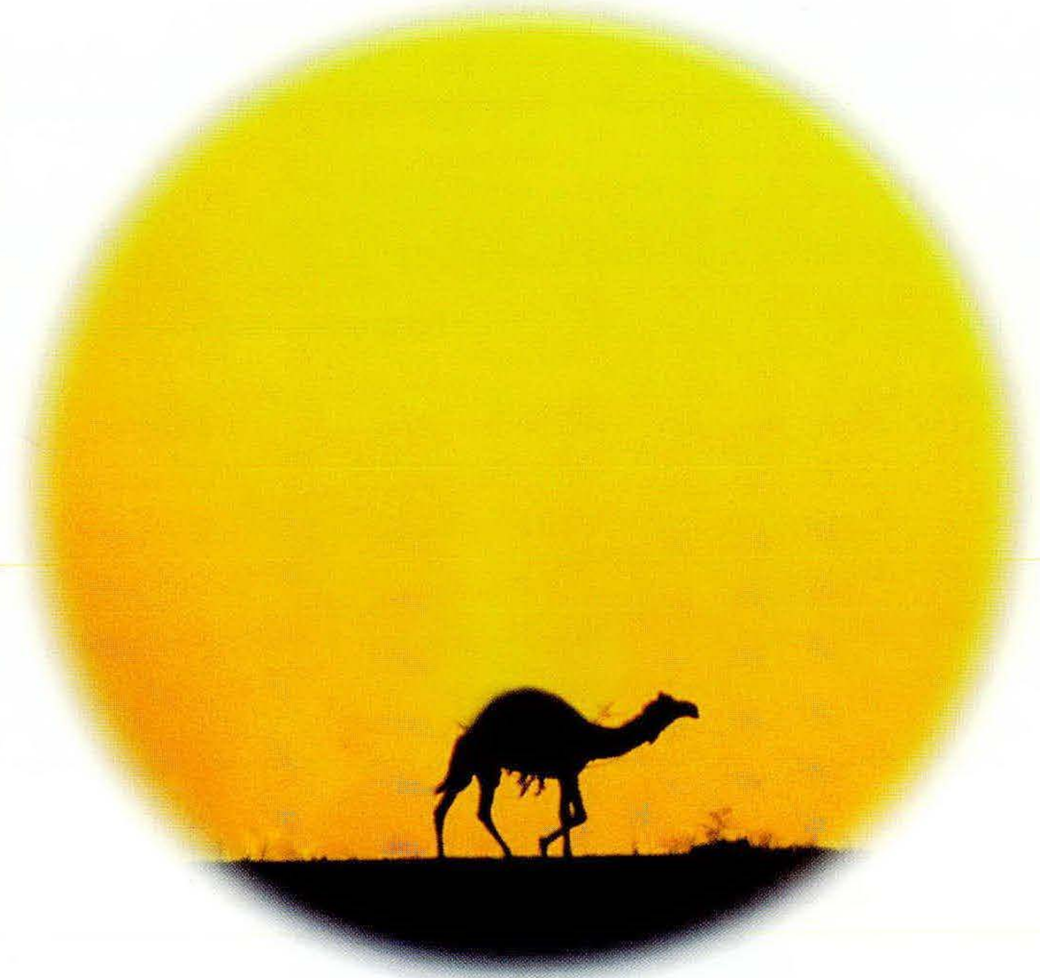
September 1997



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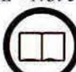

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Washington State
BAR NEWS
September 1997

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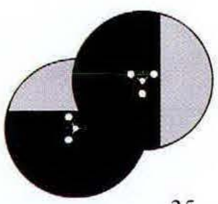

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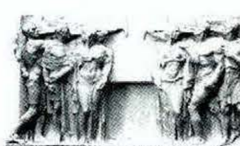

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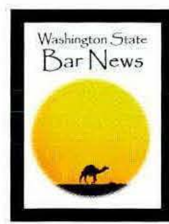

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RANDOM DRUG-TESTING FOR LAWYERS?

Editor:

Having been away from the full-time practice of law for the past four years, I find myself increasingly dismayed by the tone of discourse within our profession as illustrated in the pages of the *Bar News*. As an example, in the current issue, Mr. Bruce D. Maclean complains of the Bar Association leaders who "cravenly kowtow to the Republican Nazis when they demand that the Bar Association suspend lawyers for failure to repay student loans." This style of strident argument seems to represent a trend among a growing number of attorneys.

On the substance, speaking as neither a Republican nor a Nazi, I think it's probably a good idea to suspend the licenses of attorneys who fail to repay student loans. Judging from the many discipline cases reported in the same issue of the *Bar News*, usually involving horrendous dishonesty and misuse of funds, too many of our attorneys are becoming far too lax when it comes to other people's money. I suspect that, in addition to greed, drugs are involved in many of the lawyer discipline cases, as confirmed by at least one of the numerous cases reported in the July *Bar News*. If true, I would urge the Bar Association to take a serious look at requiring pre-licensing, pre-employment and random drug-testing of all attorneys, and automatic disqualification upon a positive finding. This is basically the rule applied to all fishing-vessel crews and, I would wager, our vessel crews have a lower incidence of drug use than the lawyer population of King County. Of course, drug-testing of vessel crews is required by Coast Guard regulation primarily for reasons of public safety, but, as all the disciplinary cases demonstrate, lawyers have a far greater potential to harm the public than crews on fishing vessels.

JOHN BUNDY
Seattle

CONTINUATION OF THE CUMULATIVE SUBJECT INDEX

Editor:

The best thing about the *Cumulative Subject Index* used to be that it was a source for finding relevant cases that was not controlled by West Publishing. Back when there was a Reporter of Decisions not accountable to West, the Reporter independently created the headnotes that were the basis for the *Index*. In my experience, checking both West's *Digest* and *Cumulative Subject Index* sometimes led to additional relevant cases. This was better than just relying on the *Digest*. Also, since the *Index* was included with the subscription, the Index was affordable for sole practitioners and for libraries other than law libraries.

In a little-noticed change, the Reporter was booted out. Instead, the caselaw is published under a contract whereby the headnotes and other editorial material are created by the contracting party. Initially, that contracting party was Lawyers Cooperative Publishing, but the contract initially went into effect around the time the Lawyers Cooperative was in the process of merging with West Publishing. Now, the caselaw is being published by West

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When the change in publishing strategy occurred, the subscription price for the advance sheets decreased slightly. Now the other shoe has dropped, and the subscriber is getting far less for the subscription price. Even if the *Index* were published by West Group or one of its sister divisions of the mega-publisher, the people of this state would lose out in two ways: 1) No one is suggesting that an *Index* will be published as part of the advance sheet subscription price. It would cost extra. 2) Unlike the situation when there was a Reporter of Decisions, the categorization of cases in the *Digest* would be the same as it is in its index because both would come from the same source. Additional cases won't be found.

RON STEINGOLD
Olympia

RE: CUMULATIVE SUBJECT INDEX

■ Editor:

West Group has received several inquiries from Washington practitioners regarding the *Washington Reports Cumulative Subject Index*. We appreciate all the customer comments concerning this product. However, due to the recent integration of Thomson Legal Publishing and West Publishing (now called West Group), we are in the process of analyzing the entire Washington product line. Until this analysis is completed (approximately Dec. 1997), we have no plans to publish the *Cumulative Subject Index*.

Please feel free to contact me if you have any questions or comments.

ROSEMARY WILLCOX
Product Development Manager
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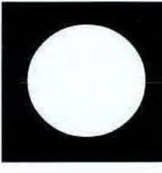
Lawyers Helping Hungry Children

Washington State Attorney General Christine Gregoire will be the keynote speaker for the annual fund-raising breakfast of Lawyers Helping Hungry Children (formerly called Lawyers Campaign for Hunger Relief) on October 8. The breakfast is from 7:30-8:30 a.m. at the Seattle Sheraton and costs $50 per person. LHHC also is soliciting firms and individuals to underwrite the breakfast and sponsor tables. All proceeds go straight to LHHC's sponsored organizations: Children's Alliance, Emergency Feeding program, Summer Meals for Kids, and CARE.

To make a reservation or for more information on being a breakfast sponsor, call Kathy Casey at (206) 622-3000.



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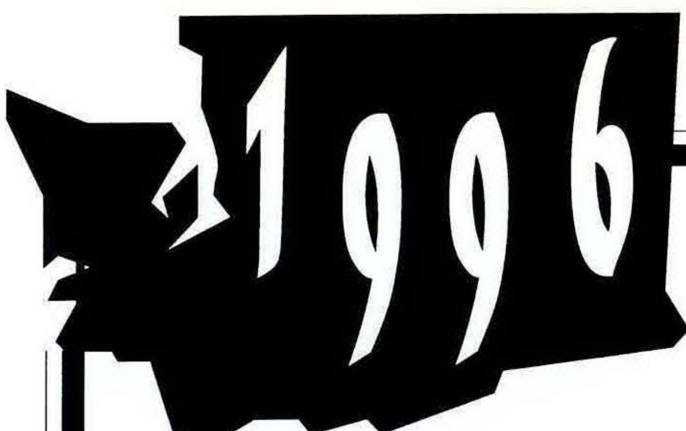

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EDITOR'S PAGE

CAN WE TALK?

It's September, a time of fresh beginnings, as we pack away the trappings of summer pursuits and hope to find renewed energy for getting down to business on projects that may have been temporarily pushed aside in the dog days of the past two months.

As fall arrives, change is in the air with the *Bar News*. You may have noticed our new look beginning with this issue. We have taken advantage of technological advances to update the graphic design of the *Bar News* without extending our graphics budget. What you see is a leaner, cleaner look that we think your overstressed eyes will appreciate.

The *Bar News* has also given birth to a fledgling web page, located at "http://www.wsba.org." You can now download and keyword search some of each current issue, as well as popular articles from past issues, interest rate charts and other frequently requested information. As technology develops, we hope to post improved facsimiles of the actual *Bar News* pages. Look for late-breaking announcements and information on our web site even before you get your *Bar News* in the mail each month, to keep your informational edge over less "techie" lawyers.

As we've been processing these changes, I've wished that I could somehow get you, the reader, to talk to me about what you'd like to see more (or less) of in the *Bar News*. A select few of you I've heard from only when I've done something to mightily offend you. Mostly, I don't hear from you at all. I am reminded of former *Bar News* editor Carole Grayson's observation that she most often heard only "thundering silence" from readers.

What would you like to see more of in the Bar News?

I know, being a fellow lawyer, that you're most likely very opinionated. And I imagine that given the luxury of a few minutes' thought, you could come up with many ideas for the *Bar News* that haven't occurred to me.

Can you think of a hot topic in your practice area that you'd like to see an article about? Or better yet, an idea that you'd like to write an article about? Are there practice areas that we appear to have ignored? Is there something missing from the *Bar News* that you'd like to see, or something we're doing now that you'd like to see more of? Are there topics that you think we've beaten into the ground and you hope you never see mention of again? Are there topics you've really got your undies in a bunch about that you think we simply can't ignore any longer? Do you consider certain of our usual columns a complete waste of space? Does our use of color make your head spin in an Exorcist-like fash-

ion? Would you like to see the *Bar News* shorter, longer or in a totally different format? Can we *talk* about whatever it is you have in mind for *Bar News*?

To get your brain molecules churning, I'm including below a listing of the *Bar News* features that I'd most like to get some input and feedback on. Please take the time to jot down your comments and e-mail to me at "comm@wsba.org," fax to me at (206) 727-8320, or mail to me at Washington State Bar Association, 2101 Fourth Avenue, Fourth Floor, Seattle, WA 98121-2330. Or call me at (206) 283-4015.

We ought to talk more often!

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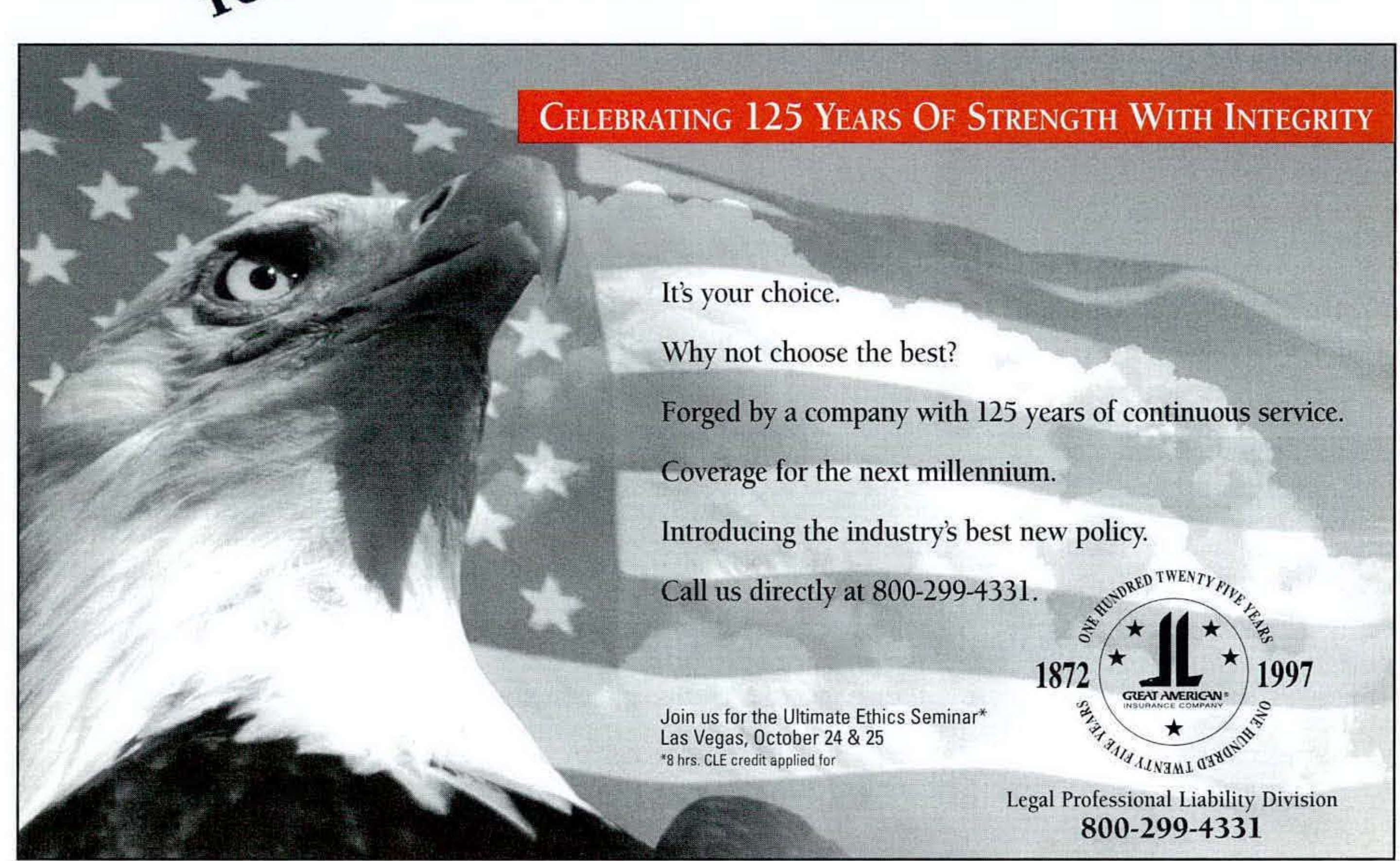
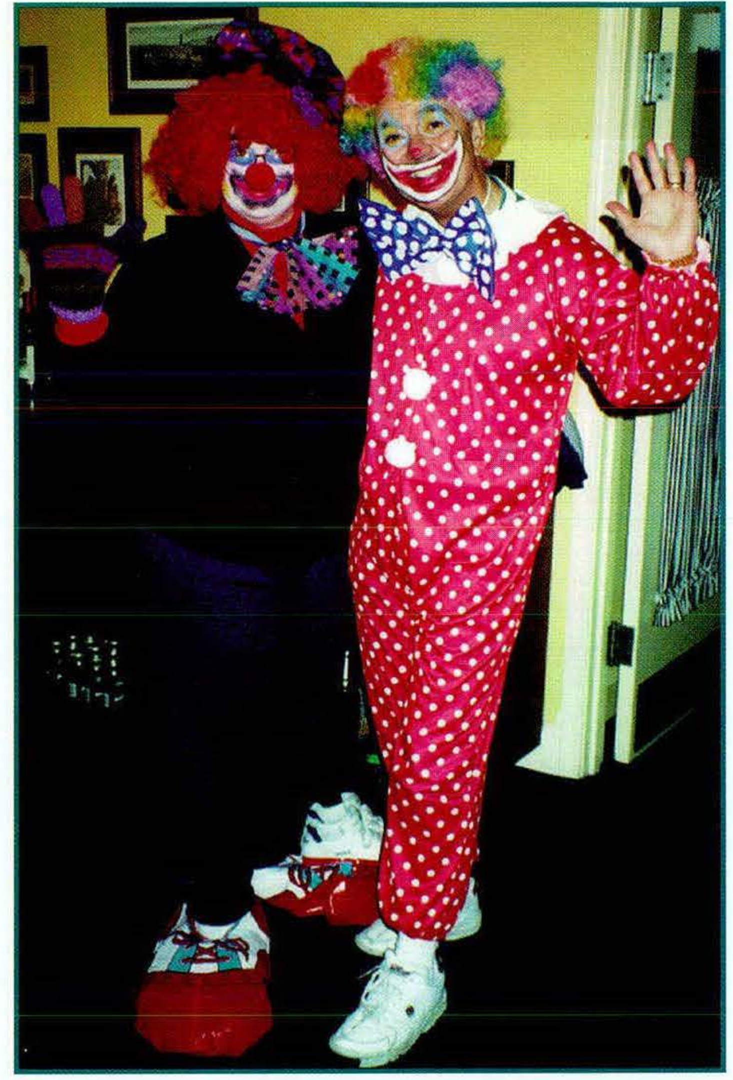




Mary Fairhurst & Tom Chambers

JUST ANOTHER OLD WHITE GUY?

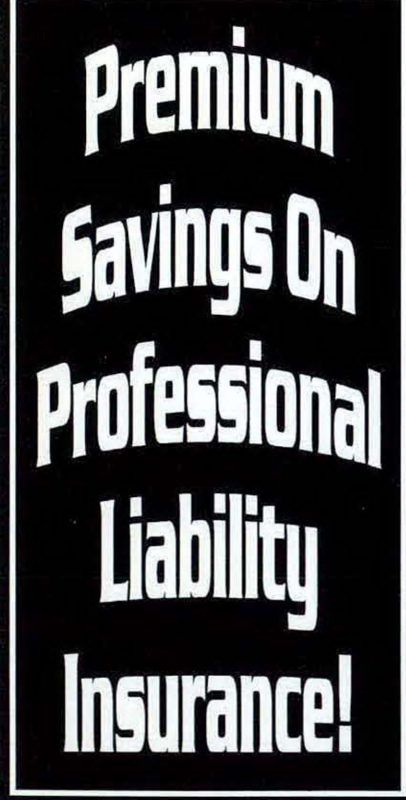
by Tom Chambers, President

Way back when, as I was preparing to assume the presidency of the Bar Association, I mentioned this very column to an associate in my office. What I heard surprised me a bit. "Oh, the President's column. I never bother to read it," she said dismissively. "It's always just another old white guy." Well there wasn't much I could do about age or the way I look. Why has my picture in the "President's Corner" always been in some silly costume? It was to catch your attention. If you're reading this column, maybe it worked.

Your next president won't have to use some gimmicky picture. Your next president is hardly "another old white guy." In fact, the person who will lead the Bar Association in the coming year is anything but typical.

For starters, Mary Fairhurst is a she — only the second woman to serve as WSBA president. More importantly, I believe her presidency heralds a new era for women in law. When I first joined the Bar Board of Governors in 1990, we were all middle-aged males. By the time I left the Board, we had one woman, Vicki Norris. Now, in addition to our president-elect, there are three women on the Board: Patricia Williams of Spokane, Marijean Moschetto of Bellevue and Mary Alice Theiler of Seattle.

The days of "just another old white guy" are gone forever — and it's about time. Mary Fairhurst represents the finest of the new era. She is intelligent, wise, thoughtful, articulate, personable and — most impor-



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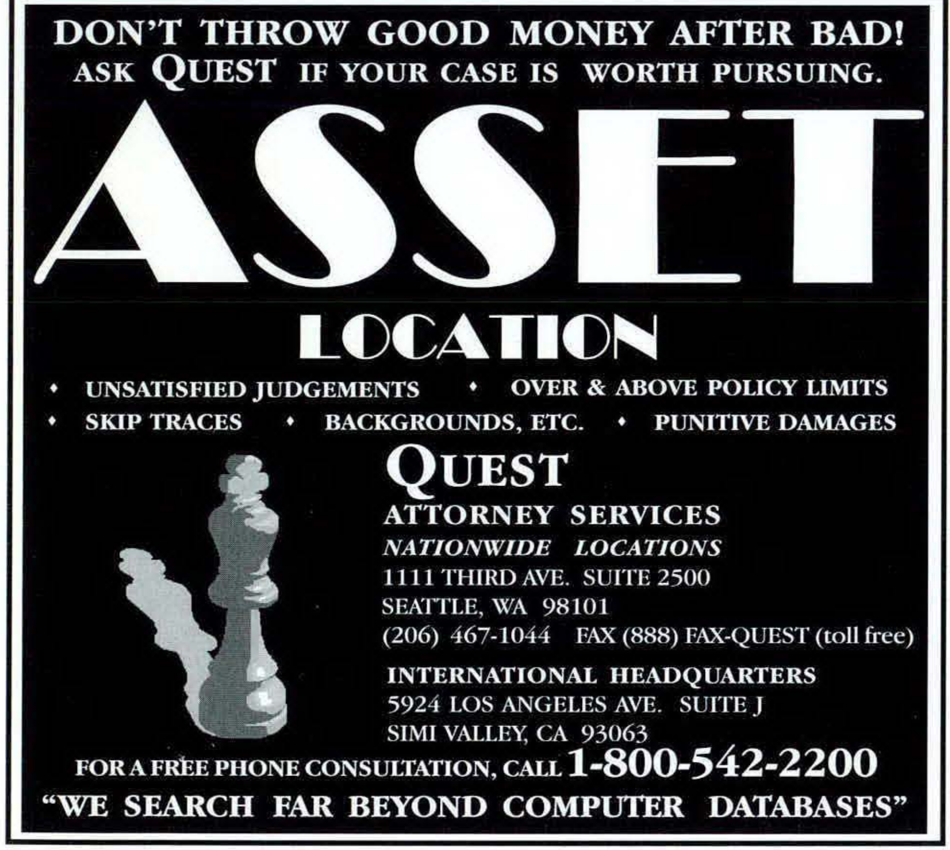

tantly — has a core of decency which gives her compassion for all lawyers and all people.

This is my last column as your president. I can think of no better way to use this space than to introduce you to the new era and your new president. Leadership and advocacy roles are nothing new to Mary. She served as president of Washington Women Lawyers in 1989-1990, and she currently heads up the Civil Rights Unit of the Attorney General's Criminal Justice Division. She has served on numerous committees and task forces, addressing such issues as domestic violence, access to justice and victims' rights.

She has served on the Attorney General's Office Management Team and the Board of Directors of her local Girl Scout chapter. And Mary shares her knowledge, whether at CLEs or a 10th-grade religious education class at St. Michael's Catholic Church.

In recent years, she has given more than just her time and seemingly boundless energy to the Bar Association. She has enabled the organization to embrace government attorneys — a group that for years has felt distanced from the Bar Association. At her urging more and more public sector attorneys are becoming involved in the Bar Association, broadening our membership as well as our ability to serve all the different lawyers in the state.

Over this last year, I have used myself as a visual aid to get my message across. Costumes and poses have been a "hook" to get your attention. I didn't take myself too seriously, and I had some fun. Next month, I wanted to be a gorilla.

Will I just be another old white guy again? Not on your life, not me, no way! Are you kidding . . . !

Dennis P. Harwick
Executive Director

A Communications Plan?

EXECUTIVE'S REPORT

One of the toughest challenges for bar associations is to formulate a comprehensive communications plan. Wait, that's wrong. What's even harder is *sticking to* a communications plan!

So what is a communications plan? I would define it as: 1) obtaining a consensus on what message you want to send, and 2) using your resources as effectively as possible to send that message whenever you get the chance. As Bonnie Kam, the WSBA's Director of Communications, is fond of saying, "You can't *not* communicate." You don't have a choice on whether to engage in the process. You can only choose what your message should be and do your best to communicate it. Obtaining a consensus is much more difficult than it sounds. I once asked a group of bar association board members to write down what each of them thought the term "public relations" (the old term for "communications") meant. Answers ranged from "number of column inches" in the local newspaper to "inter-galactic goodwill." So much for consensus!

You can't not communicate!

A lot of lawyers would say that "improving the image of lawyers" should be our top priority. Others would say that we should concentrate on explaining what lawyers do. Still others would work on explaining the judicial system. Having spent a lot of years in this business, I can tell you that "improving the image of lawyers" is probably out of reach. I've read too many president's columns (some reaching back 40-50 years) bemoaning how much lawyers used to be respected in something called the "good ol' days" compared to the "current lawyer bashing." Trouble is, there doesn't seem to be much reliable data demonstrating that the image of lawyers has taken a recent downturn.

Nonetheless, some would blame the perceived diminution in the image of lawyers on lawyer advertising — but an ABA survey found otherwise. "While the legal profession strongly believes that advertising contributes to the decline of the profession's image, the public rarely mentions advertising as a factor." Rather, "Those who dislike lawyers believe they are dishonest, selfish and too expensive." At least that gives us a target for our communications efforts!

One of the biggest mistakes in any communications plan is confusing strategy with message. Define the message first. Then decide your strategy. Then define what tactics you will use. The fact that you can put out press releases (which, if produced in excess, get ignored), call press conferences, get on public access television, or even speak to civic and school groups is no substitute for having a message. Get a message. Then stick to it! (Some of you may remember my column "Staying on Message" from November 1996 commending the ABA for finally trying to stay on message.)

By now I hope you're asking how much of this the WSBA is taking to heart. I'm pleased to report that at its June meeting the Board of Governors created a one-year ad hoc committee to create a comprehensive, statewide communications plan for the WSBA. Given the wide range of ideas and possibilities, that won't be easy. But what will be even harder is avoiding the temptation to change the message six months, one year, or two years later.

You can send your comments or observations about the WSBA's communications plan to Bonnie Kam at the WSBA. She'll pass your comments and observations on to the committee chaired by Katie Ross.

The proverbial bottom line is that we don't have the resources to keep changing the message. So let's do it right the first time!

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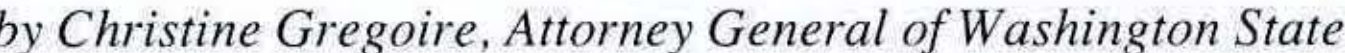

PROCESS & PROGRESS

An Insider's Perspective on the Tobacco Settlement Negotiations

by Christine Gregoire, Attorney General of Washington State

The largest financial settlement in the history of the world was stopped in its tracks by a train ride. On an afternoon in June, more than 30 attorneys waited impatiently in a Washington, D.C., hotel for a British American Tobacco (BAT) executive to check in from his train trip. After three months of difficult negotiations, an historic settlement agreement between state Attorneys General and the tobacco companies had hit a last-minute impasse which threatened to block the entire settlement.

Attorneys General were adamant that tobacco companies had to end their lawsuits against whistleblowers from their industry — including legal action against Jeffrey Wigand, the one-time head of research for a BAT subsidiary, Brown & Williamson. We couldn't settle as a matter of principle and, as one of my colleagues suggested, leave "the last hostage on the beach." It all came down to one company executive who was aboard a train in England and not reachable. In the end, the BAT executive agreed to the legal protection for whistleblowers and the Attorneys General and tobacco company negotiators sent an historic settlement agreement to the American people, the White House and Congress.

If approved by Congress, the settlement will bring about the most significant change in tobacco policy for this country in nearly half a century, arming the nation with a complete arsenal of weapons to combat the leading cause of preventable death in America. The settlement provides a comprehensive regulatory regime, strong anti-smoking prevention and cessation programs, tough new enforcement measures, clear FDA authority to regulate nicotine as a drug, a change in corporate culture, full disclosure of industry research, protections from environmental tobacco smoke, and a financial settlement package which includes industry payments in perpetuity ($368.5 billion in 1997 dollars over the first 25 years).

The agreement is aimed at trying to prevent 3,000 of our children a day from becoming addicted to tobacco products and stopping the 420,000 deaths that occur each year from tobacco-related illnesses. It is about changing the unlawful tactics of a multibillion dollar industry which has targeted our children and deceived its consumers. But this agreement may also well produce what others outside the legal system have struggled heroically toward and never been able to achieve: the adoption of a legally binding, comprehensive plan for dealing with a legal, but highly addictive and deadly product.

The story of the settlement actually began in Mississippi when Attorney General Mike Moore was approached one day by a law school friend who had just lost his mother to a smoking-related illness. They devised a strategy which included a claim for reimbursement of Medicaid dollars paid for tobacco-related illnesses. It was a unique new legal theory for use against an industry which has never paid a dime to an individual for smoking-related damages. When Moore ran for re-election, the tobacco industry promised any opponent $500,000 in campaign funds and a job if they lost.

The initiation of lawsuits against the tobacco industry in 40 states provided the leverage to get tobacco companies to the bargaining table for the first time ever to talk about fundamentally changing the way they do business. Initially, the tobacco companies were aggressive in trying to block state lawsuits, suing several states to prevent them from even filing a lawsuit. In Florida, the industry employed a strike force of 55 lobbyists to repeal the statute which was the basis of Attorney General Bob Butterworth's lawsuit. In a dramatic vote, the Legislature came within one vote of stopping the Florida suit.

Here in Washington, we spent about a year reviewing the complaints of other states and collecting and analyzing thousands of documents about the industry. My biggest concern was advertising targeting kids and false information provided consumers by the industry. We

paid close attention to Federal Trade Commission documents which were accumulated during its investigation into charges that tobacco advertising was directed at kids. We also met with health care providers and public health groups to better understand the health issues.

As we contemplated a possible lawsuit, I had my first visit from industry lawyers who informed me of the problems — evidentiary and otherwise — I would face in bringing a lawsuit against them. As in other states, the industry also was suggesting to Washington business interests that they should beware of an Attorney General who considers this kind of lawsuit because a Washington business could be the next target. We also heard another refrain common in other states: "Beware, the Attorney General will try to take your beer, gun and fast-food hamburger next."

As we were nearing decision time on our lawsuit, friends began showing me a new ad campaign which was running in Rolling Stone and other youth-oriented publications. The glitzy ad had cool Joe Camel pop up off the pages of the magazine offering two concert tickets. There was also a catalog of "Joe Camel" clothing and other paraphernalia which could be purchased with "Camel Bucks" found on Camel packages.

I invited the industry representatives back in to tell them I had reviewed the claims of the other state lawsuits, conducted my own investigation and had become very concerned about the legal conduct of their industry. In response to the recent Joe Camel ad campaign, the industry people denied children began smoking based on their advertising. They rationalized that once kids started smoking, companies should be able to vie for their fair share of the market.

Joe Camel and the Marlboro Man have been the two prime targets of those who believe the industry markets to kids and tries to make them the next generation of addicted tobacco users. And for good reason. Prior to the introduction of Joe Camel, RJR had about five-tenths of a percent of the illegal teenage market. Today, with Joe Camel, it has about 33 percent of that market.

When I asked industry representatives about the Medicaid dollars paid for tobacco related illnesses, they responded that their industry paid high taxes in Washington state (highest in the nation at that time) and those taxes, coupled with the fact that the premature deaths of their consumers subsidized pension systems, actually mitigated any Medicaid costs borne by Washington taxpayers.

Another important point in the "decision" period for me was an evening spent with some members of Trial Lawyers for Public Justice. They pointed out the obvious — the consistent lack of success by individual claimants as well as class actions against the companies. In the Cipollone case, for example, the defendants spent between $30 and $50 million while plaintiffs spent about $2 million. The result was a $400,000 plaintiff verdict which was overturned on appeal.

To date, no plaintiff has yet recovered dollars from this industry. I had the obvious questions. Was the private tort system a failure in bringing redress to consumers? Was the lack of success due to a single act of Congress — the Surgeon General Warning labels which were legislatively mandated in 1965? Could Attorneys General level the litigation play-

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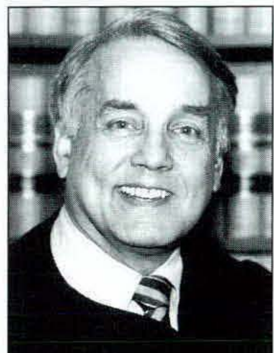

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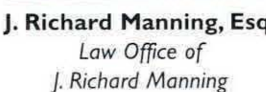

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ing field? Could Attorneys General force one of the most powerful and unregulated industries in America to comply with state laws just like every other corporate citizen in the state? If Attorneys General weren't willing to hold this industry accountable, then who would? Congress and state legislatures have shown consistently that they would not change this industry. Ultimately, we realized that had this been any other industry, with the evidence we had at hand, there would be no question about filing. So a little more than a year ago, we became the ninth state to file suit against the tobacco companies.

My meetings with industry representatives and the experience of states which had already filed tobacco litigation made it clear the industry would use its huge financial resources and pursue a scorched earth litigation practice against us. Facing tobacco's legal juggernaut, other states turned to the private sector to help pursue their claims. Mississippi, for instance, did not use its own AG staff at all. Here in Washington, we have a history of appointing special Assistant Attorneys General only in cases of conflict or where we need expertise from the private sector. But I realized that in this case the human and financial resources required to file could well exceed our office's capacity. We decided to form a public/private partnership by soliciting proposals from the state's private bar. We hired two private law firms — Hagens & Berman, primarily for the discovery phase, and Luvera, Barnett, Brindley, Beninger & Cunningham for the trial phase. After filing, we also hired the firm of Bennett & Bigelow.

Unlike many other states, however, we created and staffed our own "war room," which is led by Jon Ferguson, a highly respected legal strategist, an experienced trial lawyer and a national antitrust expert. The team includes an experienced, nationally recognized consumer protection attorney, Donna Fisher. The overall responsibility for the case went to our complex litigation head, John Hough, who recently settled a case for the State Investment Board with the largest settlement in the history of our office — more than $164 million. Our team is rounded out with two other assistant attorneys general, paralegals, and support staff.

The industry has retained 11 Washington State law firms in addition to its other legal resources from around the country. Within hours of our announcement, a tobacco industry attorney flew into Sea-Tac from Washington, D.C., and vowed at a press conference that they would never settle the case.

While it is unique to challenge an entire industry, our complaint is based in large part on traditional consumer protection and antitrust claims. We allege defendants engaged in unlawful and deceptive advertising targeted at children, and that defendant manufacturers and their trade associations acted in concert to hide critical information to deny consumers informed choices, and conspired to withhold safer products from the market.

We also alleged common law and constitutional causes of action, which were dismissed by the court and have been appealed. We seek injunctive relief to stop the advertising to kids, point-of-sale restrictions to make it more difficult for kids to acquire tobacco, disgorgement of profits from sales to minors, dissolution of the trade associations, antitrust damages and recovery of Medicaid and other health care costs attributable to tobacco use incurred by the taxpayers of the state.

Since filing, the discovery phase has been a challenge for both sides. It is the largest document production our office has experienced, and I assume other states are experiencing the largest in the history of their Attorney General's Office. Most

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states share access to a Minneapolis document depository which contains more than 32 million pieces of documentation. Washington state alone is producing six million documents to defendants. We were warned by other filing states about the extensive and costly document production demands the industry would place on state agencies. That warning has proven true in our state. Secretary of State Ralph Munro told me the document demands are stretching his Archives Division to the breaking point. To meet this demand, the bulk of our document production is on CD-ROM disks rather than through the traditional paper copy production.

Multi-state cooperation is not new to Attorneys General, particularly in the antitrust and consumer protection area. For example, we were among four states to sue the oil industry for petroleum price fixing and obtained a $150 million settlement after years of litigation. We have participated in numerous other multi-state antitrust actions, involving issues as diverse as pesticides and airline tickets. A recent multi-state consumer protection action forced Internet service provider America Online to change its billing practices.

While the tobacco defendants have attempted to isolate each state by placing huge financial and human resource demands on each, the Attorneys General are countering that by improving coordination between suing states. For instance, we secured the first agreed protective order allowing exchange of information about defendants among the states. Consequently, our attorneys and those representing a number of other states have been jointly reviewing hundreds of thousands of tobacco industry documents. We recently convened a meeting of attorneys representing 22 states to explore further ways to cooperate, discuss prosecution strategies and share our litigation "war room" set up.

The Attorneys General involved in the tobacco litigation also agreed to develop goals and objectives for our lawsuits. The goals were to:

> Protect our children by stopping the marketing of tobacco to kids and reducing youth access to tobacco;
>
> Provide full disclosure to the public about the health effects of tobacco products;
>
> Protect consumers by reforming the business practices of tobacco companies and;
>
> Provide relief to the states and individuals for their tobacco-related health care costs.

The first break in the long-time unity of the tobacco industry came in March of this year with a negotiated settlement with the Liggett Group. Liggett is the smallest of the top five cigarette manufacturers, but the settlement was a big boost to our litigation. Liggett executives agreed to turn over previously secret documents and to help our lawsuit against the other companies in any way possible.

While there had been rumors for a number of months that the tobacco industry may be willing to consider settlement, no one took them too seriously, so we were all surprised by the next turn in the litigation. Early in April, while in Washington, D.C., on other business, I received a call from Mike Moore asking me to join three other Attorneys General for a private meeting with the industry to discuss settlement. To send a signal the industry was serious about the talks, the CEOs of the two largest companies — Geoffrey Bible of Phillip Morris, and Steve Goldstone of

RJR Nabisco — met with us. They assured us that they were prepared to "fundamentally change the industry," which was important since that is the language many Attorneys General used in their lawsuits.

But despite those assurances, we wanted some early signs that fundamental change meant just that, and that the industry was prepared to make those kinds of changes. RJR responded by saying that it would get rid of Joe Camel if Phillip Morris would end the career of the Marlboro Man. The two most visible advertising symbols of the industry were being offered up as symbols that the industry meant business in these talks. For the first time, the Attorneys General began to privately speculate that the negotiations were real.

As a lawyer, the exchange about these advertising symbols provided much insight into the coming months of negotiations. As Attorneys General, we had seen the industry as a monolith, "the industry." For negotiation purposes, they were anything but. As the weeks and months of negotiations passed, that observation became more and more evident, particularly with regard to financial capability and the international market.

"For negotiation purposes, the tobacco industry was anything but monolithic."

From a negotiation point of view, the players were also interesting. General counsel for the companies never "came to the table," although we later learned they were in rooms upstairs at the hotel and the negotiators at each break would run upstairs to check with them. Most of the lawyers we negotiated with had little or no experience with the industry. In fact, some would say their past was anti-tobacco. Top executives of several companies faithfully attended all negotiation sessions and as time went on they assumed the role of technical negotiators.

Recognizing the devil is in the details in any agreement, but in particular this one, we put together our own "detail wonks," including Matt Myers, Executive Vice President and General Counsel for the Campaign for Tobacco-Free Kids, Tom Green, First Assistant Attorney General in Massachusetts, and myself. While delving into the details was extremely time consuming at first as I read all the material I could get my hands on, it was well worth it at the negotiating table. For the last five weeks, the three of us negotiated daily with three company vice presidents regarding the aspects of the settlement which impacted children and public health.

On our side of the table, we were consistently represented by five Attorneys General — the "negotiating team" as we became known to our colleagues. We had three private lawyers, including Dick Scruggs and Joe Rice from two different law firms which represent Mississippi and more than 20 other states, and Steve Berman from Seattle, representing about nine other states. In addition, from the public health side we had Matt Myers and Dr. Lonnie Bristo, former president of the American Medical Association. The so-called Castano trial lawyers were there from day one representing the private class actions.

These negotiations, like all others, be-

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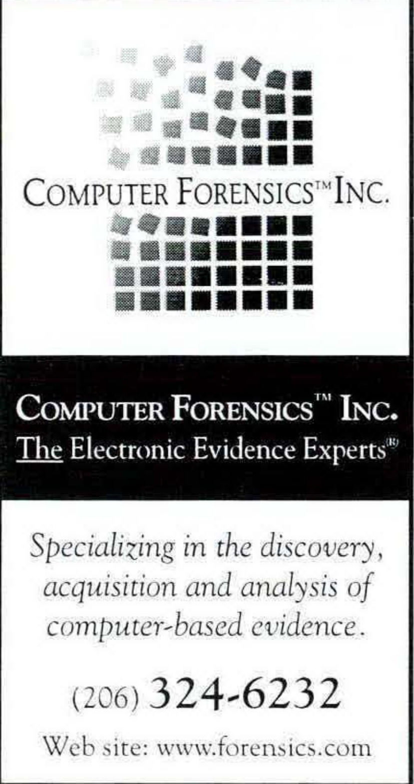

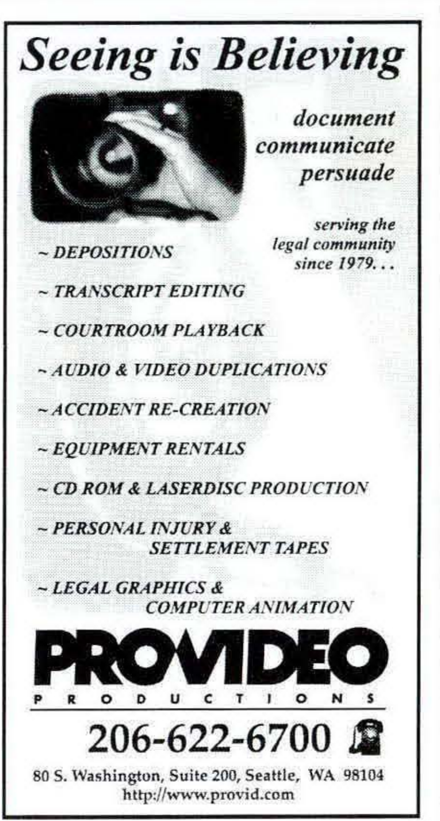

gan with setting "the agenda" for each side. For Attorneys General and Matt Myers, the agenda was kids and public health. For the industry, it was "peace, now and forever," which many of us took to mean full immunity from civil and criminal liability.

At the close of the second day, as we prepared to break up the opening round of talks, each of the Attorneys General made closing remarks. After months of experiencing the industry's scorched-earth litigation practice, of hearing their high-priced PR attacks on ourselves and our lawsuits, and reading in the litigation documents about what we believe are lies and deceit by the industry, the anger and frustration came out in those closing remarks. The basic message to industry was this: If "peace, now and forever" means the industry will buy immunity from civil and criminal actions, they could forget it. We said we would stay at the table only if the industry continued to bargain in good faith and we made progress toward our four goals. While our angry message was not well received by the other side, the lines were drawn and the stakes were clear for industry negotiators to ponder as they decided whether they wanted to continue the negotiations.

Of course, the industry did return to the table (they said they hoped the Attorneys General had vented all their frustration and there would be no more sessions like the last) and good progress was made in the talks until the next big turn in the case. In early April the *Wall Street Journal*, in a front page story, ran a remarkably accurate account of the talks. The news leak had a dramatic impact on the talks. As attorneys we were used to negotiating settlements of lawsuits in private and the new intense media scrutiny changed the nature of the talks. Reporters were everywhere. At one point during talks in Dallas, we looked up to see a microphone bobbing on the end of a boom at the window. From that point forward details would leak out and we had to deal with reaction to the stories, such as the response of Wall Street, or a steady diet of advice from all sectors as information — accurate and inaccurate — was made public. As elected officials, it was difficult to balance the need to have private discussions with the need to keep the public informed.

Another unique aspect of this settlement is that it still must go through a very public – and political — process. Unless Congress approves the package, or amends it in a way acceptable to industry and the Attorneys General, there is no deal. The settlement is complex and detailed in many respects and already we have learned that educating the White House, Congressional members and the American public is a formidable task. We have observed that critics take one specific aspect of the agreement and criticize it, rather than look at the entire settlement package and judge the whole.

For example, some are critical because private litigants cannot request punitive damages for past conduct. That argument may be appealing until you look at a number of factors. First, no one has ever recovered punitive damages against this industry. Second, under the settlement, the industry will pay $60 billion in punitive damages to the public good, which is the largest award for punitive damages in our legal history and four times the amount paid by Exxon for the Valdez oil spill. Third, some states, like Washington, don't

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allow a private claim for punitive damages. Finally, the fundamental public policy purpose behind punitive damages is to get the defendant to meaningfully change behavior and punish. We argue this is the biggest industry corrective action plan in history, as well as the largest punitive financial penalty.

"We expect Congress and some members of the public to raise concerns about attorney fees."

Some critics also have said we need to go much further in the advertising and promotion restrictions. As lawyers, we know the risks of doing so under the First Amendment. The Greensboro decision, *Coyne Beahm, Inc. v. FDA*, 958 F. Supp. 1060 (M.D.N.C. 1997), is just the start of the court's review of the propriety of restricting the industry's commercial speech. There, the court struck down the advertising restrictions enacted by the Food and Drug Administration last fall. That's why we have backed the settlement agreement up with a consent decree. If Congress does enact the restrictions as we propose and a separate entity (with or without the prodding of the industry) challenges them successfully, we have a waiver of the First Amendment rights enforceable through our consent decree.

The importance of the consent decree may best be understood by lawyers. The consent decree was our tool to provide continuing jurisdiction by our superior court, enforceability of all key provisions (particularly those subject to constitutional challenge), and the ability to use criminal enforcement through the courts should the industry violate a court order entered to enforce the decree.

We expect Congress and some members of the public to raise concerns about attorney fees. Like any other case, we settled for full restitution without regard to attorney fees and costs. Reasonable fees are to be negotiated in the future and paid separately. While I oppose a windfall to the private lawyers because the case settled relatively early and for an amount wholly unanticipated, I do support an award of reasonable fees and costs. I expect the state to make its own claim and to be reimbursed similarly. I will defend such an award because I know full well the risks involved for the private bar to undertake such a case. I also know that Attorneys General would not have been able to bring 40 state lawsuits and achieve this unprecedented legal victory without a partnership with the private bar.

Fundamental to any settlement negotiations, we had our private bottom line and a firm commitment to it. That bottom line was to achieve the litigation goals and objectives we had set out for the case. In the end, we exceeded our goals and objectives and we believe the settlement exceeds what we could ever achieve through our own litigation. Why? It seems obvious that the barrage of state lawsuits posed the threat of huge legal costs, almost endless negative publicity, and potentially staggering judgments. The suits in effect have forced this industry to the table, which is something no other lawsuits or Congress have been able to do.

We could have settled primarily for money, but we realized early in the negotiations there was a much bigger opportunity available to us. We decided to use the leverage of these lawsuits for an even greater public good — to fundamentally change the public policy of this country regarding tobacco. The risk was obvious. There would be those who would argue anything short of putting the industry out of business was simply a deal with the devil. And there would be those who would say this industry sells a legal product and therefore should not have to pay more financially and receive any greater regulatory burden than any other business in this country. To no one's surprise, in the weeks following the settlement we have heard from both ends of the spectrum.

I have come to understand that it is much easier to kill public policy than it is to make it, and throughout our history the tobacco industry has been able to kill new policy initiatives with almost breathtaking effectiveness. This time we have been able to use the legal system to leverage the industry to join us in a call for change. As a result, we have come closer to changing the tobacco industry than any group in history. Whether we now adopt these sweeping changes is in the hands of the White House and Congress.

❖ ❖ ❖

Christine Gregoire is the elected Attorney General of the State of Washington and was personally involved in the tobacco settlement negotiations as they developed.

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Why Some Lawyers Make A Fortune... While Others Struggle To Earn A Living

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TRABUCO, CA - Why do some lawyers get rich while others struggle just to get by? The answer, according to California lawyer David Ward is not talent, education, hard work, or even luck. "The lawyers who make the big money are not necessarily better lawyers," Ward says. "They have simply learned how to market their services."

Ward, a successful sole practitioner who once struggled to attract clients, credits his turnaround to a little-known marketing method he stumbled across six years ago. He tried it and almost immediately attracted a large number of referrals. "I went from dead broke and drowning in debt to earning $300,000 a year, practically overnight."

Ward points out that although most lawyers get the bulk of their business through referrals, not one in 100 has a referral *system*, which, he maintains, can increase referrals by as much as 1000%. "Without a system, referrals are unpredictable. You may get new business this month, you may not," he says.

A referral system, by contrast, can bring in a steady stream of new clients, month after month, year after year. "It feels great to come to the office every day knowing the phone is going to ring and new business will be on the line," Ward says.

Ward, who has taught his referral system to lawyers throughout the U.S., says that most lawyers' marketing is, "somewhere between atrocious and non-existent." As a result, he says, the lawyer who uses even a few simple marketing techniques can stand out from the competition. "When that happens, getting clients is easy."

Ward has written a report entitled, **"How To Get More Clients In A Month Than You Now Get All Year!"** which reveals how any lawyer can use this marketing system to get more clients and increase their income. For a **FREE** copy, call **1-800-562-4627** for a 24 hour FREE recorded message.

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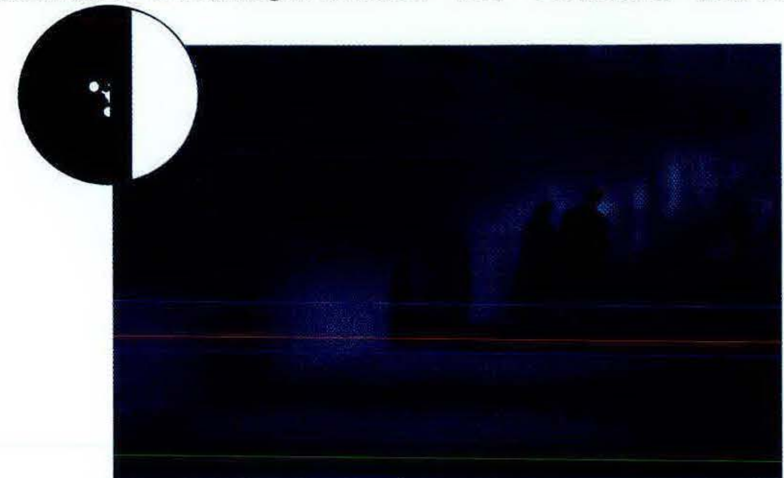

The Economic Espionage Act of 1996

by Michael Coblenz

I. Introduction

Intellectual property of all forms is becoming an increasingly important and valuable asset to business as this country changes to a high technology and information-based economy. Protecting these intellectual property assets is vitally important to the success of many businesses. There are federal laws to protect patents, trademarks and copyrights, and now there is a new law that provides federal protection for trade secrets.

The new law, the Economic Espionage Act of 1996 (E.E.A.), protects trade secrets by severely punishing their theft. It was passed in the last days of the 104th Congress, and despite its potential impact, there was little discussion in or notice to the legal community. The E.E.A. is a new section added to U.S.C. Title 18, Crimes and Criminal Procedures.[1] As the title of the law suggests, it deals with foreign espionage, particularly the growing problem of international theft of economic information. More importantly for the owners and users of trade secrets, the law also criminalizes the theft of trade secrets within the United States.

The legislative history describes the broad intent of the new law.

> For many years federal law has protected intellectual property through patent and copyright law. With this legislation, Congress will extend vital federal protection to another form of proprietary economic information — trade secrets.[2]

The E.E.A. has the potential to be both a great risk for someone accused of misappropriating a trade secret, and a powerful tool for owners of trade secrets. It adds to the existing state laws governing trade secrets.

II. Existing Trade Secrets

A. Criminal Laws

Washington is one of the few states to criminalize the theft of trade secrets. The criminal code defines "theft" as

> to wrongfully obtain or exert unauthorized control over the property or services of another or the value thereof, with intent to deprive him of such property or services[3]

and defines "deprive" as

> to make unauthorized use or unauthorized copy of records, information, data, *trade secrets*, or computer programs. [4]

The legislative history for the E.E.A. notes that only a few states have criminalized the theft of trade secrets, and that these laws "are rarely used by State prosecutors." There are, for example, no recorded cases of theft of trade secrets in Washington.

B. Civil Laws

Because of the weakness in the existing criminal laws, owners who believe that their secrets have been stolen must rely on state civil laws. The most common civil trade secret law is the Uniform Trade Secrets Act (U.T.S.A.), which is in effect in Washington and approximately 36 other states. Most of the remaining states apply the common law, which is described in the Restatement of Torts and uses terminology similar to the U.T.S.A.

The U.T.S.A., which took effect in Washington on January 1, 1982, is codified as RCW Chapter 19.108. It defines a trade secret as

> information, including a formula, pattern, compilation, program, device, method, technique, or process that: (a) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by other persons who can obtain economic value from its disclosure or use; and (b) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy. [5]

The first part of the definition has two elements: (1) value to the owner and (2) not being ascertainable to others. Both elements must be met to prove the existence of a valid trade secret. Additionally, the owner must show that reasonable efforts were taken to maintain secrecy. Proving value to the owner is usually easy and not generally disputed. But showing that the information was not ascertainable to others is more difficult to prove, as is showing that the owner took proper measures to maintain the information in secrecy.[6]

The U.T.S.A. defines "misappropriation" as

> acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means.

It defines "person" broadly, as both humans and a variety of business and governmental entities. "Improper means" includes

> theft, bribery, misrepresentation, breach or inducement of a breach of duty to maintain secrecy, or espionage through electronic or other means.

The U.T.S.A. further defines "misappropriation" as

> disclosure or use of a trade secret of another without express or implied consent by a person who: (i) used improper means to acquire knowledge of the trade secret; or

knew, or should have known, the trade secret was acquired by improper means, or revealed by accident or mistake.[7]

Proving misappropriation is often quite difficult. Businesses, and people in the same industry, typically use many of the same ideas, equipment and formulas, they are often members of the same technical and professional organizations, and read the same technical journals. Employees frequently come from the same talent pool and often the same universities. Because of this, it is not surprising that they also use very similar business or technical methods. Due to this overlap, it is often difficult to disprove independent invention. Therefore, absent a showing that someone walked out the plaintiff's door with trade secrets in a briefcase, misappropriation is difficult to prove.[8]

If misappropriation is proven, there are a number of remedies available for the successful civil litigant. "Actual or threatened misappropriation may be enjoined." The injunction can be of limited duration or can run as long as the information remains a valuable trade secret.[9] In addition to, or in place of, an injunction, the plaintiff may recover damages for actual loss, and unjust enrichment if not included in actual damages. In cases of willful or malicious misappropriation, the court may award exemplary damages "in an amount not exceeding twice" the actual damages.[10] Attorney's fees may also be awarded in cases of willful or malicious misappropriation, as well as when a claim is brought in bad faith, or a motion to terminate an injunction is made or resisted in bad faith.[11] Finally, in some rare cases the court may determine that the defendant would be unfairly burdened if prohibited from using the trade secret, and so "an injunction may condition future use upon payment of a reasonable royalty" for the duration of the usefulness of the trade secret.[12]

The problem with these civil remedies is that cases of misappropriation are difficult to prove, costly to pursue, and seldom produce sufficient relief. As the legislative history for the E.E.A. states:

> Most companies choose to forego civil litigation because of the difficulties in enforcing a monetary judgment against some defendants which may have few assets . . . or because companies do not have the resources or time to bring civil action. Additionally, private individuals and

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companies lack the investigative resources necessary to prove that a defendant has in fact misappropriated the proprietary economic information in question.[13]

In passing the E.E.A., Congress intends to correct this situation.

III. The Economic Espionage Act of 1996

The purpose of the E.E.A. is to help protect the growing wealth contained in trade secrets.

> In the last few decades, intangible assets have become more and more important to the prosperity of companies . . . . This material is a prime target for theft precisely because it costs so much to develop independently, because it is so valuable, and because there are virtually no penalties for its theft.[14]

This law is designed to rectify the existing gap in the current law.

The E.E.A. potentially covers all types of "economic espionage" from

> the foreign government that uses its classic espionage apparatus to spy on a company . . . to the disgruntled former employee who walks out of his former company with a computer diskette full of engineering schematics.

It is not intended, however,

> to apply to innocent innovators or to individuals who seek to capitalize on the personal knowledge, skill, or ability they may have developed . . . [nor] to prosecute employees who change employers or start their own companies using general knowledge and skills developed while employed. It is the intent of Congress, however, to make criminal the act of employees who leave their employment and use their knowledge about specific products or processes in order to duplicate them or develop similar goods for themselves or a new employer in order to compete with their prior employer.[15]

The E.E.A. potentially unleashes the investigative powers of the Justice Department. As the legislative history states: "a comprehensive federal criminal statute will better facilitate the investigation and prosecution of this crime."[16] The law also includes potentially harsh penalties including imprisonment, fines, and criminal forfeiture.

A. The Crime

The E.E.A. uses language similar to the U.T.S.A. and the Restatement of Torts to define trade secrets and their theft. The E.E.A. defines trade secrets as:

> all forms and types of financial, business, scientific, technical, economic, or engineering information, including patterns, plans, compilations, program devices, formulas, designs, prototypes, methods, techniques, processes, procedures, programs, or codes, whether tangible or intangible, and whether or how stored, compiled, or memorialized physically, electronically, graphically, photographically, or in writing if — (A) the owner thereof has taken reasonable measures to keep such information secret; and (B) the information derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable through proper means by, the public.[17]

This definition describes the possible types of trade secrets in much more exacting detail than the U.T.S.A. and the Restatement. This definition is also slightly broader than the definition of the U.T.S.A., which requires that the information also be of value to others who "can obtain economic value from its disclosure or use . . . ."[18]

Under the new law, a person is guilty of theft of a trade secret if,

> with intent to convert a trade secret, . . . to the economic benefit of anyone other than the owner thereof, and intending or knowing that the offences will, injure any owner of that trade secret, knowingly — 1) steals, or without authorization appropriates, takes, carries way, or conceals, or by fraud, artifice, or deception obtains such information; (2) without authorization copies, duplicates, sketches, draws, photographs, downloads, uploads, alters, destroys, photo-

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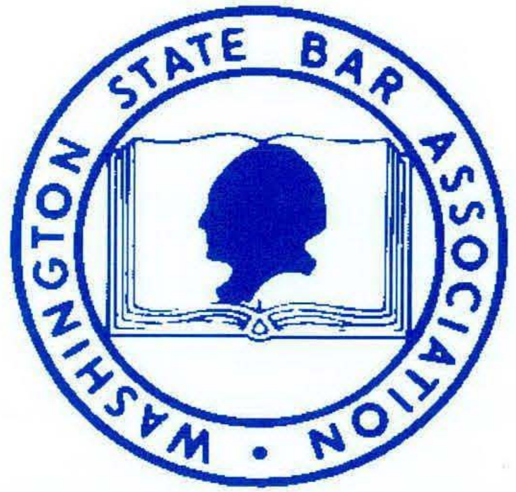

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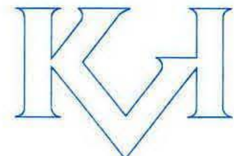

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> copies, replicates, transmits, delivers, sends, mails, communicates, or conveys such information; [or] (3) receives, buys, or possesses such information knowing the same to have been stolen or appropriated, obtained, or converted without authorization; . . .[19]

The statute is much more detailed in its description of stealing, unauthorized copying, and impermissible receiving than the U.T.S.A. or the Restatement. The law also criminalizes attempts to steal trade secrets, and conspiracies to steal trade secrets.[20]

This definition of theft or misappropriation differs from the definition in the U.T.S.A. in two regards. First, it makes it a crime to deprive the rightful owner of trade secrets in some way, as long as this creates an economic benefit for the thief or third party. In other words, the thief or third party doesn't need to gain information from the trade secret, as long as they benefit in some way because the rightful owner has lost the information. This is consistent with the slightly broader definition of "trade secrets," and broadens the scope somewhat over the U.T.S.A. The second difference narrows the E.E.A. from the U.T.S.A. Under the E.E.A. a third party who acquires a trade secret from someone else is guilty of theft only if they know that the trade secret was misappropriated, while the U.T.S.A. holds the third party liable if they knew or had reason to know the information was purloined. This is because the E.E.A. is a criminal statute, which requires a certain *mens rea*. This means that a defendant can only be held criminally liable under the E.E.A. if he knew information he received was a trade secret, while he can be held civilly liable under the U.T.S.A. if he should have known the information was someone else's trade secret.

One issue of concern to owners of trade secrets is that this information remain protected during litigation. It would frequently be unacceptable to reveal certain information in order to prevail at trial, and many businesses may choose to forgo litigation in order to protect valuable information. The E.E.A. takes this into account, as does the U.T.S.A. "In any prosecution or other proceeding . . . The court shall enter such orders and take such other action as may be necessary and appropriate to preserve the confidentiality of trade secrets, . . ."[21] This is very similar to the U.T.S.A. which states that "a court shall preserve the secrecy of an alleged trade secret by reasonable means, . . ."[22]

The major difference between the two laws is that the E.E.A. states that it protects "trade secrets" and not *alleged* trade secrets. We hope this is either an oversight or a drafting error. The Legislative History says that the "bill requires courts hearing cases brought under the statute to enter such orders as may be necessary to protect the confidentiality of the information involved in the case."[23] The E.E.A. also states that protective orders be consistent with the existing law and the Federal Rules of Criminal and Civil Procedure.[24] Rule 26(c)(7) of the Federal Rules of Civil Procedure allows protective orders for a variety of trade secrets and other confidential information, and courts have applied the Rule broadly to protect a variety of information.[25] The courts do require some proof that trade secrets or other confidential information actually exists.[26]

B. The Punishment

The E.E.A. punishes the theft of trade secrets by imprisonment, fines and forfeiture. The law states that whoever is guilty of stealing trade secrets shall be "imprisoned not more than 10 years," except organizations, which "shall be fined not more than $5,000,000."[27] This exception for organizations indicates that corporate officers are probably not subject to imprisonment for acts of the corporation which they were not directly involved in. This is somewhat different than some other corporate criminal offenses, such as the Clean Water Act, where corporate officers have been imprisoned despite lack of personal knowledge of criminal wrongdoing.[28] Corporate officers would face punishment, however, if they are personally involved in, or aware of, the wrongdoing.[29]

The E.E.A. also includes a provision for the forfeiture of property. The law states that the "court . . . shall order . . . the person forfeit to the United States — any property constituting, or derived from, any proceeds . . . of such violation" of this law, as well as property "used, or intended to be used, in any manner or part, to commit or facilitate the commission of such violation."[30] The legislative history clarifies that there

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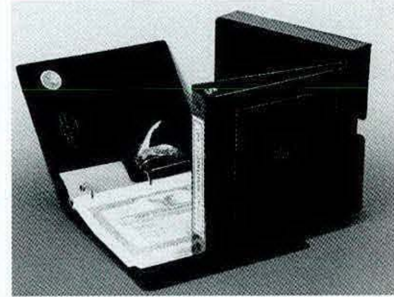

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will be criminal forfeiture of the proceeds of the crime, "and limited forfeiture of the property used to commit the crime."[31] Unfortunately, the law itself is not so limiting.

There are a few other federal statutes that include criminal forfeiture of property that can be used to determine the possible extent of the E.E.A.'s forfeiture provisions. For example, under the Racketeer Influenced and Corrupt Organizations Act (RICO),[32] the courts have broadly employed criminal forfeiture. In one case, the court ordered the forfeiture of an entire business even though only a storage area was used in violation of the law.[33] Moreover, courts have determined that the criminal forfeiture provision of RICO is *mandatory*. "Congress intended to emphasize the mandatory nature of criminal forfeiture by directing that the courts 'shall' order forfeiture of all property described in Section 1963(a)."[34] The E.E.A. also uses the same language: "The court . . . shall order" forfeiture. It is possible, therefore, that a defendant would face forfeiture of not only the property directly derived from the theft of a trade secret, but also an entire business benefiting from stolen trade secret information.

Finally, the prosecutor "may obtain appropriate injunctive relief." The statute then states that the United States district courts "shall have exclusive original jurisdiction of civil actions under this subsection."[35] Therefore, an injunction would be in a civil action dependent on the existing civil statutes, either U.T.S.A. or other applicable civil law.

IV. Conclusion

The E.E.A. has the potential to be a useful tool against thieves of trade secrets. It also has the potential to inflict serious harm on those convicted of misappropriation. The ultimate question, however, is how vigorously the Justice Department will be in enforcing this law. It seems likely that they will be willing to pursue the big cases, or high profile foreign espionage cases. It remains to be seen, however, if they will get involved in the smaller cases.

Endnotes

[1]Pub. Law No. 104-294, 110 Stat. 3488, 18 U.S.C. Sects., 1831-1839. The text of the E.E.A. and the legislative history was downloaded from the Internet, from the U.S. House of Representatives' Internet site *Thomas* <http://thomas.loc.gov>. Information on recent legislation can be searched by bill number. The E.E.A. was H.R. 3723.

[2]H. Rep. No. 788, 104th Cong., 2nd Sess. (1996). The report is available on the Internet.

[3]R.C.W. 9A.56.020(1)(a).

[4]R.C.W. 9A.56.010(5). Emphasis added.

[5]U.T.S.A. Sect. 1, R.C.W. 19.108.010.

[6]*See, Precision Moulding v. Simpson Door Co.*, 77 Wash.App. 20, 888 P.2d 1239 (1995).

[7]U.T.S.A. Sect. 1, R.C.W. 19.108.010.

[8]Compare *Boeing Co., v. Sierracin Corp.*, 108 Wash.2d 38, 738 P.2d 665 (1987), where Sierracin was found to have misappropriated trade secrets after obtaining blueprints from Boeing while working as a subcontractor and then began competing using the same blueprints, with *Precision Moulding v. Simpson Door Co.*, 77 Wash.App. 20, 888 P.2d 1239 (1995) where Simpson learned of Precision's special door trim process from a mutual machinery supplier, and was found not to have misappropriated trade secrets.

[9]U.T.S.A. Sect. 2, R.C.W. 19.108.020.

[10]U.T.S.A. Sect. 3, R.C.W. 19.108.030.

[11]U.T.S.A. Sect. 4, R.C.W. 19.108.040.

[12]U.T.S.A. Sect. 2, R.C.W. 19.108.020.

[13]H. Rep. No. 788.

[14]H. Rep. No. 788.

[15]H. Rep. No. 788.

[16]H. Rep. No. 788.

[17]18 U.S.C. Sect. 1839(3).

[18]U.T.S.A. Sect. 1, R.C.W. 19.108.010(4)(a).

[19]18 U.S.C. Sect. 1832(a).

[20]18 U.S.C. Sect. 1832(4) & (5).

[21]18 U.S.C. Sect. 1835.

[22]U.T.S.A. Sect. 5, R.C.W. 19.108.050.

[23]H. Rep. No. 788.

[24]18 U.S.C. Sect. 1835.

[25]Fed. R. Civ. P. 26(c)(7).

[26]*See* for example, *Gabriel International, Inc. v. M & D Industries of Louisiana*, 719 F.Supp. 522 (W.D.La. 1989).

[27]18 U.S.C. Sect. 1832.

[28]*See* for example, *United States v. Brittain*, 931 F.2d 1413 (10th Cir. 1991), where corporate officers were held criminally liable because "the willfulness of negligence of the actor would be imputed to him by virtue of his position of responsibility."

[29]*See* for example, *United States v. American Radiator & Std. San. Corp.*, 433 F.2d 174 (3d Cir. 1970), *cert. denied*, 401 U.S. 948 (1971).

[30]18 U.S.C. Sect. 1834.

[31]H. Rep. No. 788.

[32]18 U.S.C. Sects. 1961 - 1968.

[33]*United States v. Anderson*, 782 F.2d 908 (11th Cir. 1986) *reh'g denied* 788 F.2d 1570.

[34]*United States v. Mageean*, 649 F.Supp. 820, 822, (D.Nev. 1986) *aff'd* 822 F.2d 62.

[35]18 U.S.C. Sect. 1836.

*WSBA member **Michael Coblenz** is a 1994 graduate of Gonzaga University School of Law and is currently attending an LL.M. program in intellectual property law at the University of Houston.*

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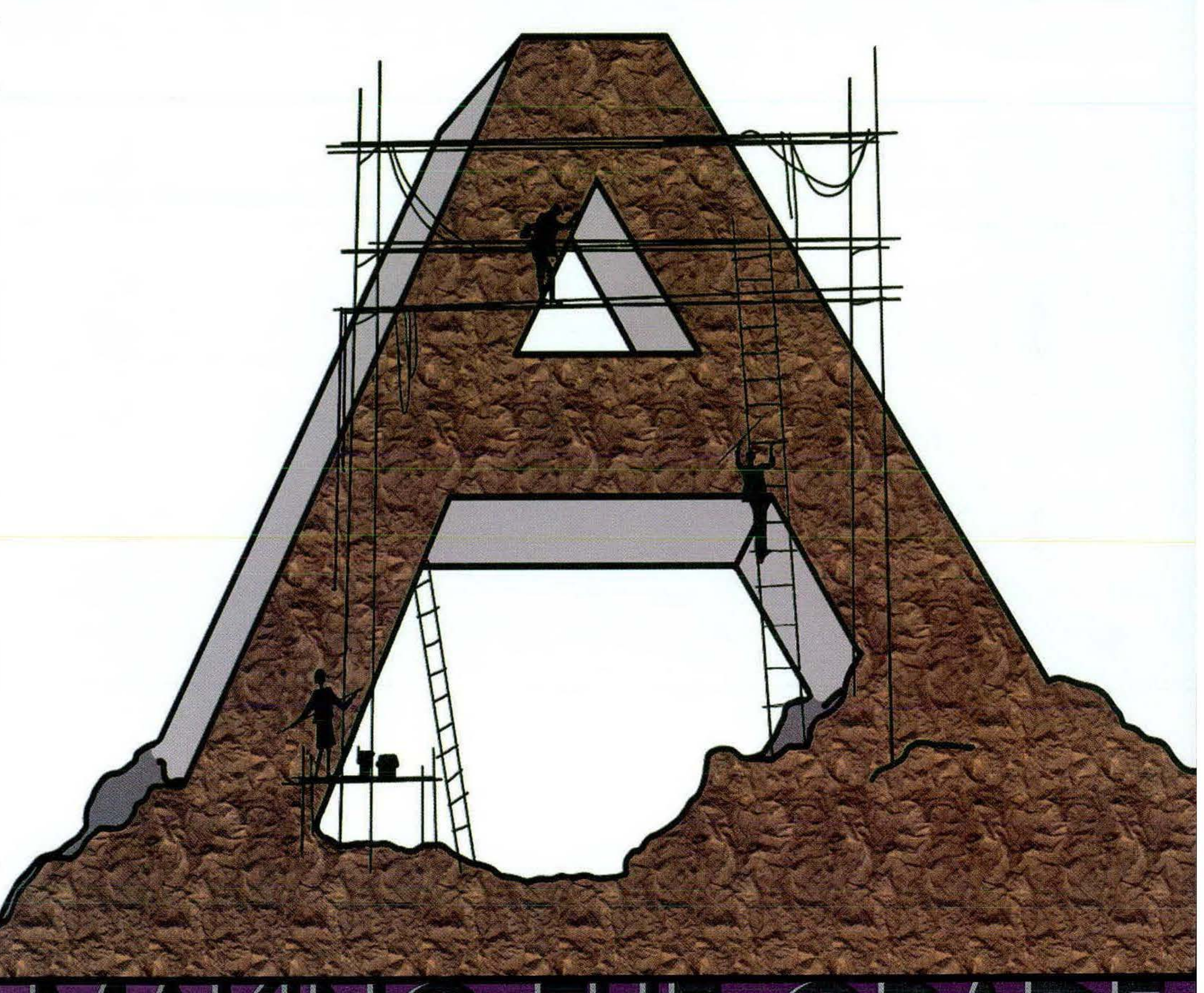
WSBA ANNUAL REPORT 1997



MAKING THE GRADE

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SERVING OUR MEMBERS

It is difficult for any lawyer, even the President, to appreciate the width, breadth and depth of the services that the Bar provides to its members.

The majority of the Bar's work is directed toward mandatory functions, such as the character and fitness of applicants, the Bar Exam, grievances against lawyers, and continuing education programs. The Bar also provides many membership services, including publications, the Lawyers' Assistance Program for impaired lawyers, insurance and credit union. In my view, the Bar performs all of these functions more efficiently, more cost effectively, and in a manner more responsive to its members than ever before.

Open Governance

The Board of Governors operates under a policy of open records and open meetings. Approximately 20 law-related organizations send liaisons to each Board meeting. When this process is described to others around the nation, they say they have never heard of such a Bar process. The Washington Bar operates more openly and under more public scrutiny than any other state Bar Association in the nation.

Diversity

We have continued to focus on diversity by supporting the Coalition of Minority Bar Associations, working to see that lawyers of color have positions of responsibility within the Bar. More than one-half of the chairs of committees are women, and next year's president will be only the second woman in the history of our Association.

Fiscal Responsibility

The Bar operates on a balanced budget and has an annual independent audit. It suffered from more than a decade without a dues increase, became lean and mean, and then lean and weak. A very-much-needed dues increase was passed in 1996, which will be gradually phased in over the next few years, permitting the Bar to perform its work effectively.

Communication

During recent years, the Bar has focused on increased and improved communication with its own members. This year we worked on dialogue with other law-related organizations. We increased the dialogue between the Bar and the Supreme Court, with minority bars, and with others within the legal community. Cooperation and coordination lead to effectiveness and efficiency.

Highlights of the Last Year

Discipline ■ The Bar has tripled the number of lawyers processing grievances to attack the backlog and has proposed to the Supreme Court rule changes, which will simplify, streamline, and expedite the disciplinary process.

Committees ■ The Bar resisted the temptation to create new committees and task forces and, in fact, eliminated several committees.

Unauthorized Practice of Law ■ The Bar supported legislation which would make the unauthorized practice of law a violation per se of the Consumer Protection Act. It failed to pass the Legislature this year but we will continue this effort.

Conferences ■ A joint conference of the Bar Board, Bar Leaders, and the Access to Justice Community was held in Yakima. More than 250 lawyers participated and it was the closest thing to a convention since the Bar's last convention in 1992.

New Headquarters ■ In order to increase productivity and to efficiently meet the needs of our members, we moved the Bar offices a couple of blocks to 2101 Fourth Avenue (known locally as the Darth Vader Building).

Legal Services Funding ■ Because justice can never be a commodity for sale, the Board made adequate funding for legal services a high priority.

Opportunities

We can establish our Bar as the national leader. Our Executive Director, Dennis Harwick, has served as the President of the National Association of Bar Executives. The success of Washington's Equal Justice Coalition and Access to Justice Board has become a model for the nation. If its leadership and membership continue to be innovative and not afraid to be the first or the only state to embark upon a program, then this state will surely be a national leader in the next millennium.

Challenges

At least three challenges face this Association. First, we must match the pool of lawyers who are available for employment with the unmet needs of low- and middle-income citizens for legal services. Second, we must continue to increase diversity and resist the challenges to affirmative action. Citizens of ethnic minorities do not trust a justice system which is dominated almost exclusively by another ethnic group. Ideally, the ethnic composition of the Bar would match the ethnic composition of our citizenry. A third challenge is to recognize the realities of specialization in today's society. Our system of a single license regardless of area of practice must change. We must develop a system of certification that serves the interests of both lawyers and consumers.

MAKING THE GRADE

How Far the WSBA Has Come

Each of the last six years, I have picked a single word to describe the preceding year:
1991 — Transition (my first year),
1992 — Reexamination (we reexamined priorities, policies, and fiscal practices),
1993 — Challenge (we downsized after the dues rollback referendum),
1994 — Confirmation (we stabilized programs and finances),
1995 — Resolution (the referendum to de-unify the bar failed resoundingly), and
1996 — Planning (for the office relocation and the four-year fiscal plan).

So the challenge is: how to define 1997? Is it a year of "execution"? A year of "closure"? Better yet, how about **1997 — a year of "completion."**

We have completed the relocation of the WSBA offices. We have completed the action necessary to implement a four-year fiscal plan. We have completed the expansion of the lawyer discipline function. We've even completed the structure of a Long-range Plan for the WSBA!

The most visible completion this past year came when the WSBA staff moved into new offices . . .

The theme of this Annual Report is *Making the Grade: How Far the WSBA Has Come*. This theme is not intended to minimize the contributions of those who came before. Rather, it is an opportunity to review what the WSBA has done during this past year and to review what we have accomplished in the 1990s.

HIGHLIGHTS

The most visible completion this past year came when the WSBA staff moved into new offices in the Fourth and Blanchard Building at 2101 Fourth Avenue in Seattle. Careful planning provided us with greater efficiency and greater security. It also provided us with a real "State Bar Conference Center" (St.BAR just happens to be the acronym of the four rooms making up the conference center: **St**. Helens, **B**aker, **A**dams, and **R**ainier).

Although we have completed the major increase in staff for the "investigation and prosecution" function of lawyer discipline, we now are gearing up for new programs to help lawyers improve their practice management skills, to mediate client disputes, and (if the Supreme Court approves) to implement a mandatory fee arbitration program — all of which are designed to divert client grievances from the lawyer discipline process into constructive programs to help both the lawyer and the client. At this point, it looks like these new programs will be housed in a "Lawyer Assistance Department" at the WSBA, which is actually an expansion of the WSBA department that houses the Lawyers' Assistance Program. The newly structured Lawyer Assistance Department will have not only the LAP, but it will be the clearinghouse for ethics inquiries, law office management assistance programs,

The WSBA is moving more actively into the Internet world with its web site at "http://www.wsba.org."

and fee arbitration programming.

This past year also represents the first year of a four-year plan to fund the expanded lawyer discipline and lawyer assistance programs through a series of membership fee increases. The recent increase in WSBA license fees is the first fee increase to have been approved without a membership referendum in recent memory, the first fee increase in 10 years, and the first *ever* multi-year plan for increasing fees. I personally believe that the fact that WSBA leadership was able to implement a significant increase in membership fees without a referendum challenge is the result of an increased institutional credibility. I hasten to add, however, that WSBA membership fees are still the lowest in comparable western states!

. . . we are headed in the right direction and have proven ourselves trustworthy stewards of our members' assets.

The WSBA is moving more actively into the Internet world with its web site at "http://www.wsba.org". Our web site contains public information, information about joining the WSBA, information about upcoming CLEs, information about WSBA Sections — and much, much more. But we've only scratched the surface of the possibilities — and added our first full-time employee to manage the web site. In addition, we've upgraded our membership database software to better serve our members' needs. The WSBA Communications Department has bright new leadership and is working on developing a "communications plan" for the WSBA rather than being reactive. We're engaged in a long needed reexamination of the CLE accreditation process. And the WSBA CLE Department is well on its way to reinventing the way it delivers CLE services. Look for more creative packaging of CLE products — maybe CLE "by the hour" or CLE "by the chapter."

COMPLETION

The interesting thing about "completion" is that it sets the stage for new beginnings. I am proud of the evolution of the WSBA over the past seven years. We have squarely addressed philosophical issues about our existence and our role in regulating and improving the legal profession. We have established a proven track record for financial stability and stewardship. We have improved the working conditions and efficiencies for the WSBA staff. We have taken a national leadership role in improving access to justice for our citizens. We have continued to upgrade tried and true programs while examining what new services might improve our members' ability to practice law. And we have instituted a staff-wide focus on member service. As someone said recently, member service is no big thing; it's a million little things!

No institution or individual is perfect. But we are headed in the right direction and have proven ourselves trustworthy stewards of our members' assets. I am confident that we *have* made the grade.

Shareholders: Robert D. Dodd, H. Walter Smith, Thomas S. Bourne, Jack W. Brown

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INDEPENDENT AUDITORS' REPORT

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

We have audited the accompanying statements of financial position of the Washington State Bar Association (WSBA) as of September 30, 1996 and 1995, and the related statements of activities, changes in net assets and cash flows for the years then ended. These financial statements are the responsibility of the WSBA's management. Our responsibility is to express an opinion on these financial statements based on our audits.

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

In our opinion, the financial statements referred to above present fairly, in all material respects, the financial position of the Washington State Bar Association as of September 30, 1996 and 1995, and the changes in its net assets and its cash flows for the years then ended in conformity with generally accepted accounting principles.

Our audits were made for the purpose of forming an opinion on the basic financial statements taken as a whole. The supplementary information on page 16 is presented for the purpose of additional analysis and is not a required part of the basic financial statements. Such information has been subjected to the auditing procedures applied in the audits of the basic financial statements and, in our opinion, is fairly stated in all material respects in relation to the basic financial statements taken as a whole.

Dodd Wing & Company, P.C.

DODD WING & COMPANY, P.C.
Kirkland, Washington
December 10, 1996

STATEMENTS OF FINANCIAL POSITION

	September 30, 1996	1995
ASSETS		
Cash and cash equivalents	$ 578,192	$ 435,925
Investments (Note 3)	2,085,844	2,485,613
Restricted cash (Note 2)	201,387	-
Trust account deposits	574	574
Receivables	324,868	126,472
Supplies	21,583	34,196
Desk and course books	196,622	161,582
Deferred costs and prepaid expenses (Note 4)	718,009	214,368
Property and equipment (Note 5)	422,389	441,094
Total assets	$4,549,468	$3,899,824
LIABILITIES AND NET ASSETS		
Accounts payable	$ 484,202	$ 321,254
Lawyers fund for client protection (Note 2)	136,140	-
Accrued expenses	261,225	266,694
Trust account liability	574	574
Deferred compensation (Note 6)	258,153	267,848
Unearned seminar revenue	436,945	290,703
Deferred licensing fees	944,595	938,179
Other deferred revenue	93,971	47,133
Total liabilities	2,615,805	2,132,385
Commitments and contingencies (Notes 7 and 8)		
Unrestricted net assets		
General	1,181,466	1,241,801
Continuing legal education	270,146	252,550
Sections	416,804	273,088
	1,868,416	1,767,439
Restricted net assets		
Lawyers fund for client protection (Note 2)	65,247	-
Total net assets	1,933,663	1,767,439
Total liabilities and net assets	$4,549,468	$3,899,824

See accompanying notes to financial statements.

STATEMENTS OF ACTIVITIES

	Year ended September 30, 1996			Year ended September 30, 1995		
	Revenues	Expenses	Revenues over (under) expenses	Revenues	Expenses	Revenues over (under) expenses
Licensing fees	$ 3,840,232	$ -	$ 3,840,232	$ 3,730,881	$ -	$ 3,730,881
Access to Justice	-	126,862	(126,862)	7,348	130,464	(123,116)
Administration	186,599	780,656	(594,057)	171,515	776,387	(604,872)
Bar examination and admissions	680,382	568,441	111,941	667,617	571,689	95,928
Audits (random and for cause)	-	120,505	(120,505)	682	93,263	(92,581)
Bar News	372,199	606,098	(233,899)	361,890	554,184	(192,294)
Lawyers' fund for client protection	210,499	145,252	65,247	259	44,511	(44,252)
Continuing Legal Education - publications	381,491	400,698	(19,207)	426,797	434,463	(7,666)
Continuing Legal Education - seminars	1,617,907	1,581,104	36,803	1,573,993	1,479,313	94,680
Communications	20,101	99,793	(79,692)	25,947	150,367	(124,420)
Court rules	-	18,149	(18,149)	-	16,015	(16,015)
Discipline	42,761	1,896,601	(1,853,840)	37,995	1,529,945	(1,491,950)
Fee arbitration	5,000	20,122	(15,122)	4,657	23,463	(18,806)
Computer bulletin board service	19,222	18,383	839	33,832	31,654	2,178
Lawyers assistance program	18,409	221,772	(203,363)	13,360	220,564	(207,204)
Leadership	1,120	221,580	(220,460)	3,045	241,465	(238,420)
Legislative	-	170,650	(170,650)	-	167,933	(167,933)
Local bar support	1,277	18,539	(17,262)	1,626	13,554	(11,928)
Mandatory Continuing Legal Education	124,462	127,438	(2,976)	103,382	169,518	(66,136)
Membership records	53,500	348,597	(295,097)	52,821	331,473	(278,652)
Resources directory	133,356	72,178	61,178	121,134	48,876	72,258
Sections - Administration	81,185	100,220	(19,035)	85,715	96,240	(10,525)
Sections - Operations	414,484	270,768	143,716	420,858	300,569	120,289
Young Lawyers Division	47,392	138,132	(90,740)	45,760	138,409	(92,649)
Other	-	12,816	(12,816)	-	41,285	(41,285)
	$8,251,578	$8,085,354	$ 166,224	$7,891,114	$7,605,604	$ 285,510

See accompanying notes to financial statements.

STATEMENT OF CHANGES IN NET ASSETS

	General	Continuing Legal Education	Sections	Lawyers Fund for Client Protection	Total
Balance, at September 30, 1994	$1,163,594	$165,536	$152,799	$ -	$1,481,929
Board-designated allocation of revenues over expenses	78,207	87,014	120,289	-	285,510
Balance, at September 30, 1995	1,241,801	252,550	273,088	-	1,767,439
Board-designated allocation of revenues over expenses	(60,335)	17,596	143,716	65,247	166,224
Balance, at September 30, 1996	$1,181,466	$270,146	$416,804	$65,247	$1,933,663

STATEMENTS OF CASH FLOWS

	Year ended September 30, 1996	1995
Cash flows from operating activities		
Cash received from licensing fees and other activities	$ 7,666,822	$ 7,698,971
Cash paid to suppliers and employees	(7,810,891)	(7,231,674)
Interest received	184,973	136,023
Deferred compensation paid	(48,000)	(48,000)
Net cash provided by (used in) operating activities	(7,096)	555,320
Net cash from investing activities		
Proceeds from maturities of investments	3,952,859	3,162,129
Purchases of investments	(3,553,090)	(3,467,742)
Proceeds from sale of property and equipment	9,514	11,800
Acquisitions of property and equipment	(259,920)	(319,141)
Net cash provided by (used in) investing activities	149,363	(612,954)
Net (decrease) increase in cash and cash equivalents	142,267	(57,634)
Cash and cash equivalents, at beginning of year	435,925	493,559
Cash and cash equivalents, at end of year	$ 578,192	$ 435,925

See accompanying notes to financial statements.

	Year ended September 30,	
	1996	1995
Reconciliation of revenues over expenses to net cash provided by operating activities		
Excess of revenues over expenses	$ 166,224	$285,510
Adjustments to reconcile excess of revenues over expenses to net cash provided by operating activities		
Depreciation and amortization	269,400	203,612
(Gain) loss on dispositions of property and equipment	(289)	29,714
Increase in restricted cash	(201,387)	-
(Increase) in receivables	(198,396)	(49,068)
(Increase) in supplies and desk and course books	(22,427)	(29,820)
(Increase) decrease in deferred costs and prepaid expenses	(503,641)	29,453
Increase in accounts payable and accrued expenses	293,619	101,024
(Decrease) in deferred compensation	(9,695)	(8,054)
Increase (decrease) in unearned seminar revenue	146,242	(43,480)
Increase in deferred licensing fees	6,416	33,489
Increase in other deferred revenue	46,838	2,940
Net cash provided by operating activities	$ (7,096)	$555,320

See accompanying notes to financial statements.

NOTES TO FINANCIAL STATEMENTS

1. SUMMARY OF SIGNIFICANT ACCOUNTING POLICIES

Nature of operations

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

Estimates

The preparation of financial statements in conformity with generally accepted accounting principles requires management to make estimates and assumptions that affect the reported amounts of assets and liabilities and disclosure of contingent assets and liabilities at the date of the financial statements and reported amounts of revenues and expenses during the reporting period. Actual results could differ from those estimates.

Cash and cash equivalents

Cash and cash equivalents includes cash-in-bank and certain interest bearing accounts with original maturities of three months or less.

Investments

In accordance with the provisions of Statement of Financial Accounting Standards No. 124 - *Accounting for Certain Investments Held by Not-For-Profit Organizations* (SFAS 124), investments are carried at fair value. Realized gains and losses for investments are reported in the Statement of Activities based on the adjusted cost of the specific investment sold.

Desk and course books

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

Deferred costs

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

Property, equipment and depreciation

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

Unearned seminar revenue

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

Deferred licensing fees

Licensing fees are recognized ratably over the applicable calendar year membership period. Accordingly, fees collected during the WSBA's fiscal year that relate to the fourth quarter of the calendar membership period are included as deferred revenue in the financial statements.

Income taxes

The WSBA is an organization exempt from federal income taxes.

Net assets

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

2. LAWYERS' FUND FOR CLIENT PROTECTION

In 1995, the Washington State Supreme Court and the WSBA created the Lawyers' Fund for Client Protection. The Fund may be used for the purpose of relieving or mitigating a loss sustained by any person due to

the dishonesty of, or failure to account for money or property entrusted to, any member of WSBA in connection with the member's practice of law, or while acting as a fiduciary in a matter related to the member's practice of law.

The Fund receives a mandatory annual assessment from each active WSBA member.

3. INVESTMENTS

Investments at September 30, 1996 and 1995 are summarized as follows:

	Cost	Market Value	Carrying Value
1996			
U.S. treasury bills	$ 385,844	$ 385,844	$ 385,844
Certificates of deposits	1,700,000	1,700,000	1,700,000
	$2,085,844	$2,085,844	$2,085,844
1995			
U.S. treasury bills	$ 395,303	$ 395,303	$ 395,303
Certificates of deposits	2,090,310	2,090,310	2,090,310
	$2,485,613	$2,485,613	$2,485,613

Interest earned on investments was $184,542 and $170,475 in 1996 and 1995.

4. DEFERRED COSTS AND PREPAID EXPENSES

Deferred costs and prepaid expenses consist of the following at September 30:

	1996	1995
Deferred deskbooks costs	$150,772	$ 2,635
Deferred CLE seminars costs	95,216	86,869
Other prepaid expenses	129,832	124,864
Furniture deposits	342,189	-
	$718,009	$214,368

5. PROPERTY AND EQUIPMENT

Property and equipment consists of the following at September 30:

	1996	1995
Furniture and equipment	$1,142,323	$ 997,420
Leasehold improvements	7,810	10,152
	1,150,133	1,007,572
Less accumulated depreciation and amortization	727,744	566,478
Property and equipment, net	$ 422,389	$ 441,094

6. DEFERRED COMPENSATION

Effective January 1978, the WSBA entered into an Employment and Deferred Compensation Agreement with its then Executive Director requiring monthly payments of $4,000 for life and the twelve months thereafter as a general obligation of the WSBA upon termination of employment. The Executive Director retired on December 31, 1981. The estimated balance due under the agreement and its amendments has been computed on a present value basis using actuarially determined life expectancy tables and interest rates and is reflected as a liability of the WSBA in the financial statements. The total amount to be paid to the former Executive Director will depend upon his actual life span. The WSBA estimates that the fair value of this instrument, at September 30, 1996 does not differ materially from the carrying value recorded in the accompanying statement of financial position.

7. LEASE COMMITMENTS

The WSBA is committed under various operating lease agreements for office space and certain equipment. Effective December 1, 1996, the WSBA entered into a 10-year noncancellable lease with two five-year renewal options for the use of office space in Seattle. The WSBA renewed a three-year lease for office space in Olympia, effective April 1, 1996.

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

Year ending September 30,	
1997	$ 553,422
1998	583,200
1999	575,640
2000	573,120
2001	573,120
	$2,858,502

Rent expense was $400,397 and $455,042 for the years ended September 30, 1996 and 1995.

8. CONTINGENCIES

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

9. INDIRECT EXPENSES

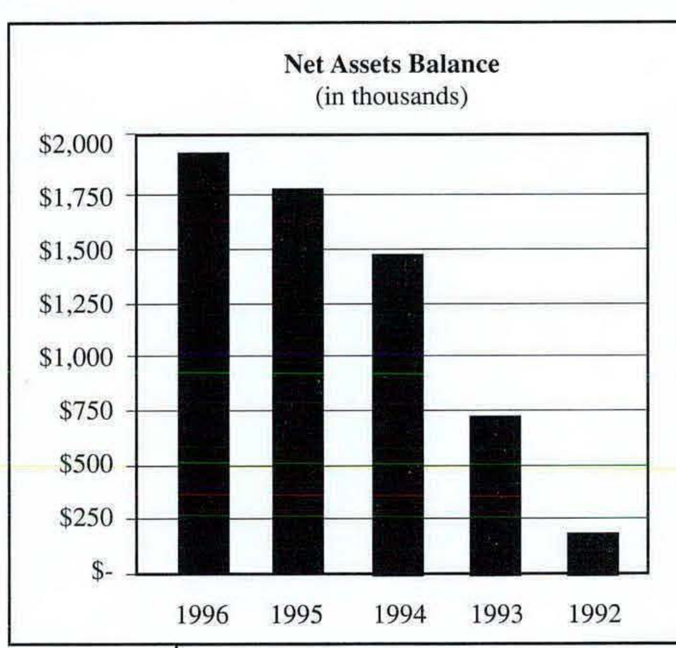
WSBA programs, services and functions are assigned to functional categories for purposes of budgeting and reporting revenues and expenses. Each category includes direct revenues and expenses for activities within that category and an allocation of indirect expenses based on time records maintained by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

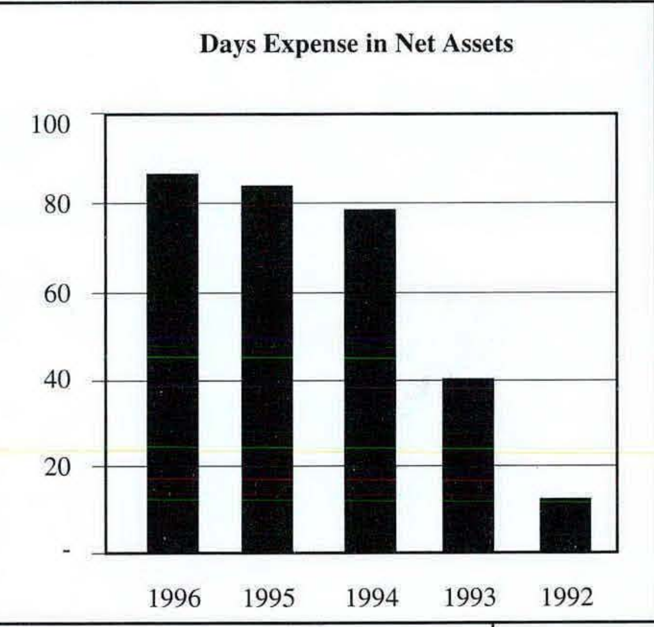
The composition of indirect expenses and total direct expenses are as follows:

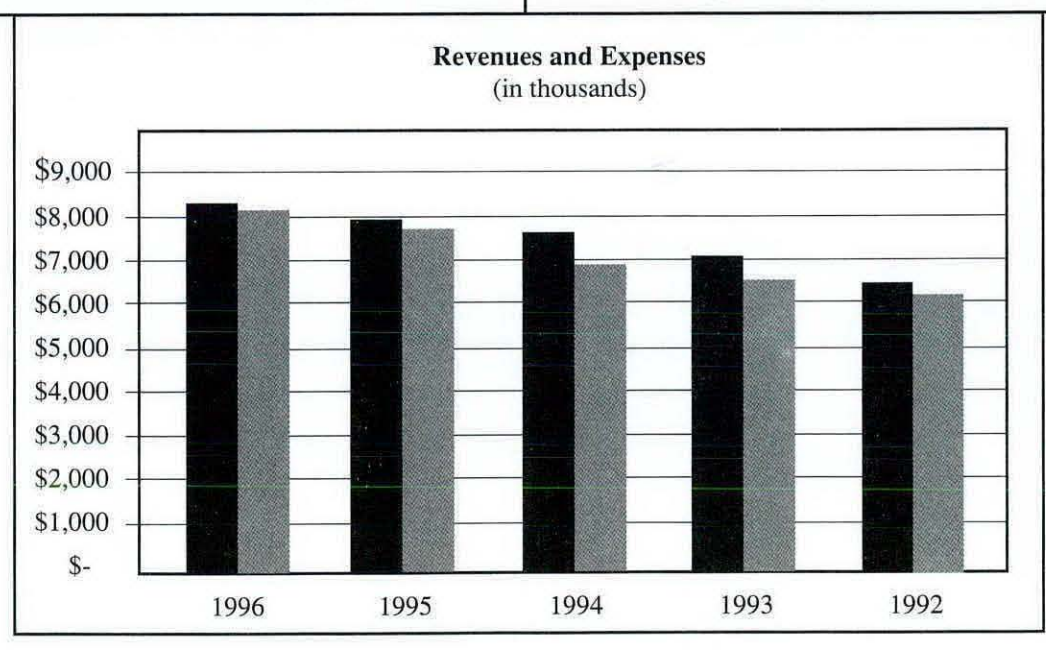
	1996	1995
Indirect expenses		
Salaries	$2,968,220	$2,638,618
Employee benefits and payroll taxes	842,127	732,175
Rent and improvements	359,435	339,070
Depreciation and amortization	222,056	203,612
Copying and production services	107,255	137,267
Supplies	103,764	186,807
Postage	63,827	60,349
Telephone	51,170	61,081
Professional fees	(1,622)	56,892
Equipment rent and maintenance	33,273	44,683
(Gain) loss on dispositions of property and equipment	(289)	29,714
Computer support	26,218	26,570
Insurance	27,366	25,446
Deferred compensation interest	38,305	23,851
Business taxes	17,156	11,566
Employment	21,194	27,686
Staff training	21,142	15,295
Office relocation	33,999	-
	4,934,596	4,620,682
Direct expenses	3,150,758	2,984,922
Total expenses	$8,085,354	$7,605,604

SUPPLEMENTARY INFORMATION
FINANCIAL HIGHLIGHTS

	Years Ended September 30, (in thousands)				
	1996	1995	1994	1993	1992
Net Assets Balance	$ 1,934	$ 1,767	$ 1,482	$ 725	$ 183
Days Expense in Net Assets	86	84	78	40	10
Revenues	$ 8,252	$ 7,891	$ 7,587	$ 7,069	$ 6,406
Expenses	$ 8,085	$ 7,606	$ 6,830	$ 6,528	$ 6,284







State Bar Highlights

FYI Information

Elder Law Section Annual Meeting & CLE

The WSBA Elder Law Section's annual meeting is set for Friday, Sept. 26 at the Edgewater Hotel on Seattle's waterfront. The featured speaker is Rebecca Morgan, President-elect of the National Association of Elder Law Attorneys. Morgan is a professor at Stetson College of Law in Florida and is a co-author of Matthew Bender's *Tax Estate and Financial Planning for the Elderly.*

The Washington chapter of NAELA is sponsoring a no-host get-together on Thursday, Sept. 25, for an informal discussion group from 8-10 p.m.

Cost for the annual meeting is $95, and includes continental breakfast, buffet lunch and afternoon snack. To register or for more information, contact Sheri Borgford, WSBA Sections Liaison, at (206) 727-8239.

Court Rules Suggestions Sought

When it reconvenes this fall, the WSBA Court Rules and Procedures Committee is scheduled to review the Criminal Rules for Superior Court (CrR) and the Criminal Rules for Courts of Limited Jurisdiction (CrRLJ). Your comments and suggestions are welcome. Please send them **by November 15** to the attention of Steven Rosen, Staff Liaison, WSBA, 2101 Fourth Avenue — Fourth Floor, Seattle, WA 98121-2330.

WSBA Annual Business Meeting Set for September 12

The WSBA Annual Business Meeting will be 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 two resolutions on reciprocity will be discussed and voted upon.

Washington Constitution Online

The Office of the Administrator for the Courts reports that a new HTML version of the Washington constitution is now online at the court's web site: http://www.wa.gov/courts/educate/wacon/constit.htm

New Features at the 4th Annual Criminal Justice Institute

Known as the most popular criminal justice program in the region, the Fourth Annual Criminal Justice Institute (CJI) will be held on September 19 & 20, 1997, at the DoubleTree Suites in SeaTac.

CJI is the region's most comprehensive, multi-profession Criminal Justice event, featuring over 50 speakers from such varying backgrounds as law enforcement, academia, social services, judicial, corrections and prosecuting/defense attorneys. The Institute provides substantive programming on topics ranging from Juvenile Offenders to the Pro/Con Debate of Videotaping of Child Abuse Victim Interviews; from the Needs of Individuals with Disabilities to Computers & Crime.

New to this year's Institute are Issue Exchange Tables and Remote Participation. At the Issue Exchange Tables, participants will meet and network with other professionals who share similar concerns. Remote Participation enables attorneys to participate in the Institute via telephone for VIA•CLE presentations on Friday, *or* listen to Session 6 *(Understanding the Juror's Perspective)* via the Internet. Participating via telephone allows members to claim the CLE credits as live credits, not as audio/video credits. Internet access to Session 6 will be available for a limited time following the Institute; no CLE credit is available for the Internet access.

Back by popular demand — the Honorable Charles E. Moylan, Jr. returns to deliver the Saturday session on *U.S. Supreme Court Decisions in Review and an In-Depth Fourth Amendment Overview with Special Concentration on Automobile Searches and "Knock and Announce" Cases.*

If attending in person, registration tuition is $159 if received by September 8; $179 thereafter; $149 per person-group rate (when 3 or more from a firm or organization pre-register at one time); $99 Saturday only; reduced tuition for Preferred Pass holders.

Continued on next page

To contribute news and information, call WSBA Communications staff at (206) 727-8203

Application has been made for CJE credits for Washington judges, and 9.75 CLE credits, including 2.5 ethics, are pending with the WSBA. For more information or a program brochure, contact WSBA CLE Program Coordinator Sonia Pagonakis at (206) 727-8246.

WASHINGTON ATTORNEY CLIMBS MT. MCKINLEY

Jerry Eline of Vancouver was one of 10 climbers scaling Mt. McKinley in June to raise $1 million for the Muscular Dystrophy Foundation. Eline was one of five to reach the 20,320-foot summit in Alaska.

DISCOUNTED BOOKS AVAILABLE TO LAW PRACTICE MANAGEMENT & TECHNOLOGY SECTION MEMBERS

WSBA's Law Practice Management and Technology Section is offering several current publications at discounts from 15% to 33% off retail to LPMT section members as of October 31, 1997. All publications are geared towards making the business end of a law practice more efficient, ordered and profitable. The focus extends from solo practitioners to moderate sized firms, recent graduates to established firms, and covers areas from billing and accounting, personnel, marketing and Internet web pages to basic computer literacy. Call WSBA Order Processing for more information, (206) 727-8278.

USURY RATE

The average coupon equivalent yield from the first auction of 26-week treasury bills in August 1997 is 5.41%. **The maximum allowable interest rate permissible for September 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*.

MANDATORY CONTINUING LEGAL EDUCATION REQUIREMENTS

As the MCLE reporting time approaches, attorneys in CLE Reporting Group 3 need to review their records to ensure that by Dec. 31, 1997, they have accrued 45 CLE credits. Four of those need to be ethics. You will receive a CLE Certification form enclosed with your WSBA Licensing Form packet in Dec. 1997, which you will need to return by Jan. 30, 1998.

NOTE: It is the responsibility of the individual attorney to keep a record of CLE attendance.

CLE REQUIREMENTS

Admission to Practice Rule 11 (APR 11) as adopted by the Supreme Court of Washington, requires that each active member of the WSBA complete a minimum of 45 credit hours of approved legal education within a three-year period. A "credit hour" equals one clock hour of actual attendance. A maximum of 15 credits may be earned by self-study of approved audio/videotapes. All members are required to earn six CLE credits out of the 45 total in the areas of legal ethics, professionalism (including diversity and anti-bias training), or professional responsibility for each reporting period. *The ethics portion is being phased in for the current reporting period* (see below). All members will need to report a minimum of 6 ethics credits out of the 45 *after* the 1995-97 reporting period. An easy way to remember is, beginning with 1996, you should get an average of 2 ethics credits per year.

MCLE Tips:

- **Please read all MCLE reporting and application materials thoroughly.**
- **Apply to have courses approved as they occur, to beat the year-end rush.**
- **If you call and get voicemail, please leave a detailed message so that we can find the answer before returning your call.**
- **Remember: an average of two ethics credits per year will satisfy the ethics requirement.**

Current Reporting Period (1995-97) for Group 3

You are in Group 3 if you were admitted between the years 1984-90, or in 1993, or 1996. Group 3 members admitted before 1994 are required to complete a minimum of **four ethics credits** out of the 45 required by Dec. 31, 1997.

Reporting Period 1996-98 for Group 1

You are in Group 1 if you were admitted through 1975 or in 1991, 1994, or 1997. Group 1 members admitted in 1994 or before are required to complete a minimum of **six ethics credits** out of the required 45 by Dec. 31, 1998.

Reporting Period 1997-99 for Group 2

You are in Group 2 if you were admitted from 1976 through 1983, or in 1992, or 1995. Group 2 is required to complete a minimum of **six ethics credits** out of the required 45 by Dec. 31, 1999.

Members Admitted After 1993

You are exempt from CLE requirements for the year you were admitted to the Bar (from the date of admission to the end of the same calendar year), as well as the following calendar year. However, any CLE credits you accrue during this period may be applied to your first reporting cycle. Your first three-year reporting cycle will begin following your period of exemption. For instance, if you were admitted in 1994, you are exempt from CLE requirements for the remainder of 1994, as well as all of 1995. Your first reporting cycle is Jan. 1, 1996, through Dec. 31, 1998, so you will need to file your Certification by Jan. 31, 1999.

Course Approval

To ensure review of a course for CLE pre-approval, it is important to mail (not fax) a completed "Form 1" application well in advance of the program date. Under most circumstances, applications are processed in a few weeks. However, some applications must be reviewed by the Washington State Board of Continuing Legal Education, which meets bi-monthly. Seminars occurring outside Washington State may qualify for CLE credit — i.e., it is not necessary for out-of-state WSBA members to return to Washington State to obtain CLE credits. Standards for approval of CLE credit may be found in APR 11, Regulation 104.

Late Filing Fee

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

Carry-over Credits

If an active member completes more than 45 credits during a three-year reporting period, a maximum of 15 excess credits may be carried over and applied to the next reporting period. Of these 15 credits, a maximum of five audio/video credits may be carried over. Two ethics credits may be carried forward. (Additional ethics carry-over credits will be converted to general credits.)

Teaching Credit

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

Continued on next page

KING COUNTY BAR WINS NATIONAL LEGAL SERVICE AWARD

Last month, the King County Bar Association was awarded the prestigious ABA Harrison Tweed Award for its achievements in developing and expanding programs for free legal services to the the poor. KCBA was presented the award, along with co-winners Bar Association of San Francisco and Gaston County Bar Association (NC), in San Francisco on August 1.

The King County Bar undertook a number of new initiatives and expanded existing programs in conjunction with legal services programs, the bankruptcy court and local law schools, in response to the massive restructuring of statewide legal service programs due to federal funding cuts. KCBA's projects included:

Coordinated Client Access Project — designed to increase pro bono referrals and participation among large firms; Native American Panel — a new statewide effort that KCBA assisted in creating to refer cases from remote parts of the state to appropriately skilled attorneys in more populous portions of the state; Debt Clinic/Law School Bankruptcy Program — KCBA worked with the bankruptcy court to refer bankruptcy cases to law students who provide service while supervised by volunteer attorneys; Public Benefits/Housing Training and Panels — a CLE and a panel of volunteer attorneys to accept referrals in the areas of public benefits and housing, which have traditionally been handled only by staff of legal service programs; AIDS/HIV Community Education — publications and seminars educating clients about issues confronted by AIDS/HIV sufferers, including estate matters, debts and insurance issues; Expanded Recruitment of Pro Bono Volunteers — new contacts with firm managing partners, bar leaders, judges and the bar at large.

Left to right, front: Megan Muir, Dan Gottlieb, Robin Lester, Lucy Isaki, Mary Alice Theiler; back: Alice Paine, John Widell, Janet Helson, Cynthia LaRowe, Sherry Anderson

NEED CREDITS?

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- Litigation
- Real Estate

Audio and video seminars offer a convenient way to earn CLE credits. Order your tapes now to avoid the year-end rush. For a complete list of WSBA-CLE audio and video seminars, call (206) 733-5918 and leave your name and fax number. For a list of upcoming WSBA-CLE Seminars, call (206) 727-8202.

MCLE Continued

the time spent attending the rest of the seminar. If your lecture continues into a second hour, then your limit on prep time is 20 hours (10 for each hour).

MCLE COMITY AGREEMENT FOR SOME OUT-OF-STATE LAWYERS

On May 12, 1997, the Supreme Court of Washington entered an order approving a new provision in Washington's MCLE regulations:

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.

Supreme Court Provides Greater Public Access To Disciplinary Information

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

The Supreme Court recently amended the Rules for Lawyer Discipline, effective September 1, 1997, to provide greater public access to disciplinary information. This culminates a three-year review by the Board of the Governors and the Supreme Court of how open the disciplinary process should be to the public. The amendment adopts changes recommended last October by the Board of Governors.

The amendments are intended to balance the needs of legal consumers for greater information about lawyers, of the Bar for increased public confidence in the Bar's self-regulatory lawyer discipline system, and of lawyers to protect their reputations from serious and undeserved harm resulting from sometimes baseless grievances, even though such grievances may be ultimately dismissed. The amended rules provide greater public access to the system, but only after there has first been a determination that there are substantial concerns about a lawyer's conduct.

"The amended rules provide greater public access to the system, but only after there has first been a determination that there are substantial concerns about a lawyer's conduct."

Key Features of Current System Remain

Although the amendments are extensive and important, three key features of the existing rules remain intact:

Investigations Remain Confidential.

Investigations of disciplinary grievances remain confidential. Under both the existing and amended rules, if a grievance is dismissed as frivolous, unsupported by sufficient evidence, or beyond disciplinary jurisdiction, and the dismissals are upheld, the grievance, with a few exceptions, remains confidential and never becomes public under the RLDs. Under existing rules, if a grievance is ordered to a hearing by a Review Committee, the existence of the grievance becomes a matter of public record under the RLDs only after disciplinary counsel has filed and served a formal complaint and the respondent lawyer has answered, or the time to do so has expired. Under the amendments, grievances remain confidential until a determination has been made that there are legitimate concerns about the lawyer's conduct. This occurs once disciplinary counsel has concluded an investigation with a recommendation for discipline or an admonition. The effect of the amendments is to retain confidentiality for the overwhelming majority of grievances, but to lift that confidentiality earlier as to the much smaller number of grievances that result in recommendations for public hearings. *See* below.

Advisory Letters Remain Confidential.

Advisory letters remain confidential. These letters are sometimes issued by a Review Committee or the Disciplinary Board when dismissing a grievance to recommend that the lawyer take care in the future as to a particular aspect of his or her practice, but they are not based on a finding of misconduct nor are they disciplinary action. Since confidential advisory letters serve an important purpose to warn a lawyer before the lawyer's conduct results in rule violations, it is believed that this can be done most effectively by keeping advisory letters confidential.

Stipulations To Discipline Remain Confidential Until Approved.

Stipulations to discipline are agreements between respondent lawyers and disciplinary counsel that misconduct has resulted in rule violations. They become public when approved by the Disciplinary Board. Stipulations which are not approved remain confidential and are of no force or effect and can not be introduced into evidence (RLD 4.14(d)).

Key Revisions to System

The key features of the amended rules include:

Admonitions Become Public.

Admonitions are issued after a finding of misconduct involving inattention, neglect, or lack of competence. Under existing rules admonitions are generally confidential. Under the amendments, admonitions issued after the effective date will now be public. Because admonitions will thus be the least serious form of public discipline, they will remain a part of a lawyer's public disciplinary file only as long as the record of the admonition is now maintained, usually three years, after which the records will ordinarily be destroyed unless there are ongoing investigations or proceedings (RLD 5.5A(b); RLD 12.8(b)).

Recommendations For Disciplinary Action Become Public.

Under existing rules disciplinary counsel's recommendations to a Review Committee that a hearing be ordered, or an admonition be issued, are confidential, and the matter becomes public only after a formal complaint has been filed and served and the respondent lawyer has answered, or the time to do so has expired. Under the amendments, those recommendations, along with their supporting documentation, will become public when submitted to the Review Committee. Matters at this stage have been fully investigated and disciplinary counsel has determined there is adequate evidence of misconduct to support finding a rule violation and either imposing an admoni-

tion or holding a public hearing to determine if more severe discipline is warranted. Materials related to client confidences and secrets may remain confidential under a protective order. This change will thus make disciplinary proceedings public several months sooner, and in a few cases may make matters public which would under existing rules have remained confidential.

Statements of Concern.

Discipline grievances usually do not become public until many months after an investigation is undertaken. During this time disciplinary counsel may be aware of facts giving it significant concern about a lawyer's conduct, but, if anyone were to inquire about a lawyer's status with the Bar, all that could otherwise normally be said is that the public records of the WSBA reflect that the lawyer is a member in good standing and does not have any public discipline. To provide a warning to the public when deemed necessary to protect the public from a substantial threat, the Chief Disciplinary Counsel is authorized to issue a statement of concern, based on otherwise confidential disciplinary information from a pending investigation into serious ongoing misconduct, and make that public. This can happen only after service of the proposed statement on the respondent lawyer, who can appeal the issuance of the statement directly to the Chairperson of the Disciplinary Board.

Disclosure to Protect Public Interests.

While the Court retained the Bar's current ability to disclose in particular cases such confidential information as may be necessary to protect the interests of clients, other persons, the public or the integrity of the Bar, the amended rules place this discretion in the Executive Director or the Chief Disciplinary Counsel. In the past these disclosures have generally been made mostly to other investigative or prosecuting agencies, or, infrequently, to the news media in response to existing media knowledge and interest in the underlying conduct. The amended rules also clarify and expand existing WSBA policies on disclosing disciplinary information in several areas, including:

- Providing greater access to disciplinary information by state and federal judicial officers;
- Authorizing cooperation with criminal authorities;
- Granting greater ability to respond to false or misleading statements; and,
- Clarifying authorization to release information to other jurisdictions' admissions and lawyer discipline programs, and for evaluation for judicial or appointive office.

Effect on Pending Investigations and Proceedings.

Under RLD 12.16 the Court's changes will apply in their entirety to any matter or investigation which is pending and which has not been ordered to hearing, or ordered dismissed, prior to September 1, 1997. The Court's changes will apply to pending public proceedings insofar as practicable as determined by the hearing officer or the Chairperson of the Disciplinary Board.

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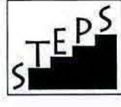

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Seattle lawyer James M. Roe (WSBA No. 8553, admitted 1978) has been ordered reprimanded by order of the Disciplinary Board entered on June 3, 1997, following the filing of findings, conclusions and recommendation by the hearing officer. The discipline is based upon Roe's conduct during a motions argument in open court.

In May 1995, Roe represented a criminal defendant on an assault charge with a defense of self-defense in Bothell Municipal Court. At the conclusion of a three day trial, the jury rendered a verdict of not guilty. Following the verdict, the prosecutor moved to stay the verdict on costs and fees. During the argument on the motion, Roe interrupted and referred to the prosecutor by his first name. When the prosecutor asked Roe to address him by his surname, Roe responded, "It's [prosecutor's first name] to me, boy, and . . . you remember that." Roe apologized almost immediately after making the statement. The prosecutor is African American. Roe is Caucasian.

Based on the May conduct, the Bothell Municipal Court found Roe in contempt of court for addressing counsel in a disrespectful manner, addressing counsel with a racial slur, and creating disorder in the court. The Court ordered Roe to pay a $500 fine or donate $500 to an organization fostering sensitivity toward ethnic diversity or anti-discriminatory action; perform 40 hours of community service; apologize to the prosecutor on the record; and complete a Cultural Diversity Education Program through the Washington State Minority and Justice Commission.

In a separate action, the WSBA investigated Roe's alleged conduct, and the matter was ordered to hearing. The hearing officer found that Roe did not purposefully use a racial slur in addressing the prosecutor as "boy," but that Roe should have known that, when directed to an African American male, the use of the word "boy" is racist. Roe's negligent conduct in addressing opposing counsel during a court proceeding in a racially demeaning manner was found to be harmful to counsel, to the court, and to the legal profession. The hearing officer also found that Roe's actions violated Rule of Professional Conduct 4.4 and the Oath of Attorney, and subjected him to discipline pursuant to Rules for Lawyer Discipline (RLD) 1.1(c) and (i). Accordingly, the hearing officer recommended a reprimand, which became a final decision pursuant to RLD 4.13(f). In addition to the reprimand, Roe will be on probation for one year, during which time Roe will comply with the terms of the contempt order entered in Bothell Municipal Court.

The hearing officer was John E. Hanson of Bellevue. Respondent was represented by Kurt M. Bulmer. The Bar Association was represented by disciplinary counsel Anne I. Seidel and Marsha A. Matsumoto.

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

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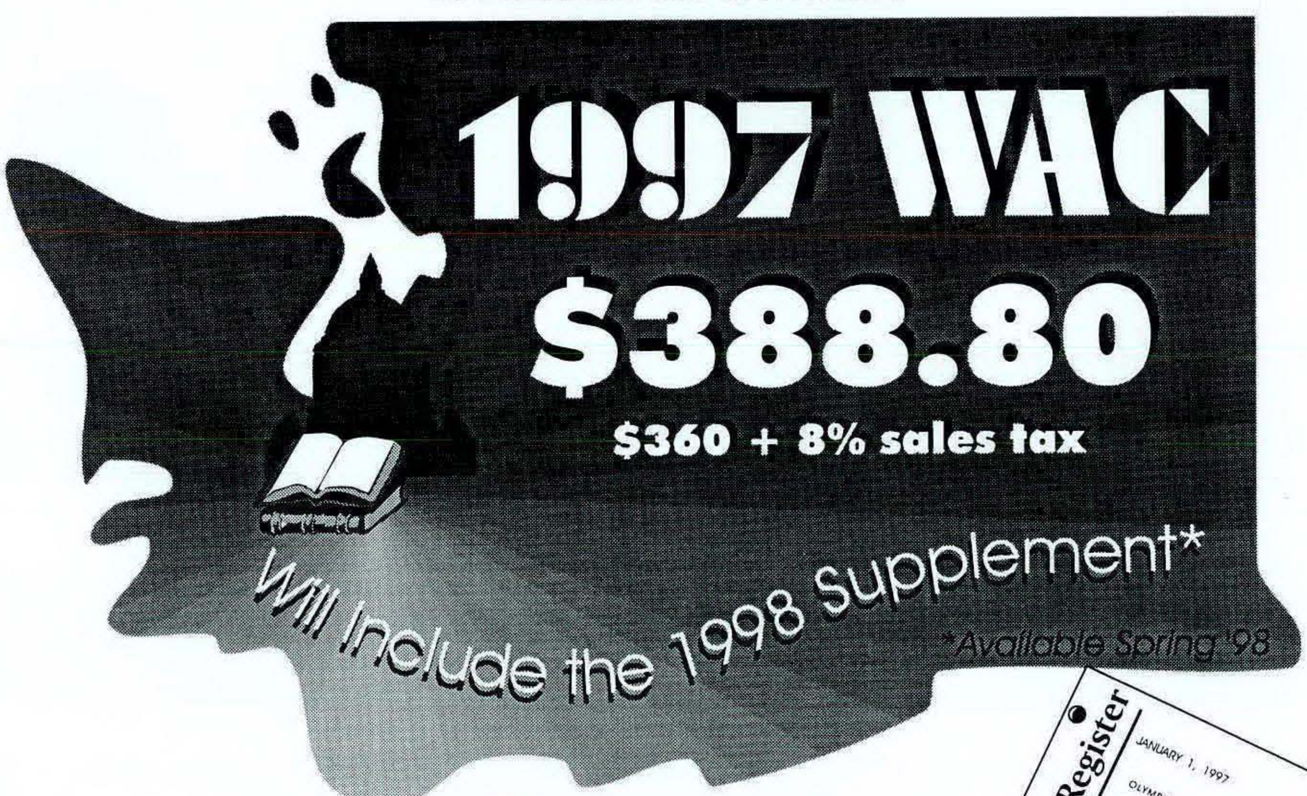

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Governors Continue to Seek Comment on Mandatory Fee Arbitration

The WSBA Board of Governors continues to seek feedback on the proposed rules for mandatory fee arbitration.[1] At its August 9 meeting, the Board reviewed and commented on the draft rules. The Board reaffirmed its support for requiring fee arbitration when it is requested by a client, but noted that a number of issues have been raised which require further review before final action by the Board at its September 11-12 meeting.

The Board authorized distribution of the following proposed APR 17, with the caveat that they would be giving further careful review of the language of the proposed rule including reviewing the following issues:

- Whether the arbitration should be binding or subject to de novo review [APR 17(b)].
- Whether or not a lawyer should be required to meet a heightened burden of proof in the absence of a written fee agreement [APR 17(j)];
- The minimum requirements for arbitrator qualification and whether or not arbitrators should be appointed by the Board of Governors or open to any lawyer who meets the minimum requirements and completes the required training [APR 17(i)];
- Whether or not a statute of limitations other than the six-year limitation should apply to disputes subject to arbitration [APR 17(f)(4)];
- Whether or not arbitrators should be charged to report to the Office of Disciplinary Counsel apparent attorney misconduct [APR 17(q)];
- Whether or not to permit the lawyer to condition fee arbitration on the client posting a bond for the disputed fee [APR 17(m)(2)]; and
- What fees, if any, should be charged to the participants and whether or not attorney fees, expert witness fees and costs should be assessed against the non-prevailing party [APR 17(l)].

[1] *See* "Fee Arbitration to be Mandatory When Requested by a Client," Barbara Harper & Randy Beitel, August 1997 *Washington State Bar News*, pp.37-39.

Comments should be submitted in time for the Board of Governors to consider prior to their September 11-12 meeting. Comments may be forwarded to Peter Ehrlichman, chair of the Board of Governors Discipline Committee [*e-mail at* Ehrlp@Foster.com *or fax at* (206) 447-9700] or any of your local governors.

Proposed

(August 8, 1997 Version)

APR Rule 17. Mandatory Fee Arbitration

(a) Policy. It is the policy of the Supreme Court to encourage the informal resolution of fee disputes between lawyers who practice in Washington and their clients and, if such informal resolution cannot be achieved, to provide those clients the opportunity to arbitrate such disputes.

(b) Mandatory Fee Arbitration Program. The Washington State Bar Association is authorized to maintain a mandatory fee arbitration program pursuant to these rules and the regulations adopted by the Board of Governors and approved by the Supreme Court for the arbitration of disputes concerning any and all fees and costs paid, charged, or claimed for professional services by lawyers. The determination by the Arbitrator or Arbitration Panel shall be binding on the lawyer and the client, subject to modification, correction or vacation as provided in section (t) of this rule.

(c) Arbitration Mandatory When Requested By Client. Arbitration pursuant to these rules is mandatory for a lawyer when commenced by a client filing a petition for fee arbitration. For the purpose of these rules, a "client" includes any person who is legally responsible to pay the fees for professional services rendered by a lawyer. Failure of a lawyer to cooperate fully and promptly with mandatory fee arbitration as set forth in these rules shall constitute grounds for discipline under Rule 1.1 of the Rules for Lawyer Discipline.

(d) Jurisdiction. Any lawyer admitted to the practice of law in Washington, or any other lawyer who appears, participates or otherwise engages in the practice of law in this State, unless exempted under Section (f)(1) of this rule, is subject to the jurisdiction of these rules, as is the assignee of any such lawyer.

(e) Arbitration Pursuant to Joint Agreement. Arbitration may also be commenced by the filing of a joint agreement between a lawyer and a client to arbitrate a fee dispute.

☞ more

(f) Disputes Subject to Arbitration. All disputes concerning fees charged for professional services or costs incurred by a lawyer are subject to arbitration under these rules except for:

(1) disputes where the lawyer is also admitted to practice in another state or jurisdiction and the lawyer does not maintain any office in the State of Washington and no material portion of the legal services were rendered in the State of Washington, unless the lawyer practiced under APR 8;

(2) disputes where the client seeks affirmative relief against the lawyer for damages based upon alleged malpractice or professional misconduct, unless both the lawyer and the client agree in writing to include such claims in the arbitration;

(3) disputes where the fees or costs paid, or to be paid, by the client or on his or her behalf is determined pursuant to statute or by a court rule, order or decision; or

(4) disputes over fees or costs which were charged more than six (6) years earlier, unless the lawyer or client could maintain a civil action over the disputed amount.

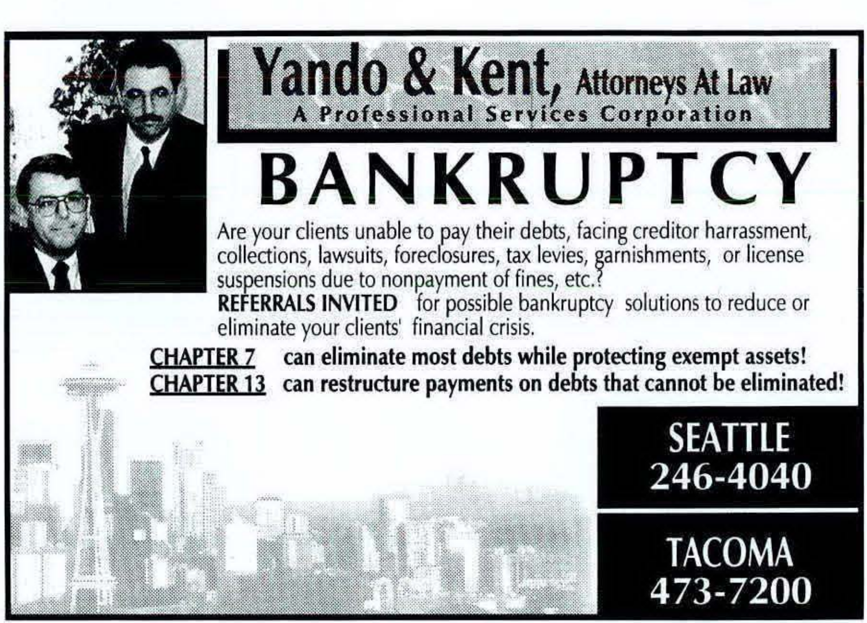
(g) Disputes Between Lawyers. By agreement, disputes between lawyers involving the apportionment of a fee may be submitted to arbitration by the Bar Association.

(h) Duty to Assist. All lawyers practicing in Washington shall have a duty to inform any member of the public with whom he or she has a fee dispute of the existence of the mandatory fee arbitration program. Each member of the Bar Association has the duty to cooperate with and assist the arbitration staff of the Bar Association and the arbitrators in the efficient and timely arrangement for, and disposition of, fee arbitrations.

(i) Assignment of Arbitrators. Arbitrators shall be assigned from a list, maintained by the Board of Governors, of both lawyers and non-lawyers.

(j) Fees For Legal Services; Arrangements For Costs; Agreements.

(1) Basis or Rate of a Lawyer's Fee. An arbitrator's award will seek to assure that a lawyer's fee will be the lesser of the amount agreed to between the lawyer and client and a reasonable fee as provided by the Washington Rules of Professional Conduct. In determining the reasonableness of a fee, the arbitrator may consider, and make a finding regarding, the relative merit and quality of the professional services; however, such findings shall not be considered conclusive evidence in any proceeding against the lawyer for damages based upon alleged malpractice or professional misconduct arising out of



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professional services, or against the lawyer in any action to collect fees and costs.

(2) Effect of Lack of Written Agreement Regarding Fees. In the absence of a written fee agreement, the lawyer shall bear the burden of proof of all facts, including the competency and diligence of the work, and the lawyer shall 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.

(3) Effect of Lack of Written Agreement Regarding Costs. In the absence of a written agreement regarding arrangements for costs in a matter, the lawyer must prove that the agreement regarding costs is different from that alleged by the client.

(k) Notice Requirements by Lawyer to Client.

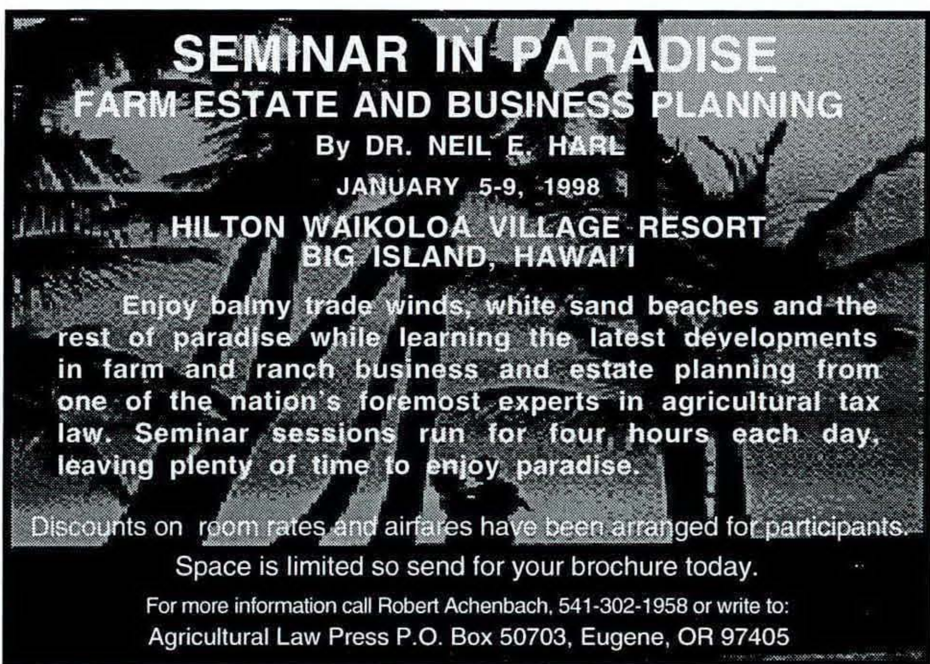
(1) At the time of service of a summons, counterclaim or crossclaim in a civil action by a lawyer, or a lawyer's assignee, against a current or former client of the lawyer for the recovery of fees for professional services rendered or costs advanced, a lawyer or the lawyer's assignee shall also serve upon the client a written "notice of client's right to arbitrate," which may be set forth in the summons, counterclaim or crossclaim, as the case may be, which shall state:

> You are notified that you have a right, under rule 17 of the Admission to Practice Rules, to file a Petition for Arbitration of Fee Dispute with the Washington State Bar Association and stay this civil action. Forms and instructions for filing a Petition for Arbitration of Fee Dispute and a motion for stay are available from the Washington State Bar Association. If you do not file the Petition for Arbitration of Fee Dispute within twenty (20) days after your receipt of this notice, you will waive your right to arbitration by the Washington State Bar Association under Admission to Practice Rule 17 and waive your right under that rule to a stay of this civil action.

Failure to give this notice will be grounds for dismissal of the lawyer's claims for the recovery of fees in the civil action.

(2) Every written agreement providing for payment of fees for professional services rendered by a lawyer or reimbursement for costs advanced shall include a notice that the client may elect to have disputes concerning fees charged for professional services or costs incurred by a lawyer submitted to arbitration by the Washington State Bar Association.

(l) Administrative Fees. The Bar Association may collect an administrative fee from the petitioning client and the respondent lawyer upon acceptance of the dispute for arbitration. As part of the award, the arbitrator may apportion the



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administrative fees among the parties as deemed appropriate.

(m) Stay of Civil Proceedings, No Bond Required.

(1) If a lawyer, or the lawyer's assignee, commences an action to collect fees or costs in any Washington court, the client may move to stay the action and any related attorney's lien proceeding pending resolution of the fee arbitration. Such motion shall be granted upon a showing that the client has requested arbitration of the dispute by the Bar Association within twenty (20) days of receiving the notice of the client's right to arbitration.

(2) No bond or surety may be required of a client to participate in the fee arbitration program or to obtain a stay of civil collection proceedings pending fee arbitration by the Bar Association.

(n) Refrain from Non-judicial Collection Actions. After a client files a petition for arbitration, the lawyer shall refrain from any non-judicial collection actions related to the fees and costs in dispute pending the outcome of the arbitration; however, this shall not preclude a lawyer from filing or serving notice of an attorney's lien or otherwise perfecting such lien.

(o) Waiver of Right to Request or Maintain Arbitration. A client's right to request or maintain an arbitration is waived if:

(1) the lawyer files a civil action relating to the fee dispute, and the client does not file a petition for arbitration within twenty (20) days of service of the "client's notice of right to arbitrate" pursuant to section (k) of this rule; or

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(2) *after the client receives notice of the fee arbitration program, the client commences or maintains a civil action or files any pleading seeking judicial resolution of the fee dispute, except an action to compel fee arbitration, or seeking affirmative relief against the lawyer for damages based upon alleged malpractice or professional misconduct, except when both the lawyer and the client agree in writing to include such claims in the arbitration, in which case the judicial action shall be stayed.*

(p) Subpoenas. Subpoenas for witnesses or for production of documents or things shall be available to, and enforceable in superior court by, the arbitrator, panel chair, respondent lawyer or lawyer of record for a party in a fee arbitration pursuant to the terms of CR 45.

(q) Referral For Disciplinary Investigation. When an arbitrator concludes that a lawyer involved in an arbitration has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, the arbitrator should comply with Rule of Professional Conduct 8.3.

(r) Confidentiality. All records, documents, files, proceedings and hearings pertaining to the arbitration of any dispute under these rules shall be confidential and shall be closed to the public. Disciplinary counsel shall have access to any records, documents, files, proceedings or hearings necessary to investigate apparent acts of misconduct.

(s) Confirmation Of An Award. The arbitrator's award may be confirmed by a superior court as provided by RCW 7.04.150.

(t) Modification, Correction or Vacation of Award. Either party may bring an action to modify, correct or vacate the award of an arbitrator or panel in the superior court under the provisions of RCW 7.04.160 through RCW 7.04.180. The action shall be filed with the clerk of the superior court in accordance with RCW 7.04.180, and notice of such action shall be served upon the arbitration administrator.

(u) Exoneration From Liability.

1(1) Bar Association and Its Agents. No cause of action shall accrue in favor of any person, arising from any proceeding pursuant to these rules, against the Bar Association, or its officers or agents (including but not limited to its staff, members of the Board of Governors, arbitration administrator, arbitrators, or any other individual acting under authority of these rules) provided only that the Bar Association or individual shall have acted in good faith. The burden of proving bad faith in this context shall be upon the person asserting it. The Bar Association shall provide defense to any action brought against an officer or agent of the Bar Association for actions taken in good faith under these rules and shall bear the costs of that defense and shall indemnify the officer or agent against any judgment taken therein.

(2) Parties and Witnesses. Communications to the Bar Association, Board of Governors, arbitration administrator, arbitrator, or any other individual acting under authority of these rules, are absolutely privileged, and no lawsuit predicated thereon may be instituted against any party to an arbitration, witness or other person providing information.

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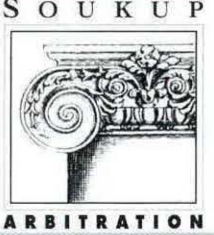
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Proposed

(August 1, 1997 Version)

CIVIL RULE 87 as drafted by Mandatory ADR Court Rule Task Force

The Board heard a full report from the Alternative Dispute Resolution Task Force and invites comment on the following proposed Civil Rule 87, which has been forwarded to the Court Rules Committee for full debate and discussion.

(a) **Objective**. Litigants should be afforded the opportunity to resolve their disputes early and inexpensively through early impartial evaluation, mediation, consensual binding or nonbinding arbitration, settlement conference conducted by an attorney or by a judge or other judicial officer approved by the court; or any other recognized form of alternative dispute resolution (ADR). This rule is intended to promote timely and affordable justice while reducing calendar congestion and the financial and emotional burden on parties to litigation.

(b) **Scope of Rule**. All parties in all civil actions filed on or after September 1, 1999, other than the types of cases described immediately below, shall as soon as practicable but not less than 90 days prior to trial participate in some form of ADR conducted by an impartial third party, unless excused by order of the court for good cause shown. Demonstration that the requirements of this rule would work a financial hardship on a party shall constitute good cause for exception from the provisions of this rule. Parties who participate in a proceeding to which the Mandatory Arbitration Rules, RCW Chapter 7.06, apply shall not be required to participate in any further ADR proceeding. Motions for exception from the requirements of this rule shall be heard not less than 120 days prior to trial or 14 days after the trial date is set, whichever occurs later. Unless included within the requirement to submit to alternative dispute resolution by local court rule, the following types of cases are excluded from the scope of this rule:

A) Cases subject to the Rules of Appeal from Court of Limited Jurisdiction,

B) Cases involving the following:

i) abstract or transcript of judgment;

ii) adoption;

iii) arbitration (private binding) actions to compel or stay arbitration and actions to confirm or vacate an award;

(Continued on page 59)

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10-13 SECOND ANNUAL FUNDAMENTALS OF INTELLECTUAL PROPERTY
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CLE credits TBA

11 LEGAL FOUNDATION OF WA PUBLIC MEETING & OPPORTUNITY TO COMMENT
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11 CURRENT ISSUES IN COMMERCIAL REAL ESTATE LEASES IN WA
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11 THE TROUBLE WITH DYING: DECISIONS AT THE END OF LIFE'S JOURNEY
Seattle
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11-12 WSBA BOARD OF GOVERNORS MEETING
Seattle
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12 WSBA ANNUAL MEETING
Seattle
(206) 727-8244

12 NONPROFIT LAW & LEADERSHIP
Seattle
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CLE credits TBA

12 NEW PROBATE & ESTATE PLANNING-RELATED LEGISLATION (AM) FUNDING, DISTRIBUTION & TAX WORKSHOP FOR ESTATE PLANNERS (PM)
Seattle
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3.5 CLE credits (p.m.)

14-16 JUVENILE TRAINING PROGRAM
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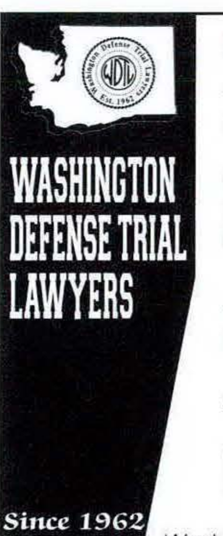

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NOVEMBER 13	**INSURANCE LAW** - *Spokane*
NOVEMBER 14	**INSURANCE LAW** - *Seattle*
DECEMBER 12	**PRODUCTS LIABILITY** *1/2 Day - Seattle*

1998

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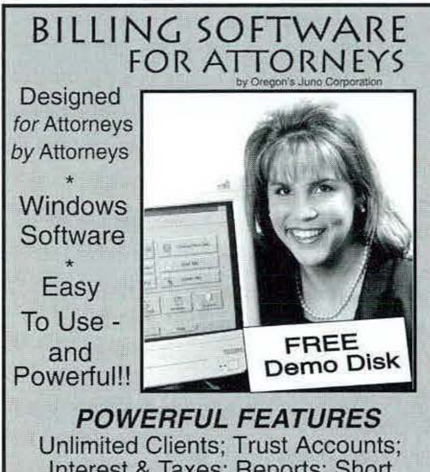

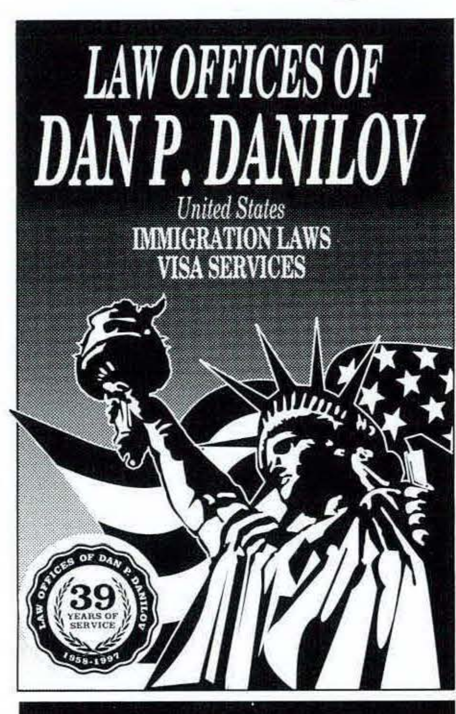

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JUNE 1997

Mr. Myre was an associate at Hillis Clark Martin & Peterson from 1977 to 1981. Most recently he was a shareholder at Heller Ehrman White & McAuliffe. Mr. Myre's practice will continue to emphasize corporate and partnership organization, real estate ventures and transactions, tax planning, waste disposal and general business transactions.

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have joined the firm as Associates.

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has joined the firm as an associate

and that

the office has moved to:

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an Associate of the Firm

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Mr. Levelle's practice emphasizes estate planning, probate, elder law and business and corporate law.

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MARC R. GREENOUGH
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Montgomery, Purdue, Blankinship & Austin, PLLC, a mid-size Seattle firm, is accepting résumés for an associate position. The position requires a minimum of two years of business litigation experience. All responses will be held in confidence. Submit letter of application, résumé and law school transcript to: Montgomery, Purdue, Blankinship & Austin, PLLC, attn. Joseph C. Brown, Jr., 701 5th Ave., Ste. 5800, Seattle, WA 98104.

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ited liability companies. (A five-credit course to be taught during spring quarter.) *Pretrial Practice:* instruction in the theory and fundamental skills of pretrial advocacy in civil cases, including interviewing, fact investigation and analysis, case valuation/risk analysis, client counseling, pleading, discovery, negotiations, alternative dispute resolution and motions practice. (A three-credit course to be taught during spring quarter.) The application deadline is September 29, 1997. The University of Washington is building a culturally diverse faculty and strongly encourages applications from female and minority candidates. The University is an equal opportunity/affirmative action employer.

Attorneys wanted: motivated, qualified attorneys to staff a contract attorney firm in western Washington. Practice law while setting your own schedule. Work on a short-term basis for firms who have overflow work, special projects, or just need to fill in for temporarily absent staff. Gain valuable experience, establish contacts with law firms throughout Puget Sound, and choose the work you do. For more information or to begin the screening process, send a résumé and transcript to: Associated Provisional Attorneys, PO Box 44593, Tacoma, WA 98444.

AV-rated law firm in downtown Vancouver, WA seeks experienced employment law attorney. Ideal candidate will have experience in counseling employers on a broad range of employment matters including discrimination, wage and hour, ADA compliance, drug testing, and personnel handbooks. Litigation experience a plus. Applicants must be self-starters with the ability to manage rapid growth. A superior academic background and excellent writing skills a must. This firm provides an excellent compensation and benefits package. Please submit cover letter and résumé in confidence to Executive Director, PO Box 1086, Vancouver, WA 98666.

McNaul Ebel Nawrot Helgren & Vance PLLC is soliciting applicants with a minimum of two years' experience for a position in its growing real estate and business practice areas. Applicants with significant experience in these areas and some client base are also encouraged to apply. Please reply to Michael Cason, Firm Administrator, 600 University St., Ste. 2700, Seattle, WA 98101-3143.

Small Olympia-based general practice law firm seeks associate attorney with willingness to travel to rural areas. Salary DOE. Send résumé and references to 1615 E. 4th Ave., Olympia, WA 98506.

Insurance defense firm seeks one attorney with minimum three years' civil litigation experience and a second attorney for an entry level position. Please submit résumé to WSBA *Bar News* Box 534.

Washington State Office of the Attorney General has a position available for Assistant Attorney General. We are looking for an entry-level attorney to represent the Department of Social and Health Services in juvenile dependency and licensing hearings. Contact Jeffrey L. Adatto, Assistant Attorney General, 500 W. 8th St., #110, Vancouver, WA 98660. (360) 696-6471.

Attorney recruitment: The Counsel Network is an international attorney recruitment firm with offices in Seattle and affiliations nationwide. Our focus is high-level permanent placement and our clients are generally larger domestic and international law firms and companies. We are continually seeking candidates with top credentials and superior experience for a broad range of positions with blue chip firm and in-house clients locally, nationally and internationally. The economy is great and salaries are rising; there has never been a better time to move. If you would like to explore your career options in complete confidence, please contact Stephen Nash (former attorney) at TCN in Seattle at (206) 224-3160, toll-free 1-800-COUNSEL, fax (800) 469-2233 or e-mail snash@headhunt.com.

AV-rated law firm in downtown Vancouver, WA seeks employment law attorney. Ideal candidate will have experience in counseling employers on a broad range of employment matters including discrimination, wage and hour, ADA compliance, drug testing and personnel handbooks. Litigation experience a plus. Applicants must be self-starters with the ability to manage rapid growth. A superior academic background and excellent writing skills a must. This firm provides an excellent compensation and benefits package. Please submit cover letter and résumé in confidence to: Executive Director, PO Box 1086, Vancouver, WA 98666.

Business attorney. A 23-attorney firm in Vancouver, Washington, seeks an experienced business/corporate law attorney for an associate position in the firm's fast growing business practice. Applicants should have a minimum of two years of experience in the areas of general corporate and business matters with emphasis on business organizations (corporation and partnership), business transactions, and commercial matters. Applicants must be licensed in either Washington or Oregon and possess a superior academic background and excellent writing skills. Please send résumé, law school transcript and a short writing sample to Executive Director, Landerholm, Memovich, Lansverk & Whitesides, P.S., PO Box 1086, Vancouver, WA 98666.

Established Clark County firm seeks Commercial Litigation associate with a minimum of six months' experience. The applicant must have strong verbal, research, and writing skills and an excellent academic record. Motion and/or trial experience desirable, but not necessary. The position will emphasize a fast-paced debtor/creditor, bankruptcy, and collections practice in Oregon and Washington. Applicants should send their résumé, writing sample, and references to: Landerholm, Memovich, Lansverk & Whitesides, Executive Director, PO Box 1086, Vancouver, WA 98666. All responses shall remain confidential.

Associate position available for litigation department. Reply in confidence to Miller Nash, attn. Libby Matheny, 4400 Two Union Square, 601 Union St., Seattle, WA 98101-2352.

Associate or "of counsel" position. Twelve-attorney Eugene AV firm with strong business credentials and substantial experience trying insurance defense cases are required. Transportable practice not required. Please send résumé in confidence to: Administrator, Arnold Gallagher Saydack Percell & Roberts, PC, PO Box 1758, Eugene, OR 97440-1758.

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computerized legal research and UW Law Library. Will draft trial briefs, motions, memoranda, CLE materials. Clerked in King County Superior Court, U.S. Bankruptcy Court. Elizabeth Dash Bottman (206) 526-5777, fax (206) 528-4818, e-mail lizbottman@sprintmail.com.

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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.

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Contract attorney: experienced, accomplished trial and appellate attorney available. Fifteen-plus years' experience. Litigation and writing emphasized. References; reasonable rates. M. Scott Dutton (206) 324-2306, fax (206) 324-0435.

Islamic consultants: articulate American Muslim jurists, counsel for senior nonprofits, successful litigators. Expert testimony, case preparation, client communication. 1-800-MUSLIMS (687-5467).

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.

Forensic document examiner. Trained by Secret Service/U.S. Postal Crime Lab examiners. Court-qualified. Currently the examiner for the Eugene Police Dept. Only civil cases accepted. Jim Green (541) 485-0832.

Contract attorneys. Associated Provisional Attorneys is a full-service contract attorney company providing law firms with intelligent, qualified attorneys for short-term and per-project work. We are diligent in our screening process, and we provide only the most skilled lawyers to work for you. Whether you need someone to research case law, draft pleadings, or conduct pretrial discovery, call Associated Provisional Attorneys. APA attorneys can help you to continue to serve your clients during your busiest times, and allow you to maintain your work quality during attorney vacation time, all without having to hire a full-time associate. We have a strict screening process so you can be sure you are working with the best contract attorneys available. Take the pressure off when you need to the most. Call Associated Provisional Attorneys at (253) 536-2733, toll-free at (888) 303-LAWS, or fax at (253) 539-2973.

Feeling overworked? Let Fraser Robinson Speir, Attorney Outsource, take off some of the pressure. Contract research and writing at reasonable rates. Rush jobs no problem. References available upon request. (253) 564-3669, fax (253) 564-3552, e-mail reed@seanet.com.

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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.

Will Search

The Estate of Robert Lee Fawcett: Deceased resident of Longview, WA; born 1/8/55; Ray Fawcett, father's name. Mr. Fawcett was a carpenter who worked in the shipyards. If you possess any information regarding Mr. Fawcett, his relatives, or any friends he may have had, please contact Geri at (360) 425-4470.

Searching for the lost will and testament of Rachel Cohoon, born in Glasgow, Scotland, in 1933; resident of the Seattle area for 35 years, especially Ballard; last residing in Edmonds; 30-year employment with Safeway's meat department. Anyone with information about a will please contact Erik Hansen (425) 239-6950 or (206) 367-7058.

Miscellaneous

Wanted football tickets: UW v. Nebraska 9/20. Need 5-10 general admission tickets. Seats together preferred but not required. Doug Marfice (208) 664-5818 days, (208) 667-1871 evenings.

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' waterfront, 2.21 sunny acres. Panoramic Rosario Straits/Mt. Baker view. Steps to beach, tennis. $569,000. Island House Realtors (360) 468-3366.

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

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

Proxima Desktop Projector 5500 for high-quality computer or video presentations. Dual computer, video, and audio inputs. 500 ANSI lumens, remote control mouse, built-in audio, heavy-duty traveling case. $250 per day. Leave message for Bill Connors at (206) 557-6404.

Maui: deluxe one- or two-bedroom condos. Located directly on four-mile sand beach. Panoramic ocean views, pool, BBQ. Summer rates from $75 for one-bedroom, $110 for two-bedroom. (800) 877-3826.

- iv) change of name;
- v) civil traffic administrative law decisions — appeal/review;
- vi) emancipation of a minor;
- vii) guardianships and minor settlements;
- viii) domestic violence;
- ix) harassment;
- x) interpleader or deposit of surplus funds;
- xi) petitions for registration or enforcement of foreign judgment;
- xii) petitions for Writ of Habeas Corpus and personal restraint petitions;
- xiii) probate proceedings (except will contests);
- xiv) proceedings regarding treatment for criminally insane;
- xv) juvenile offender proceedings;
- xvi) proceedings for alcoholism and other chemical dependencies;
- xvii) mental-illness proceedings;
- xviii) isolation and quarantine;
- xix) seizure of property resulting from a crime;
- xx) subpoenas — issuance for deposition or documents in action pending in foreign jurisdiction;
- xxi) supplemental proceeding or other proceedings to enforce judgments;
- xxii) Uniform Reciprocal Enforcement of Support Act (URESA) and Uniform Interstate Family Support Act (UIFSA);
- xxiii) unlawful detainers and exceptions by local court rule.

Nothing in this rule shall prevent (1) the parties in any case to which this rule does not apply from stipulating to the use of any ADR proceeding or (2) the court from requiring the parties in any case to participate in early impartial evaluation, mediation or a settlement conference conducted by an attorney, or by a judge or other judicial officer or other ADR provider approved by the court.

(c) **Procedure Where Parties Cannot Agree on ADR Proceeding**. In any case subject to the provisions of this rule where the parties cannot agree on the form of ADR proceeding to be conducted, the parties shall, unless the court orders otherwise, participate in a settlement conference conducted by an attorney or by a judge, or other judicial officer, approved by the court.

(d) **Qualifications of ADR Practitioners**. To act as a mediator, arbitrator or other provider of ADR services in any court-annexed ADR program established by any superior court under this rule, an individual shall have satisfied the minimum qualifications established by the superior court. The requirements related to credentials of any court-annexed ADR program established under this rule shall include training, practicum, and actual experience in the relevant field, and adherence to a recognized code of professional conduct. Nothing in this rule shall prevent the parties in any case from stipulating to the use of an ADR practitioner who does not meet the qualifications of any court-annexed ADR program.

(e) **Implementation by the Superior Courts**. The superior courts shall implement this rule not later than June 30, 2000. In implementing this rule, the superior courts shall identify procedures and resources to ensure that persons of limited financial means have access to ADR at a reduced or no cost.

Comments should be submitted to the chair of the Court Rules Committee, John Monter, at (800) 572-7354, ext. 1210; 128 N. 2nd St., Rm. 329, Yakima, WA 98901

Other business:

The Board also adopted the 1998 fiscal year budget and authorized the CLE department to proceed with negotiations with three publishers for nonexclusive agreements to publish CLE deskbooks on CD-ROM. The Board also authorized Executive Director Dennis Harwick to hire a collection agency to seek reimbursement from lawyers who have caused expenditures from the Lawyers' Fund for Client Protection.

The Board appointed Kimberly Goetz and Jennifer Wathen as nonlawyer members of the Disciplinary Board and will send the names of Stewart Estes, Vicki Orrico and Terri Malolepsy to the Supreme Court as nominees for two positions available on the MCLE Board. The Board also appointed Brian Kelly to the Limited Practice Board and Greg Dallaire to the Commission on Judicial Conduct.

WSBA Annual Meeting 2 p.m.
September 11 at the WSBA offices

The Law Offices of
Hartwig & Templeton
108 S. Washington
Suite 306
Seattle, WA 98104

Dear Mr. Harwick,

I am an attorney, admitted to the bar in this state. Recently, I initiated an effort to seek admission to the BC Law Society. In order to practice in BC (Canada), one must take a six-week course, article for 10 months and pass the BC bar exam. However, before application to the BC Law Society can be made, a foreign, including U.S., applicant must first apply to the Canadian Accreditation Society, which generally requires the applicant to take the equivalent of a bar exam in several areas of law. In short, in order to qualify to take the provincial bar, one must first take a bar exam. The entire process, from commencement of the application to the Canadian Accreditation Society through admission to a Canadian Law Society, takes at least two (2) years.

Conversely, a Canadian practitioner seeking admission to our bar need only pass the Washington bar exam.

Obviously, there is something amiss. While I certainly have no problem allowing Canadians to practice in our state, this sentiment is apparently not shared by our Canadian brethren, whose unions far less complacent than ours with respect to limiting competition.

Hence, the purpose of this letter. To ask, no, to demand, that some form of reciprocity be developed whereby the admission hoops for Canadians reflect their criteria for admitting us. If our good neighbors to the north are recalcitrant, perhaps a blockade of a Canadian ferry — by the yacht-owning attorneys of our state (unfortunately, I don't have a yacht; can't afford one, probably because some Canadian carpetbagger is stealing clients I might otherwise have by offering to work in Canadian dollars) will make the point.

However you choose to deal with this objectionable state of affairs is up to you, but deal with it you must. The fifty-first state must be made to see the light or suffer the consequences. Bring the scoundrels to their knees.

Trusting you will give this matter your immediate consideration, I am,

Respectfully,
Mark J. Hartwig

Washington State Bar Association
2101 4th Avenue
4th Floor
Seattle, WA 98121-2330

Dear Mr. Hartwig,

I, too, am shocked that you have been so soundly rebuffed in your efforts to join the practice of law (in British Columbia). It's known as being "called to the bar" up there.

Based on your treatment, however, I am urging a boycott of Canadian bacon. In addition, the two of us (neither of whom have yachts) can sit down at Shilshole Bay and drink non-Canadian beer while waiting for a fleet of yachts to blockade some remote Canadian harbor.

I trust that this proposal will bring the scoundrels to their knees.

Sincerely,
Dennis P. Harwick

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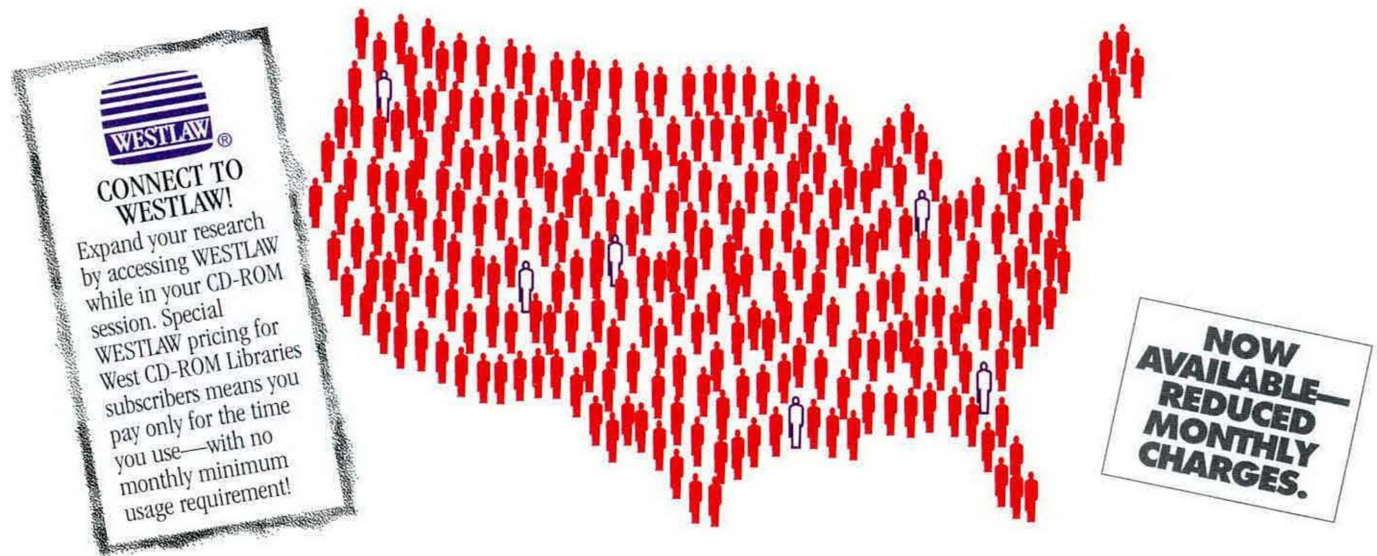

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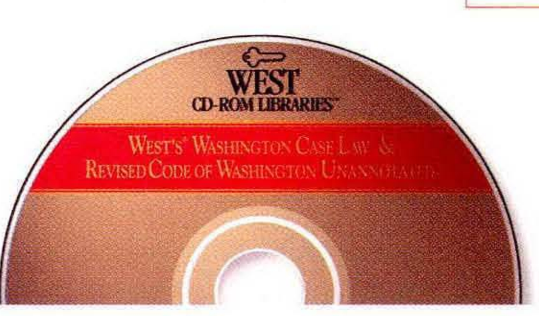

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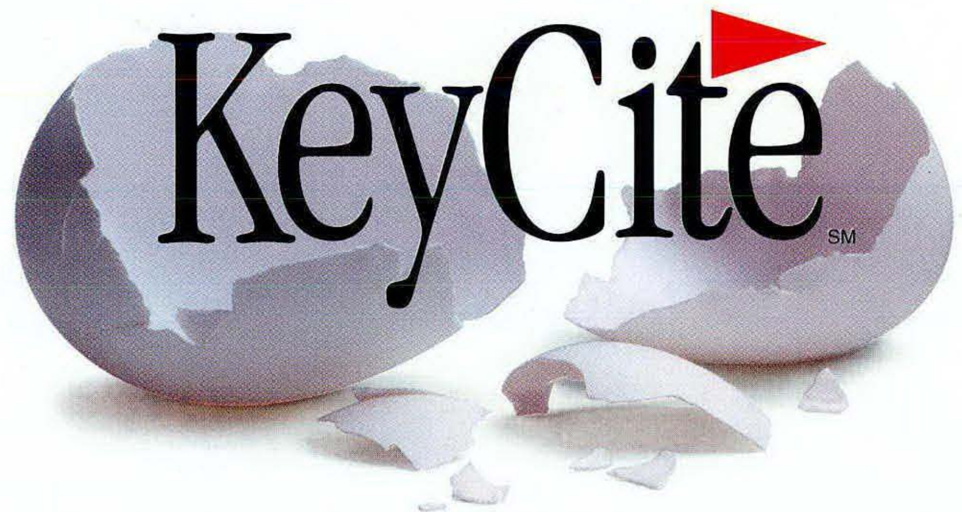

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