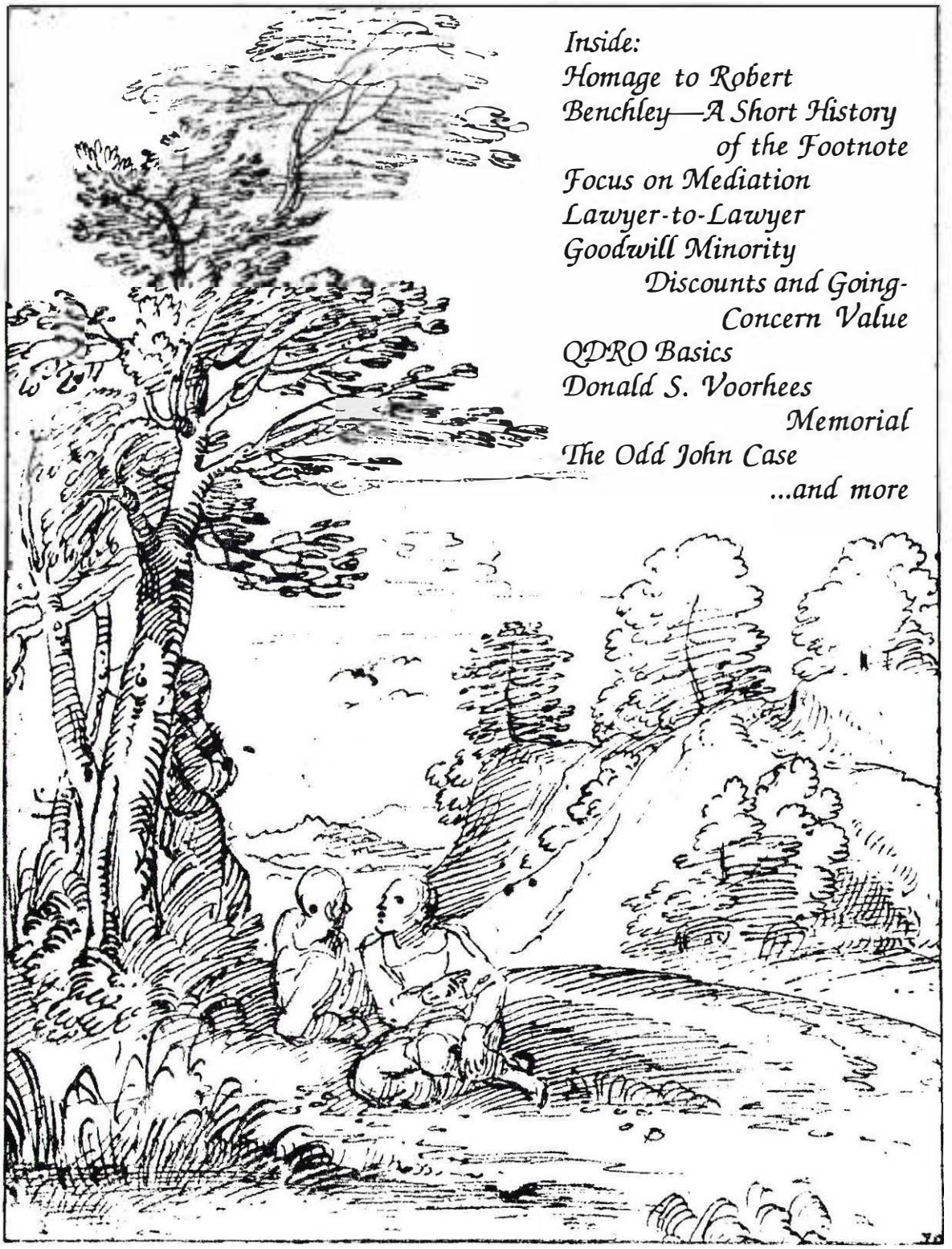
Washington State Bar News
Vol. 45, No. 4, April 1991



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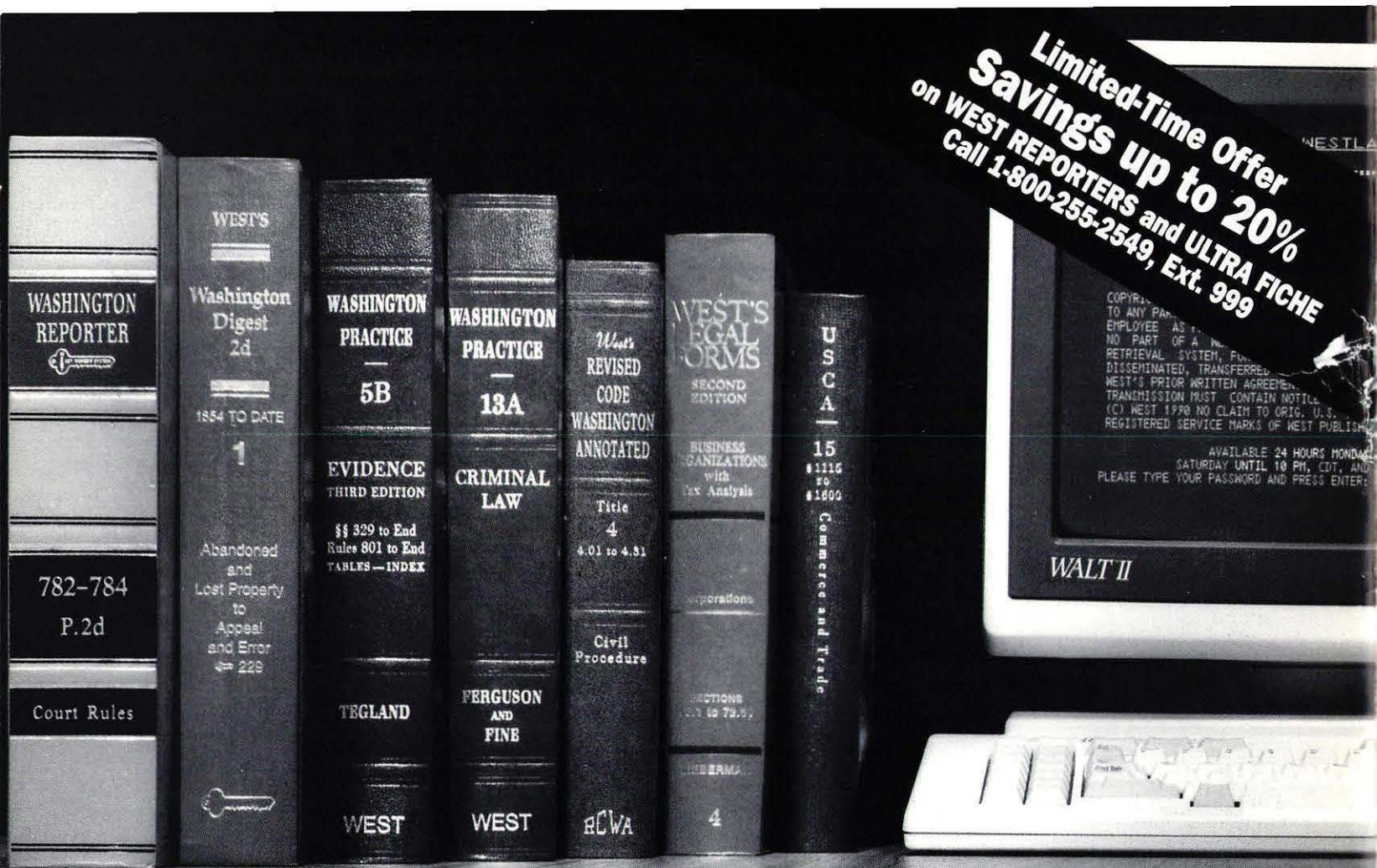

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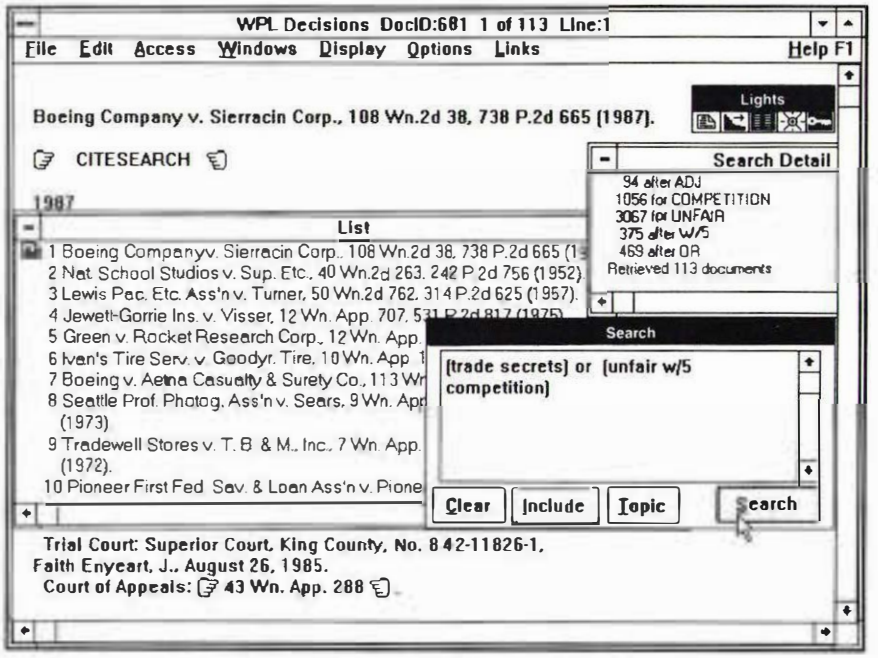

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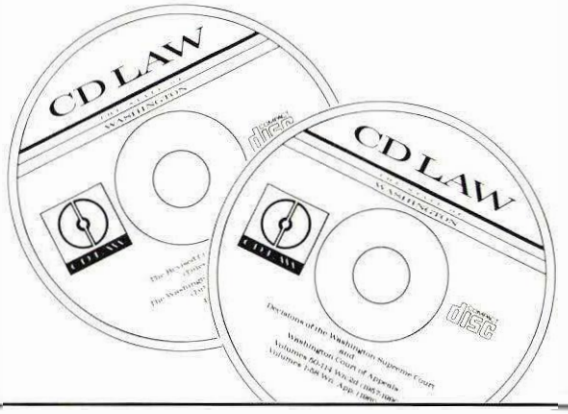

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Letters to the Editor of reasonable length are invited. Such letters should be typed and signed. The Editor reserves the right to select communications or excerpts therefrom for publication, and to edit any letter as may be appropriate.

Those Mischievous Judges

Editor:

Division 3 of the Court of Appeals in *Estate of Meyers*, 60 Wn.App. 39 (1990), at headnote 4, states that the standard Quit Claim Deed with after-acquired title language, when used for a conveyance from one spouse to another, includes an interest that the grantor might subsequently acquire.

The pertinent facts of the case involved a house purchased with community funds on which a wife quit claimed her interest to the husband. The wife was claiming a lien on the house, alleging that community funds had been used for work on the property subsequent to the Quit Claim Deed.

The argument of the wife was that the after-acquired interest clause in the Deed conflicted with community property law recognizing a reimbursement for community funds used to improve separate property. The Court said the wife had not cited any authority for the proposition. The Court then went on, also without citing any authority, and held that the language of the Deed controlled and that the trial court was correct in refusing to recognize any community lien.

If the Court has accurately stated the law, then I, for one, am surprised. I would have told the wife that a court could consider the subsequent expenditures as a basis for creating a community lien, depending on the development of the full facts. The Court of Appeals does go on to say that in any event Mrs. Meyers failed to prove that community funds were actually contributed to the property and the record seems to indicate to the contrary.

Hopefully we will get clarification that headnote 4 is either dictum or strictly limited to the facts of that case.

THOMAS M. BURKE
Seattle

Reminder of Court Rule Changes

Effective September 1, 1990, CR 10(d) requires all pleadings, motions and other documents to be drawn on 8 1/2 x 11 inch paper.

Also effective September 1, 1990 APR 13 requires attorneys to put their bar number on all papers filed in state courts,and gives lawyers ten (10) days to notify the Washington State Bar Association of personal name or address changes.

Welcome to the Computer Age

This month's column is written for the 80 percent of us who do not practice in large law firms. It is also for those who do not operate a computer and have a gnawing sense of unease about that.

They said It Couldn't Be Done, But...

First, though, you need to know that the bar now has an electronic bulletin board. It's definitely a Ma and Pa Kettle operation, temporarily operating out of lawyer Jeff Jernegan's basement on an old beater XT computer, which he loaned to the project. But not for long. The bar, though the Joint Computerization of the Law Committee, is acquiring its own equipment, which will be housed at the bar offices. For years, the Big Firms have had Lexis, Westlaw, ABNet and whatnot. Now, through the prodigious volunteer efforts of a few computer-literate lawyers, we have a *free* demonstration project. If you have a modem (pronounced "mo/dem," available anywhere for about $80) follow the instructions in the accompanying box and try it out. This system is a member benefit provided without charge (except for your long-distance telephone costs if you're outside Seattle). Follow the instructions in the side box and you can immediately "log on" and start sharing information with other lawyers around the state. You can even get into the complete RCWs. And we're working on adding deskbooks, CLE listings, civil jury instructions, lawyer jokes, document assembly systems and, someday, maybe even decisional case law, administrative law decisions and AG opinions.

Keyboard Phobia

So you're not impressed. You have no intention of buying a computer. Like a Viking, you intend to take your IBM Selectric to your grave. Secretly, you don't own a computer because you flunked typing in high school. Or maybe, like Golda Meir, you made a special point of not learning to type because you did not want to get waylaid up the professional ladder into some secretarial pool.

Nota Bene

That excuse will soon date you back to when the earth was cooling. A new brand of computer is on the way this year which will eliminate the "all-thumbs" excuse. Even general practitioners without previous typewriter experience will be able to use a computer. *Fortune* magazine reports that IBM and others are developing personal computers that will read your handwriting. These will be out on the streets by the end of this year. These new computers will be more like "notepads." They won't have keyboards, just screens on which you write with a special stylus or pen. As *Fortune* describes them, these notepads will be the ultimate:

"...little black books capable of storing, cross-referencing and instantly retrieving names, addresses, phone numbers, correspondence and calendars."

Fortune, February 11, 1991

They will be used to "send and receive memos, review and mark up contracts, documents and spread sheets," just as our bulletin board is being set up to do.

...Everybody's Doin' It

The implications for lawyers, even curmudgeons who hate the electronic age and have bad handwriting, are enormous. Lawyers will be able to take notes during interviews, much as they did in the good old days before word processors. Software training, a huge barrier for many of us, will take only minutes, not hours or even days, of tedious study. The cost of legal research, both in time and money, may become much more competitive because of marketplace pressures such as our new electronic bulletin board. Once your notepad learns to identify your handwriting (a process which will take about one-half hour, claim the proponents) you can become computer friendly within a day. And just to whet your appetite you should know that State Farm has just invested an undisclosed pile of money into these notepads to help their adjustors fill out evaluation forms, calculate damages on the spot and record the assessment for transmission to their central computers at the end of the day.

The lesson to be learned from all this exploding technology is that the small

Lowell K. Halverson

practitioner *does* have an opportunity to play with the big leaguers on the computer front. Our bar association through its Computer Law Committee continues to monitor appropriate technology for the small firm practitioner. This bulletin board is a first tangible step toward ensuring that access. I hope you will log on.

The Log Roll

Persons requiring technical assistance should contact the WSBA offices to receive an information packet and shareware programs that will give the user access to the bulletin board system (BBS). Those of you who already use a communication program may simply access the system [see box].

Additional information concerning instructions for use of the BBS will be found in the bulletin section of the BBS.

Individuals wanting to promote, support and/or expand this project should either contact James Wagemann or Jeffrey Jernegan, present co-system operators (sysops) of the BBS. Volunteers are needed for the purpose of developing special-interest conferences. Information and materials necessary to train such volunteers will be made available. Additionally, donations of equipment and database resources should be brought to the attention of the co-sysops.

Please relay ideas or suggestions for BBS improvements directly to the BBS via the BBS E-mail function.

Russell K. Nelson

How to Log Onto the WSBA Computer System

1. Use a communication program and modem with your computer to dial (206) 526-5701. Consult your local computer guru, or send for the instructional packet described above if you need help with this.
2. When the WSBA computer answers, it will ask you your name, ask you to select a password, and require various other information for first-time users. Pseudonyms are not allowed for user names!
3. After this, you will arrive at the "main menu." Enter the word "DOOR," and press the "enter" key. This will put you on the legal-research menu. Select RCW search, and press "enter." Helpful hints will appear on the screen to guide you through the key word search process.
4. Once you are done with your RCW search, you will arrive back at the main menu. Enter the letter "B," and press "enter." A bulletin with further instructions on other features of the systems, such as electronic mail and conferencing, will be displayed.
5. If you can get onto the system, but have questions on how to use it, try the electronic mail feature to send a message to "SYSOP." When you call back in the future, you will receive a response to your questions.

A packet of instructional materials on how to use the system together with a floppy disk containing a suitable telecommunication program is planned for the near future. Watch the *Bar News* for further developments.

Changes at the WSBA Office:

As a continuation of the efforts to provide better service to WSBA members and the public, the office hours at the WSBA office have been expanded. Basically, there will be staff available from 8:00 a.m. to 5:30 p.m., Monday through Friday. (Staff will have the option of working 8:00 a.m. - 5:00 p.m. or 8:30 a.m. - 5:30 p.m. so long as there is phone coverage in each department.)

My philosophy is to treat Washington lawyers as if the WSBA were a voluntary bar association seeking their membership rather than a mandatory bar association taking their membership for granted. We intend to upgrade *Resources*, our annual membership directory, by including bar numbers this year and by including law firm names and fax numbers next year.

I also hope to simplify the annual licensing forms. If you have any forms from the WSBA that you find difficult to use, send them to me. We'll try to improve them.

ABA Midyear Meeting in Seattle:

As most of you probably know, Seattle was host to the American Bar Association's Midyear Meeting in February. The meeting will probably be best remembered for the eighty-eight (yes, 88) ballots it took to elect a new president for the ABA. Rumor has it that Mike McWilliams has a new nickname—"Landslide."

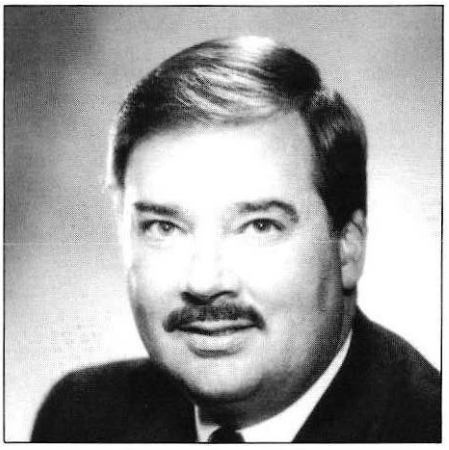
"Proud to Be a Lawyer"

In the shadow of the ABA meeting there occurred the most poignant and moving event I have yet witnessed in Washington—the ***Legal Foundation of Washington's Annual Goldmark Award Luncheon.*** In a surprise move, the Legal Foundation honored Lowell Halverson, current president of the WSBA, charter president of the Legal Foundation, and godfather of IOLTA in Washington. Whether you agree or disagree with the concept of IOLTA, there is no doubt that Lowell has worked his heart out to deliver legal services to the disadvantaged in our society.

It is equally fitting that this year's Goldmark Award for "exceptional efforts to provide equal access to justice" went to Peter Greenfield. Interestingly enough, Peter is the incoming president of the Seattle-King County Bar Association, so it was a big day for bar presidents. He was given the Goldmark Award for his singularly long and distinguished service to the legal needs of low-income people, first through his work with Seattle Legal Services and then for his work with Evergreen Legal Services, where he is director of litigation. To repeat the description used at the luncheon, Peter has been with legal services "since the earth cooled."

Another highlight of the Goldmark Award Luncheon was the address by Howard H. Dana, Jr., a conservative Republican from Maine and a Reagan appointee to the Legal Services Corporation's Board of Directors. Dana delivered a stinging indictment on the attacks against civil legal services for the poor over the past decade. Recounting his support of "Extremism in the pursuit of liberty is no vice and moderation in the pursuit of Justice is no virtue" (Barry Goldwater), Dana pointed out that supporting the American promise of "liberty and justice for all" is not just for liberals.

Dana observed, "When the poor are well represented, they not infrequently



Dennis P. Harwick

prevail, and when they prevail against the rich and powerful, the rich and powerful sometimes seek revenge."

Dana concluded, "that the organized Bar made what I think is its greatest single contribution to the American experiment. It rescued the Legal Services Corporation. It frustrated a popular President and denied him a quick victory over an old foe. The American legal profession literally marched on Washington to explain to Congress that 'Justice for all' requires, *at a minimum*, procedural due process and that, in turn, requires access to lawyers." In support of his premise, Dana offered the fact that the American Bar Association, over 30 state bar associations (including the Washington State Bar Association), and over 50 other local bar associations and bar foundations have gone on record opposing recent attacks on the Legal Services Corporation encompassed in what has been called the McCollum/-Staggers/Stenholm bill.

Dana concluded, "The War for Simple Justice is an essential element in the American Experiment, and, with our collective vigilance, it will be won."

I wish you all could have been there. It would have made you proud to be a lawyer.

HOMAGE TO ROBERT BENCHLEY[1]—A SHORT HISTORY OF THE FOOTNOTE

by Lindsay T. Thompson[2]

Footnotes are so ubiquitous a part of the law that it's hard to believe the term is of nineteenth century coinage.[3] They have gotten mixed reviews,

1. American humorist, critic and sometime actor (1889-1945). Author (1921) of *Shakespeare Explained: Carrying on the System of Footnotes to a Silly Extreme*, anthologized in THE OXFORD BOOK OF HUMOROUS PROSE 542 (F. Muir, ed., 1990), and just about the best there is.

2. Would-be American (born, N. Carolina, 1955) humorist (The Board's Work, WASHINGTON ST. B. NEWS, 1988-), critic (The Board's Work, WASHINGTON STATE B. NEWS, 1988-) and sometime actor (Clark County District Court, 1985- ; cameo appearances in other venues, including Clark, Cowlitz, Skamania, Thurston and King County Superior Courts and U.S. District Court, W.D.Wash.). The author's dismaying interest in the subject at hand may be traced to having vetted all the footnotes in Coggins, *The Law of Public Rangeland Management: I: The Extent and Distribution of Federal Power*, 12 ENVTL. L. 535 (1982); Coggins and Lindeberg-Johnson, *II: The Commons and the Taylor Act*, 13 ENVTL. L. 1 (1982); Coggins, *III: A Survey of Creeping Regulation at the Periphery, 1934-1982*, 13 ENVTL. L. 295 (1982); *IV: FLPMA, PRIA, and the Multiple Use Mandate*, 14 ENVTL. L. 1 (1983); *V: Prescriptions for Reform*, 14 ENVTL. L. 497 (1984)—3,003 of them—and a fondness for Robert Benchley which survived the experience. This article conforms to the Escher-like demands of A UNIFORM SYSTEM OF CITATION (13th ed., 1981).

3. 2 THE COMPACT VERSION OF THE OXFORD ENGLISH DICTIONARY 1046 (1971) cites SAVAGE'S PRINTING DICTIONARY (1842) for its first use: "*Bottom notes* ... are also termed *Foot Notes*." It is a portmanteau word, and is the descendant of *gloss*, "a word inserted between lines or in the margin as an explanatory equivalent of a foreign or otherwise difficult word in the text; hence, applied to a similar explanatory rendering of a word given in a glossary or dictionary. Also, in a wider sense, a comment, explanation, interpretation, often used in a sinister sense: a sophistical or disingenuous interpretation. From *glose*, refashioned in the 16th c. after L. *glossa*, Gr. γλοσσα in the same sense. In the 15th c. the spelling *glosse* occas. appears for *glos(e)*." Certainly that's how it has been used. A past master was Edward Gibbon, "whose ironic comments on clerical lapses, deceived husbands and colorful figures such as the Empress Theodora provoked his contemporary, the scholar Richard Porson, to remark on 'the rage for indecency which pervades the whole work...' Gibbon defended himself by pointing out that anything which could be found offensive was relegated to the notes, and often left in 'the obscurity of a learned language.' GIBBON, 1 THE HISTORY OF THE DECLINE AND FALL OF THE ROMAN EMPIRE 20 (B. Radice, ed., 1983). But in those days—at least in the first few volumes of Gibbon—the printing machinery of the time was insufficiently developed to insert notes at the bottom of the pages on which they occurred and so had to go in at the end of the text: hence the term of the day, *end notes*. A DICTIONARY OF MODERN LEGAL USAGE 246 (B. Garner, ed., 1987). *See also*, G.W. Bowersock, *The Art of the Footnote*, 53 AM. SCHOLAR 1 (1984).

4. "Footnote strategy invariably begins with the author focusing on a 'numbers' decision—how many? Neophyte writers have a tendency to go for quantity. The motivation behind a high number is to issue a direct challenge to rivals. The customary objective is 500 or more footnotes. Exceeding 500 is a dramatic expression of footnote machismo. Implicit in the message that the higher the number count, 'the more authoritative will be the article.'[44]

particularly in this century, for their profusion,[4] their utility,[5] their style,[6] and their malleability.[7]

"Exceeding the magic one thousand level might produce notoriety—and a more positive differentiation image—by attracting media attention. *The National Law Journal* has, for example, kept a running scoreboard on the law review article with the most footnotes.[45]

"44. Thorne, *supra*, note 20, at 1159.

"45. Kaplan, *The Article in a Law Review That Includes the Most Footnotes Is...*, NAT'L. L.J., March 18, 1985, at 4, col. 3. So far the answer is 1247 in an article by Arnold S. Jacobs, a partner at the New York City law firm of Shea & Gould. *Id*, *see*,

particularly in this century, for their profusion, [4]their utility, [5]their style, [6] and their malleability.[7]

Jacobs, *The Meaning of 'Security' Under Rule 10b-5*, 29 N.Y.L. SCH. L. REV. 211 (1984).[1] United States v. E.I. DuPont de Nemours & Co., 118 F.Supp. 41 (1953) is the alleged record holder for judicial opinions with 1715 footnotes.[2] Kaplan, *supra*. Austin, *Footnotes As Product Differentiation*, 40 VAND. L. REV. 1131, 1141 (1987).

1. Poor Mr. Jacobs. The current record, I thought, is held by University of California-Berkeley Law School dean Jesse H. Choper, whose "495 page article in the New York Law School Review... contained 4,842 footnotes.[1]

1. A.B.A. J. 40 (May, 1989). "I'm very proud of the article. I didn't write it to set the footnote record."[1]

1. ABA J., *supra*. Now a friend at the A.B.A. J. tells me someone else has lugged away the prize. Couldn't find out who, though.

2. Former Supreme Court Justice Arthur J. Goldberg "noted an appellate opinion with over 500 footnotes and observed: 'Had I remained on the Supreme Court,[1] I would have reversed him on the sheer impossibility of reviewing an opinion of this type.'"[2]

1. Goldberg, who sat on the court from 1962 to 1965, got fidgety. He left the bench to become ambassador to the United Nations. JOHNSON, THE VANTAGE POINT: PERSPECTIVES ON THE PRESIDENCY, 1963-1969 544 (1971). He later ran for governor of New York. He probably wishes he'd stayed put. He's also probably forgotten that Supreme Court law clerks are drawn from the ranks of major law review editors, who egg authors on to do things like that prior to going on to help write opinions like that.

2. Austin, *supra*, at 1134, citing Goldberg, *The Rise and Fall (We Hope) of Footnotes*, 69 A.B.A. J. 255 (1983). [1]

1. This run of nested footnotes is a parlor trick inspired by Garrison Keillor [1], who described a story he wrote [2] for *The New Yorker* [3] which "contains a quintuple interior quote, a quote of a quote of a quote of a quote of a quote, the deepest interior quote ever published there. You could look it up."[4] I wondered if it would work here.

1. American humorist, critic and sometime actor (*see also*, fn, 1,2, *infra*), fl. 1980s.

2. "Don: The True Story of A Younger Person." *See* fn. 4, *supra*.

3. Noted American magazine of arts and letters, longtime literary home of Robert Benchley, *supra*, fn. 1. Some consider it an object of religious veneration. *See, e.g.*, GILL., HEREAT THE NEW YORKER (1975).

4. I took his word for it. *See*, KEILLOR, WE ARE STILL MARRIED, xiv (1989).

5. "When you read a footnoted opinion, your eyes must constantly move from text to footnotes and back again. The distraction and time wasted are substantial. If footnotes were a rational form of communication, Darwinian selection would have resulted in the eyes set vertically rather than on an inefficient horizontal plane."

Mikva, *Goodbye to Footnotes: Relinquishing A Tradition*, TRIAL 46 (August, 1986), based on *Goodbye to Footnotes*, 56 UNIV. COL. L. REV. 647 (1985). Those leaning to Creationist views, especially those reared in the Calvinist tradition, will likely conclude it's just another case of getting what we deserve.

6. "Phony excrescences," Rodell, *Goodbye to Law Reviews*, 23 VA. L. REV. 38 (1937); (A)rticles are Typhoid Marys of an insidious plague—footnotes" (Citation lost to history). Consider this jewel: Wheeler, *The Bottom Line: Fifty Years of Legal Footnoting in Review*, 72 LIB. L.J. 245. Edmund Wilson called them "scholarly barbed wire," and I've misplaced that source, too.

7. "Law that one hesitates to flaunt above the line sneaks into the footnote. Hedges against forthright statements in the text are squirreled away for a rainy day." MELLINKOFF, LEGAL WRITING: SENSE AND NONSENSE 94 (1982). "Justice Stone liked to use footnotes to generate debate over ideas that he had not developed fully." Mikva, *supra.*

8. "No literate person can possibly be disturbed by a little small type at the bottom of a page, and everyone, professional and lay readers alike, needs to know on occasion the credentials of a fact. Footnotes also provided an exceedingly good index of the care with which a subject has been researched." J.K. GALBRAITH, "A Note on Sources," THE GREAT CRASH (1972).

9. Judge Mikva, *supra*, at 48 says "the classic example, of course, is footnote 4 in United States v. Carolene Products, 304 U.S. 144, 152 (1938). Every first-year law student knows that Carolene Products stands for the proposition that strict scrutiny will be given to statutes affecting 'discrete and insular minorities.' But... how many realize that the doctrine has no relevance to the case itself?" Footnote 4 got its own twelve-page, 72-footnote article in 1982 (82 COLUM. L. REV. 1093). Mikva goes on to rhapsodize over footnote 59 in United States v. Socony Vacuum Oil Co., 310 U.S. (1940), now celebrating its golden anniversary along with the films "Wuthering Heights" and "Fantasia" (One gets the opinion that the '40s were the heyday of *Film Noir*, detective novels, and footnote writing at the Supreme Court.)

'This two-and-a-half-page beauty (the footnote only—the majority opinion itself is approximately 100 pages long)...has long since swallowed up the holding of the Court." And footnote 37 in Crane v. Commissioner, 332 U.S. 1 (1947), is cited in Rice's Toyota World, Inc. v. Commissioner, 752 F.2d 89 (4th Cir. 1985) in (you guessed it, footnote 9) as "affectionately known to tax practitioners as the most famous footnote in tax history." Mikva, *supra*. [1] "Some people sure know how to have a good time." [2]

1. This paragraph highlights an element of footnotery so far untreated in the literature: their anthropomorphic qualities. We see, for example, that they can be beautiful, can inspire affection, but can also be a bit carnivorous. I imagine such a footnote to be something between a spaniel, a Schmoo and a Gremlin (the little movie creatures, not the car).

2. CHABON, THE MYSTERIES OF PITTSBURGH 15 (1988). [1] This, by the way, is an example of the buried "lead-in " quotation (Austin, *supra*, at 1142-44), whose "objective is... to spark immediate attention with a titillating sample of erudition, humor or impertinence... Ideally, the lead-in quote should be obscure—oriental sources are recommended—and should not have a substantive link to the subject matter of the article. [2] Lack of linkage provides mystery and forces the reader to ponder the author's hidden (albeit nonexistent) reason for using the unreliant quote. [3] This technique can generate guilt among readers who suspect the game but lack the nerve to speak out." [4]

But they have their defenders, too.[8] And there is a select pantheon of footnotes in judicial opiniona which have developed something akin to fan

1. It just seemed to fit: the quotation, that is. Chabon is a young writer of great promise who recently moved to Washington. [1]

1. I cite this to lead into an example from Austin of the "fugitive source" citation: something unpublished or obscure to mark the author as "an 'insider' to a mysterious clique or a ferocious archaeologist of buried scholarship" (Austin, *supra*, at 1147-48). I heard Chabon say he'd moved to the Seattle area at a reading by him in Powell's Books in Portland, Oregon in April, 1989, where he read the galley proofs of "A Model World," *The New Yorker* 41 (May 8, 1989)(See fn. 4(2)(2)(1)(3), *supra.*

2. A more standard example is the title of this article.

3. In what might be called the "Where's Waldo?" gambit, I'll tell you my reason for using the title I did is in the article, but not where.

4. *Id, ibid*, or, maybe, *infra.*

10. A legendary exemplar of the art in my salad days was my first year property professor, Michael C. Blumm, whose footnote density in articles written for Anadromous Fish Law Memo (1979-90) inspired the following parody:

ANOMALOUS FISH PURSUE HAPPINESS UPSTREAM
by
Miguel Plumm*

Anomalous[1] fish[2] usually[3] migrate[4] upstream[5] to spawn[6] except[7] when[8] stream[9] barriers[10] obstruct[11] passage[12]. These barriers[13] primarily[14] are dams.[15]

* Acting Director, Equal Justice for Fish Institute; J.D. 1976, Chase P. Salmon Law School, Kentucky. Author SHOULD FISH HAVE WATER? (Underwater Press, Running River, Texas); *The Environmental Impact of Bombing the Major Columbia River Dams* (article cosponsored by the Bureau of Reclamation and the Department of Defense).

1. *See* any fish text for definition. *See generally, Fish or Foul?,* 11 COLUM. RIV. FISH MKT. 242, 245 (1980) citing Plumm, *Foul or Fish?,* 12 FISH STORY DIGEST 310 (1979).

2. Scaly vertebrates usually found in water. M. PLUMM and P. MICKIE, SCALES OF JUSTICE 16 (1978).

3. Conditional adverb, necessary for avoiding gross generalities.

4. *See* Webster's Dictionary.

5. Since they are at sea before migration, it is pretty hard to do much else except go upstream.

6. A euphemism for "doing it." *See generally,* Roe v. Wade, 410 U.S. 113 (1973).

7. *See* note 3, *supra.*

8. Usually refers to time, but in this case used to denote place.

9. For a discussion of streams, *see* R. BRAUTIGAN, TROUT FISHING IN AMERICA.

10. This phrase was used so that a new sentence could be written to define stream

clubs.[9] Some people use them rather a lot.[10] Sometimes people use them to make jokes,[11] sometimes more successfully[12] than others.[13]

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barriers.

12. This word refers to stream migration and has no relation to the excellent novel, A PASSAGE TO INDIA.

13. *See*, note 10, *supra*.

14. There are other barriers, but they are the subject of my next paper, Plumm, *Anatomy or Anomaly?*, 2 ANOMALOUS FISH L. MEMO 2 (1982).

15. These are constructed by agencies of the federal government staffed by people with tendencies similar to beavers—they can't stand the sound of running water. Comment, *Carpe Diem*, 15 Nippon L.J. 34 (1977). [1]

1. ANOMALOUS FISH L. MEMO 1 (April 1, 1982). *See also* fn. 9(2)(1-4), *supra*.

Another champion of the art is Professor Donald W. Large, also of Northwestern School of Law of Lewis & Clark College. *See, e.g., A Beestly Tradition: Softball and the Law School,* 5 THE ADVOCATE 16 (1985). For a double-barreled hit, see Blumm and Johnson, *Promising a Process for Parity: The Pacific Northwest Electric Power Planning and Conservation Act and Anadromous Fish Protection*, 11 ENVTL. L. 497 (1981) and Large and Michie, *Proving That the Strength of the British Navy Depends Upon the Number of Old Maids in England: A*

Comparison of Scientific Proof With Legal Proof, 11 ENVTL. L. 557 (1981). Large pulls off a particularly nice example of the obscure lead-in quotation (fn. 9(2), supra), by citing an extended bit of text from W. Disney, *The Flower Monsters*, and ***Huey, Dewey and Louie, Junior Woodchucks*** 10 (1979).

11. *See, e.g.*, the masters of the juxtaposition of text and footnote, SELLAR & YEATMAN, 1066 AND ALL THAT: A MEMORABLE HISTORY OF ENGLAND (1931)("Comprising all the parts you can remember, including one hundred and three *good* things, five *bad* kings, and two genuine dates"), and their American counterpart, CUPPY, THE DECLINE AND FALL OF PRACTICALLY EVERYBODY (1950), and his disciples, including ARMOUR, IT ALL STARTED WITH COLUMBUS (1953) and IT ALL STARTED WITH HIPPOCRATES (1966) and Thompson, *Everything You Always Wanted to Know About Mooses—But Didn't Think Anyone Would Take Time to Write Down*, 4 ST. ANDREWS REV. 113 (1976).

12. *See*, fn 11, *supra*, or Kerrigan, J. in MELLINKOFF, THE LANGUAGE OF THE LAW 443 (1963):

"Having ample means—the value of the estate amounting to some $90 thousand —the not unnatural desire arises in her to remove to California, or at least to live there during a part of the year. Should she leave her husband toiling and moiling in Chicago?"

The judge's footnoted riposte: "No! No! A thousand times no!"

13. Depending on your degree of humor-impairment (Do you watch a lot of PBS shows?), fn 11, or this entire article.

STOCK VALUATION DISCOUNTS: 0% or 90%?

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Sobriety--No Laughing Matter

"We're sober...it was a good day!" one wretched-looking prisoner, who is dangling by his manacled wrists from a ceiling dungeon, remarks to his dangling cellmate. Such gallows humor would probably not rate much of a chuckle from a social drinker, but it would with a recovering alcoholic who has been on the brink of destruction and has been rescued.

Indeed, what could possibly replace the "happy hour" at my favorite bar where sparkling wit and wisdom flowed as freely as the bourbon, scotch, and martinis, I wondered? Alas, I would have to resign myself to a life of sobriety attending dull, humorless Alcoholics Anonymous meetings. Wrong, I discovered much to my delight and relief 28 years ago.

In World War II, cartoonist Bill Mauldin captured the essence of foxhole humor with his two combat riflemen, Willie and Joe, fighting in the Italian mountains. In one cartoon, a sergeant says to them, "I need a couple of guys who don't owe me any money for a little routine patrol." I could appreciate that: I was in those miserable, deadly mountains at that same time. The vino helped ease some of the pain but, just maybe, also headed me down the road of alcoholism. Today, the cartoons of Larson are a happy relief from the "foxholes" of daily living sober.

A recent article in the *Bar News* (December 1990) discusses A.A.'s "acceptability to the courts, and what kind of resource A.A. is." Outside the scope of that article is the fellowship of Alcoholics Anonymous and the good humor surrounding this splendid movement, which saved my life and those of millions of other recovering alcoholics, (although sober for 28 years, I still consider myself recovering, not recovered. There is no cure; the disease is only arrested).

The promises of sobriety are set forth eloquently in the classic book, *Alcoholics Anonymous*, written by the founders of A.A.:

> We are going to know a new freedom and a new happiness. We will not regret the past nor wish to shut the door on it. We will comprehend the word serenity and we will know peace. No matter how far down the scale we have gone, we will see how our experiences can benefit others. That feeling of uselessness and self-pity will disappear. We will lose interest in selfish things and gain interest in our fellows. Self-seeking will slip away. Our whole attitude and outlook upon life will change. Fear of people and economic insecurity will leave us. We will intuitively know how to handle situations which used to baffle us. We will suddenly realize that God is doing for us what we could not do for ourselves.

And we have fun doing it. Much of my legal life was spent as a defense trial lawyer. In the olden days, this often involved trying two jury cases a week, but those days weren't all that bad either, at least from a preparation viewpoint. Often three or four depositions would suffice--none of the 20 or 30 depositions one might see today, along with the two or three weeks of trial for a $5,000 whiplash case. (Are you plaintiffs' counsel cringing?).

Along with continuous sobriety, my trial record improved. I even learned to joke, cautiously with jurors (in appropriate circumstances) in final argument, although I once had this shoved down my throat by opposing counsel when I wrote on the blackboard in big letters my opinion of the merits: "NUTS!" His killing riposte written boldly over mine: "PEANUTS!", adding, "He wants you to give my client PEANUTS!" So, humor--like putting one's head in a crocodile's mouth--must be used carefully.

The court gets the punchline. I once entreated an Irish-American judge to extend the court time for a "short" witness. "Well, counsel, just how tall is this witness?"

An outstanding user of eloquent and literary wit, retired Washington Supreme Court Justice Frank Hale, often wrote his opinions like fiction:

> These are such stuff as dreams and law suits are made on--a builder, an architect, an owner, and great expectations unfulfilled. Ralph and Margaret Thomsen set out to build the house of their dreams. They would build it high on a hill overlooking the moving waters of Puget Sound amidst the serene splendor of the sun setting behind the towering Olympics.
>
> *(Armstrong Construction Co. v. Thomson*, 65 Wn.2d 191, 1964*)*.

Good humor and wit help smooth the sobriety journey. I am indebted to people like Frank Hale, John Rupp, Gary Larson, James Thurber, E.B. White, Russell Baker, Calvin Trillin, Dave Barry, Mark Twain, Charles Dickens, Fred Allen, Jack Benny, Edgar Bergen, Patrick McManus, W.C. Fields, Dorothy Parker, Ogden Nash, Charles Schulz, and countless others, many long since departed, who prove conclusively, "No one will get out of this thing alive."

A Meditation on Mediation

by **Randolph I. Gordon**

Roots

As must be immediately apparent, the word "mediator" and "immediately" have a common root: *medius*, meaning middle. To speak of something as "immediate" is to say that there is no intermediary or intervening member, medium, or agent, that there is actual contact or direct personal relation. Mediation involves a mediator or intermediary and consequently, at its core, is antithetical to the concept of immediacy. That, I contend, is why it works.

Mediation is, quite literally, the process of bringing people together by keeping them apart. In the context of legal disputes, the parties involved have demonstrated an inability to communicate effectively so as to resolve issues between them. This is hardly surprising since the word communicate derives from the Latin *communicare*, meaning "to make common." The parties, to their own detriment, have been unable to work together to achieve their common good. One of the principal tasks of the mediator is to create an environment in which the parties can work independently to achieve the common good by removing from the negotiation process the interference of dysfunctional communication.

In this context, the mediator acts as conduit and translator actively listening to the desires and concerns of each party and, free from issues of ego, personality, or self-interest, transmitting clear and effective messages. The mediator need only—indeed, should only—transmit across a narrow band in order to be effective. The static of past wrongs and misunderstandings must be systematically screened out to produce a sanitized, but effective, message with a focused purpose: to resolve the dispute. The direct personal interaction which has engendered the dispute is filtered through the mediator, leaving only the residue of addressable concerns.

The Classic Pattern: *The Phantom Tollbooth*

The classic pattern of mediation is set out in the children's story, *The Phantom Tollbooth*. Once upon a time there were two kingdoms, Dictionopolis (the city of words) and Digitopolis (the city of numbers), the kings of which had stopped speaking to one another because they disagreed on whether words or numbers were more important. They disagreed, consequently, on everything. In effect, they *agreed* to disagree.

This slender reed is all that is required, however, for them ultimately to reconcile their differences. With the assistance of an intermediary, a boy named Milo, who, with their permission, undertakes the rescue of the Princesses Rhyme and Reason, the kings resolve their differences: words and numbers, they conclude, are of equal importance. This humble parable contains within it the elements of the classic mediation: a dispute, a breakdown in communication, an intermediary, an agreement to a common process, and a reconciliation.

The Continuum

Moving along a continuum from negotiation towards arbitration and litigation, one encounters an increase in both the formality and the extent to which the decision-making power is transferred from the parties to an independent authority. In negotiations, there are virtually no formalities and the parties retain all settlement authority. By contrast, a jury trial is replete with the formalities accreted over a thousand years of common law, and the parties have yielded virtually all control over process and result to the judge and jury. Mediation shares features of both extremes. As in arbitration or litigation, the mediator is a neutral figure whose commitment is to the process, not to the result. Consequently, the degree of comfort which the parties have with a mediation, and hence the effectiveness of the process, is directly related to the confidence in the independence and integrity of the mediator. Parties are exquisitely sensitive to any asymmetry in the relationship between the mediator and either party, just as they are to the appearance of bias in an arbitrator or judge. Anything less than strict neutrality is almost invariably fatal to the process.

Unlike the arbitrator or judge, however, the mediator is not cloaked in formal authority and is powerless to impose a solution upon the parties. In this sense, mediation is far more like negotiation with a facilitator. The mediator has no more authority than the parties have given. This fact constitutes both the greatest strength and greatest weakness of mediation.

The strength lies in the fact that the parties, who are most knowledgeable respecting the circumstances, remain empowered. How often, particularly in the context of business disputes, do

lawyers or judges understand the subtle tradeoffs possible in a complex business relationship? By remaining empowered, the parties are capable, if the barriers to effective communication can be removed, of arriving at a better solution than one imposed by even the best-intentioned outsider.

The weakness arises from the mediator's lack of judicial powers of compulsion. As a consequence, containment of the parties within the mediation may be difficult. The authority of the mediator or, rather, the perceived authority of the mediator, is all important. In a recent mediation I had before a United States district court judge, it was clear that appointment by the President of the United States and life tenure together with the badges and indicia of authority were critical in making the process work. Having the parties and attorneys leaping up out of their chairs whenever the mediator enters the room is a nice place to start. But, strictly speaking, it is not necessary. The integrity of the mediator, the confidence reposed in the mediator by the parties or their attorneys, the evident commitment to the process, a prevailing spirit of optimism, the competence and perspicacity of the mediator, the financial investment of the parties in the mediation, and even the sense that the mediator is really "working hard" can often provide the mediator with enough informal authority to address the task at hand.

The effective mediator, in order to maximize the likelihood of a successful process, must create a dynamic equilibrium, acting as both an authority figure and a leader. As an authority figure, the mediator has at the outset a reservoir of informal authority upon which to draw which serves to contain the parties within the process and to maintain stability and order. The tone of the mediation must be set by the mediator, not the passions of the parties. In practice, this is easier than it sounds. After all, the parties have agreed upon the mediator and the process, invested time and money, and the mediator controls the agenda and, often, the physical plant. As a leader, however, the mediator must shatter complacency and illusion and take the parties outside of themselves to observe the dispute as it would appear to outsiders. In other words, having established a framework of stability and order, the mediator will often systematically inject chaotic elements into the proceeding: uncertainty, doubt, insecurity, to unsettle the stable, but unproductive, stasis which has deadlocked the parties. Powerful tools available to the mediator enable the mediation to simulate a "pressure cooker" environment within which the hard shell of self-justification developed during the course of litigation is cracked and the parties are asked to cast off pretense and come to grips with the risks and uncertainties of their positions while contained within the process. The pressure cooker not only cooks hotter and faster, but it tenderizes. And during this process, the mediator ought not to be surprised if a lot of steam is released.

The Pressure Cooker

The pressure in a pressure cooker is created by an increase in kinetic energy within an enclosed space—a pot with thick metal walls, a lid that clamps down, the application of heat, and a method of releasing excess pressure without explosion or injury. Mediation functions along similar principles. By creating a spatial separation, controlling the agenda and, often, the physical plant, eliminating dysfunctional communications and personality issues, and by taking advantage of a number of social constraints, mediation can increase the pressure on the parties beyond levels which can be achieved in negotiations without a blowup or walkout. When release of excess "pressure" is necessary, the mediator can permit the party to vent pent-up emotions privately without the adverse consequences of such expression in the presence of the other party. If a safe environment for the expression of feeling has been created and the party has been heard, the party will often recognize the value of resolving the

legal and business issues without asking the legal process to address emotional issues which it is ill-equipped to handle. The walls of pressure cooker mediation include the loss of face associated with walking out, the commitment to the mediation process engendered by the investment of time or financial obligation, the control of the physical plant by the mediator, the desire to persuade a neutral party of the correctness of one's position, the agenda established by the mediator, the consequences of failure to resolve the matter, and the authority of the mediator. Having embarked upon the mediation agenda, the parties are constrained from abandoning the process until completed. The heat is nothing less than the recognition of the risks of litigation including, yes, attorneys' fees. Focusing on the disastrous consequences of prolonged litigation is turning up the heat.

Jarndyce v. Jarndyce

Experience appears to bear out the value of this analogy. The mediation process is the contained environment and the challenge of the mediator is to establish a process and to motivate the parties so things get cooked faster short of a blowup or walkout. Time, risk and expense of litigation are features common to nearly every mediation because they not only constitute a significant basis for commitment and containment within the process, but they are the most certain visible consequence of failure to resolve the dispute. In one case, it was sufficient for me to point out to the parties the fact that there were eight lawyers sitting around the table to disabuse the parties of any hope of a simple and inexpensive solution at trial. In another case, a chart demonstrating that a total victory would barely exceed the expenses of litigation was sufficiently persuasive for one of the parties to exclaim, "Well, obviously, we have to settle this thing!" Lawsuits making lawyers wealthy and benefiting no one is part of the popular culture and literary tradition. Although deeply troubling to members of the profession, the fear of litigation does have its uses in encouraging settlement.

Consider this paragraph respecting the case of Jarndyce and Jarndyce from Dickens' *Bleak House*:

> Jarndyce and Jarndyce drones on. This scarecrow of a suit has, in course of time, become so complicated, that no man alive knows what it means. The parties to it understand it least; but it has been observed that no two Chancery lawyers can talk about it for five minutes, without coming to a total disagreement as to all the premises. Innumerable children have been born into the cause; innumerable young people have married into it; innumerable old people have died out of it. Scores of persons have deliriously found themselves made parties in Jarndyce and Jarndyce, without knowing how or why; whole families have inherited legendary hatreds with the suit. The little plaintiff or defendant who was promised a new rocking horse when Jarndyce and Jarndyce should be settled, has grown up, possessed himself of a real horse, and trotted away into the other world. Fair wards of court have faded into mothers and grandmothers; a long procession of Chancellors have come in and gone out; the legion of bills in the suit have been transformed into mere bills of mortality; there are not three Jarndyces left upon the earth perhaps, since old Tom Jarndyce in despair blew his brains out at a coffeehouse in Chancery Lane; but Jarndyce and Jarndyce still drags its dreary length before the Court, perennially hopeless.
>
> Jarndyce and Jarndyce has passed into a joke. That is the only good that has ever come of it. It has been death to many, but it is a joke in the profession.

The chances are, when the heat is turned up during a mediation, someone in the room is thinking: "Jarndyce and Jarndyce."

Mediating in the Adversarial Model: One Story

Although classic mediation involves an independent mediator, it is possible for similar factors to be brought to bear by the attorneys themselves. In order to illustrate this, I will have to ask for your patience while I share a personal story.

Several years ago, I was invited to a community meeting in a church in the Midway area and asked to make a presentation to a number of families concerned about their proximity to the Midway Landfill. These families were all to the west of the landfill and all the available evidence suggested that the effluent or leachate, which raised concerns respecting health hazards and property values, was flowing to the east, away from their homes. These individuals had not participated in a large multiple plaintiff legal action which had settled shortly before and, having bided their time, now found themselves two weeks from the end of the limitation period on their claims. I spoke to the families and advised them that based upon what I knew, their claims were only of modest value, and might well be exceeded by the costs of experts and litigation. The truth was, I confessed openly (I was in a church, after all), I was not eager to undertake representation in situations where expectations were likely to be disappointed. I suggested that it might be possible for me to contact the Seattle city attorney's office to obtain an extension on the statute of limitations, to file administrative claims, and to establish a series of mediation sessions in which each of them would have an individual meeting with assistant city attorneys and the opportunity to reach a settlement. The settlement would, I suggested, provide only modest compensation and might be constructed so as to reserve claims for unknown health problems which might manifest themselves in the future. To my surprise, not only did all 19 households ask me to pursue this approach, but the city agreed to each element of the proposal.

I undertook representation of my clients with the clear written understanding that if settlement was not able to be reached through mediation that they would have to seek other counsel if they chose to pursue litigation. In any event, they would have gained time to obtain such counsel, and administrative claims—a necessary condition precedent to commencing suit—would have been filed.

To the credit of Vicki Seitz, now Southwest District Court Judge, then of the city attorney's office, who championed the proposal, we were able to agree upon an extension of the statute of limitations for 90 days, and a series of mediations was scheduled. Comprehensive claims were filed for each household and, within 60 days, we had settled 17 of 19 claims during three long days of back-to-back mediations.

What happened?

Why did it work?

Elements of Success

First, both sides were committed to the process and approached it in good faith and with remarkable optimism. The city and the claimants had every reason to want to resolve the matter short of litigation. The power of optimism—belief in the process and prospects for success—is essential for the mediator and helpful to the extent found within the parties. The more confident the parties are that a mediated solution can and must be found, the greater the commitment—and probable success—of the process.

I had made it clear that I was committed to the mediation of the disputes by my disclosing to the city, as I had to my clients, that if settlement was not reached, other counsel would have to appear in my stead. Unconsciously, by abandoning any implied threat of litigation, I had assumed the role of quasi-mediator, dedicated to the process, and in a remarkable demonstration of homeopathic magic, my commitment to the process evoked a similar response from the city. In retrospect, although the city undoubtedly recognized the risk that failure to settle would have them looking at some other (perhaps less reasonable) attorney, the efforts of the city attorneys clearly reflected positive commitment to the process, not fear of the unknown.

Second, the clients had the opportunity to hear and be heard. The truth is, in many cases, the mediation process gives the client a chance to hear and to be heard in a way that a trial does not. What is more, the client's

subjective sense of having had his or her "day in court" is often better satisfied by an exhausting day of mediation than by three weeks in the courthouse. The pace and progress of a successful mediation is much faster than the ponderous procedures in the courtroom and far more in keeping with client expectations respecting legal proceedings as established in the media. Trials with the full panoply of administrative procedures and due process simply would not do well on prime-time television. A complete description of a trial would include: waiting for assignment to a judge, voir dire, exercise of challenges, legal motions, side bars, lengthy examinations which all too often are stilted, tedious, intermittant and discordant, often obscure evidentiary objections and rulings, review of jury instructions, scheduling of witnesses, and jury deliberations. The average trial is simply not what the client expects. The client expects both less and more: less time, more opportunity to simply "have it out." In many respects, mediation satisfies these expectations better.

Third, the clients did not experience the inflationary effect that prolonged litigation has on expectations.

In this case, the success was achieved by mutual commitment to the process, recognition of the risks, expenses and uncertainties of litigation, and the extraordinary sensitivity of the assistant city attorneys to the need of these clients to air their concerns. The city, as a large governmental body, is capable of an apparent neutrality which is difficult for an individual party to exhibit. Hence, the communication was not obstructed by ego, personal animus, or the heat generated by the adversarial process. The particular elements that rendered this particular process successful, however, continue to impress me as significant: (i) commitment; (ii) hearing; (iii) minimization of what I call "legistagenic" effects (expectations arising from the legal process, itself).

Eliminating the High Cost of Legistagenicity

In the world of subatomic particles, the Heisenberg Uncertainty Principle asserts, in essence, that the observer affects the events observed. In the medical field, physicians have long recognized that medical treatment itself can have deleterious consequences on the complex biochemical system which is the human body. Such consequences are labeled as "iatrogenic": induced by medical care or treatment. In dealing with complex social and economic relationships, litigation will, itself, induce distortions which, with appropriate care for the correct etymological antecedents, I have labeled "legistagenic." Clients who only want "X" at their initial conference, are outraged when they are offered "2X" on the eve of trial and crushed by a jury verdict of only "3X." How often do clients approach attorneys with a clear understanding of the appropriate measure of legally cognizable damages? More often than not, the client's perception of injury and expectations respecting compensation are shaped by the legal system. How often does litigation persist in order to recover damages which did not exist at the outset? How often are business relations made untenable by the prolongation of litigation? How do you know, as attorneys, that the parties do not, behind your back, actually like one another? Mediation is one way to eliminate the often unacceptably high costs of legistagenicity.

Where in litigation anything said by a party is a weapon, in mediation there is the shield of confidentiality. Where in litigation there is cunning, in mediation there is candor. Where communication between the parties in litigation confronts a wall, in mediation there is a corridor. Where in litigation there is a tendency toward hyperbole, in mediation there is the pressure for realism. Where in litigation there is delay, in mediation there is speed. Where in litigation actions must be taken which only indirectly contribute to the end result, in mediation there is a concentrated focus on resolution of the dispute itself.

In mediation, litigants find the last, best chance for resolving differences without abdicating their power to control the result. As a consequence, mediation serves the individual need for communication, understanding, security, conservation of resources, and peace. ☐

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Mediation Before the Board of

The views expressed in the article are those of the author and are not

by **Mori Irvine**

Mediation formally came to the Board of Industrial Insurance Appeals on July 28, 1985. On that date SSB 4190 went into law amending RCW 51.52.095. This amendment recognized the need for Alternative Dispute Resolution (ADR) in workers' compensation cases and directed the board to develop an expertise in mediation for the purpose of conducting settlement conferences under the statute. For the first time, judges conducting mediation conferences were prohibited from presiding over the hearings in the case. The division of ADR and hearings was born.

Prior to the amendment, each hearings judge conducted one or more pre-hearing conferences. At those conferences motions were ruled on, the issues were framed for hearing and witnesses were identified and scheduled. Depending on the judge, the attorneys and the case, settlement was discussed informally. Sometimes a settlement was reached and hearings weren't needed.

As caseloads grew, the need for an effective means of encouraging and facilitating settlements became necessary. The decision was made to establish a formal mediation process that would be utilized prior to hearings. RCW 51.52.095 and SSB 4190 were part of that commitment to the mediation process.

The structure was simple. Senior judges, known as review judges (who were responsible for reviewing Petitions for Review), were given the task of conducting mediation conferences. Two judges were added to the staff of four review judges. Each was to serve a four-month term performing the review duties and then serve four months as a mediation judge. The state was divided into three geographic areas and the first mediation runs were established. Early statistics are sketchy. But in 1986-1987, mediation handled 2,046 cases and issued 915 orders for a settlement rate of 44.7%.

Each year, the caseload for the board

Industrial Insurance Appeals

necessarily those of the Board of Industrial Insurance Appeals.

has increased, and so has the number of orders initiated by its mediators. The settlement rate has also risen. In 1987-1988, 2,419 cases went to mediation, and 1,099 of those resolved for a settlement rate of 45.4%. In 1988-1989, 2,594 appeals were mediated, and 1,257 orders were issued for a settlement rate of 48.5%.

This last year, FY 1989-1990, 80% of the 3,976 appeals granted went to mediation. The unit has grown to 12 mediation review judges and six geographic runs. Each run is supported by a legal secretary and a scheduler. Each secretary and scheduler are assigned to two active mediation judges, who continue in their dual roles as mediator and reviewer, rotating from one to the other.

The 3,185 new cases assigned to mediation in 1989-1990 were an increase of 23% from the year before. An additional 131 appeals originally sent directly to hearing were later assigned to mediation. While absorbing the increase in assigned appeals, mediation maintained approximately the same percent of settlement---48.3% as compared to last year's 48.5%. Even with the increase in caseload, the time it took to resolve a case in mediation dropped from 27 weeks (from the date the appeal was granted) in 1988-1989 to 22 weeks for fiscal year 1989-1990.

Mediation generated 38% of *all* final orders in fiscal year 1989-1990 compared to 31% last year. Sixty-one percent of the agency's orders on Agreement of Parties were mediation-initiated compared to 56% in fiscal year 1988-1989, and 49% of the agency's dismissal orders were from mediation, up from 44% in fiscal year 1988-1989.

Mediation is working in Washington Workers' Compensation cases. The success of the program is due in large part to the mediation judges themselves. The requirements to be a mediation review judge are:

- Active member of the WSBA
- One year of experience as a senior hearings judge, or
- Four years' general trial practice with two years of substantial experience before the Board of Industrial Insurance Appeals.

• Four years as judge for a court of general jurisdiction. Most of our mediation judges come from the ranks of our hearings judges.

The professional staff training committee is responsible for establishing and implementing ongoing professional education programs for the judges. This includes mediation training.

To sharpen their skills, all our judges are given a variety of training opportunities. Each judge is provided 15 hours of continuing legal education per year. A judge may select from a wide range of offerings presented by the Bar Association, the University of Washington Law School Foundation, the Washington State Trial Lawyers Association and other professional organizations.

Twice per year, the training committee brings experts to the Board for day-long seminars. Such presentations have included speakers from the National Judicial College, the Mediation Institute and Willamette's Center for Dispute Resolution.

Every year, a certain number of judges are sent to out-of-state, week-long intensive training programs. In the past, we have sent mediators to the National Judicial Colleges' Dispute Resolution Seminar.

In 1989, the training committee created a mediation judge bench book, which was adopted by the board and has been distributed to the mediators to assist them. Some of our judges participate in the ADR section of the WSBA and in the Society of Professionals in Dispute Resolution.

Our mediation process is straightforward. Once an appeal has been granted, the file is reviewed by the chief mediation judge for likelihood of settlement. (This year, 80% of all appeals were directed to mediation.) The case is then assigned to the mediation judge for that geographic area. In 1989-1990, each mediation judge received an average of 12.3 new cases per week.

Once a case has been assigned to a judge, a conference is scheduled. When the parties are represented by attorneys, as is the case in most of our appeals, the conference is conducted by telephone. When a party is *pro se*, the conference is conducted live in the county where the worker resides or where the injury occurred. A mediation judge conducts 10 to 14 conferences per day, three days per week. At the conference, jurisdiction of the board is established and the issues are framed. It is also a time to take care of any preliminary legal matters or motions. Then the parties talk settlement.

Unlike the hearings judge, the mediation has access to and has reviewed the complete department file. As a result, the mediator is aware of the strengths and weaknesses of each side. Individual style plays a big role in the approach taken by the mediator. Some act as a facilitator; some are aggressive in getting the parties to settle; some are in between. All styles are successful.

Once the parties have resolved a case, which might come after one or more conferences, the judge is responsible for creating the necessary record to support the settlement agreement. The mediator then drafts the order, called an Order on Agreement of Parties, for the board's signature. The board will not approve a settlement unless it conforms with the law and the facts (RCW 51.52.095).

If the case cannot settle, it is then referred to the hearing judge. But by then, jurisdiction has been established, preliminary legal matters dealt with, and the issues narrowed and framed.

Mediation of workers' compensation cases has worked well for Washington. This last year, five mediation judges were responsible for 1,537 settlements. Mediation has proven to be a cost-effective way to quickly resolve the appeals before the board. It has also been instrumental in relieving delay and congestion in an already overtaxed system. But most importantly--it has helped thousands of injured workers receive swift and successful resolution of their appeals.

Mori Irvine is currently the ADR training manager for the District of Columbia Superior Court in Washington, D.C. She served as an industrial appeals judge and a mediation review judge with the Board of Industrial Insurance Appeals from 1984-1991.

Lawyer-To-Lawyer: A New Program of the Washington State Bar Association

by **Beth A. Jensen,**
YLD LTL Coordinator

Lawyer-to-Lawyer is a new WSBA program. It was first suggested by the Task Force on Professionalism, headed by WSBA Governor Stephen E. DeForest. President Lowell Halverson has picked up the torch, beginning with his "leaping tall buildings" column in the December 1990 *Bar News*:

> The State Bar is currently working on a program to pair up every new admittee with an experienced lawyer/teacher as a way of providing a rite of passage into the profession. In the past, when our numbers were small, "mentoring" was accomplished informally as a step in the transition every new lawyer made in becoming an "accepted" member of the local bar organization. Normative behavior, for example, the "minimum amount of courtesy that is expected of every lawyer practicing in Omak, Washington," was easily transmitted by oral tradition. Unwritten and even obscure local rules were discussed over lunch one on one, senior lawyer to young associate. A lawyer/mentor, by example, demonstrated that intimidation, manipulation, making life miserable for the opponent, unnecessary motions and other attrition behaviors were simply unacceptable.

Lawyer-to-Lawyer pairs a newly admitted lawyer with a more senior lawyer (in practice more than five years). The two are encouraged to have lunch (or breakfast) at periodic intervals (once a month or more) to discuss the kinds of questions and problems every new lawyer faces.

Lawyer-to-Lawyer is not limited to the solo practitioner who hangs out a shingle and has no one to turn to for advice. Even in large law firms, there may be a reluctance to ask certain questions for fear of appearing to be stupid, challenging the established order, or whatever. There are also many lawyers who work for government agencies, or are corporate counsel, who have no practical window on the world of private practice, or who may experience a sense of isolation from other members of the bar. The thrust of Lawyer-to-Lawyer is to tap experience, not legal expertise in a specialty area. The duration of the relationship is up to the two individuals; a minimum of a year is to be agreed to.

Your bar association needs you! Lawyer-to-Lawyer is creating a "bank" of senior lawyers who will participate in the program, beginning with the May 1991 admittees. Lawyer-to-Lawyer needs at least 500 of you right now. Will you help pass on the traditions of our profession? Will you help to instill in new lawyers a sense of pride based on a new sense of professionalism? You do not have to spend all your nonworking hours on this project; just have lunch with a young colleague once a month, and pass along some of your experience about the techniques and ethics that "make an effective lawyer." Help the new lawyer struggle with the Rules of Professional Conduct, professional courtesy, finding the courthouse, getting to know the judges and local rules and getting to know other lawyers. We all struggled during our first year of practice. We wondered whether we were really cut out for this work; we realized how little we really knew about practice and how much we still needed to know. Lawyer-to-Lawyer is not a program for you to train a new lawyer in a specialty area. It is a return to some of the older, essential intangibles of our profession. Please lend your support by completing the following sign-up form and returning it to the bar office. Here is another opportunity to practice professionalism and ensure others can practice it as well! Please complete, fold, staple and mail the clip-out coupon if you are interested.

TEAR HERE

TO: Beth Jensen, Esq., Lawyer-to-Lawyer Coordinator, c/o WSBA Department of Public Affairs

I accept the LTL Committee's invitation, and wish to be placed in the WSBA's matching pool as a prospective "Senior Partner." I agree to: 1) Be in touch with a "new lawyer" I have been paired with within seven days of notification, 2) arrange meetings at least monthly for a year, 3) notify Sharlene Steele at the WSBA (at (206) 448-0441, Ext. 281) if one of us wishes to end the partnership, and indicate whether I wish to stay in the pool.

I have never been formally disciplined, nor is discipline pending against me.

I have been in practice at least five years.

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by **Lindsay T. Thompson,** Bar News *Editor*

Bellevue, Washington, March 22-23, 1991

Present: President Lowell Halverson, president-elect Joe Delay, and the governors. Also present: Robert Bakemeier (WSBA/YLD); C.C. Bridgewater (Prosecuting Attorneys' Assn.); Judge Joseph Coleman (Court of Appeals, Friday), Judge Walter Webster (Court of Appeals, Saturday); Frank Edmondson (Government Lawyers); Sheryl Garland (Washington Women Lawyers); Nancy Gibbs (Legal Foundation of Washington); Judge Donald D. Haley (Superior Court Judges' Assn.); Dennis P. Harwick (WSBA Executive Director); Donna McNamara (SKCBA/YLD); Judge Dan Phillips (Magistrates/District Court Judges' Assn.); Geoff Revelle (SKCBA Trustees); Lindsay Thompson (*Bar News* Editor/ Clark County Trustees); and Robert Welden (WSBA General Counsel).

Executive Session: Glasnost returned. The published agenda restored the items to be addressed by the Board in private session: administration of a reprimand, a review of the disciplinary proceedings docket, reports from WSBA counsel on unauthorized practice of law matters and implementation of *Keller v. State Bar of California*; a personnel report by Dennis Harwick, and approval of the executive session minutes from February. And that's what the president reported they did when the open session began.

President's Report—The Smoked Smelt Tour '91: President Halverson said he'd spoken to a number of county bar associations, testified before the WSBA Long Range Planning Group, worked on the WSBA Computer Bulletin Board, and fielded two more volumes of correspondence. He also handed out several tons of Cowlitz River smoked smelt all over the place, including the Friday night pre-dinner gathering. Boy, that brie-and-smelt set are a fast crowd.

President Halverson also introduced his successor, Spokane lawyer Joe Delay. A respected eastern Washington attorney, Delay served on the Board of Governors from 1982 to 1985. The Board's approval of the minutes of the February meeting included note that outgoing governor Don Curran, Delay's law partner and brother-in-law, took no part in the election of Delay and absented himself from all meetings where it was discussed.

Meanwhile, Down at the Westin Building: Executive Director Dennis Harwick announced the appointment of Diane deRyss, former assistant CLE director, to succeed Terry Foster as the Association's CLE Director. A review and discussion of financial reports followed. In his first comments on his first WSBA budget, Harwick told the Board his two "high priorities" were investing in more equipment for WSBA staff (mainly computers) and enhancement of the *Bar News* and *Resources*, the annual directory. "Rather than more staff, I want to concentrate on enhancing the productivity of existing staff," he told the Board in a memorandum. "An appalling number of our employees are still working off typewriters. In the long run, tools are much cheaper than staff." Harwick said the *Bar News* "is a good publication, but it could be much more effective with a few enhancements and a slight change in priorities." He said he thought it worth looking at a *Bar News* subsidy, among other things, to guarantee a certain volume of editorial content every month. Harwick continues to make changes in internal operations, including adopting a personnel manual and employee time sheets to better track indirect costs in the budget.

Reports from the Field: Seattle lawyer Peggy Lum, president-elect of the National Asian Pacific American Bar Association, reported on the organization's work and its 1991 convention, set for November in Seattle. With some 2,500 members, the Association is working to improve professional development opportunities for Asian-American law students, lawyers and communities. After a general discussion with the Board on some of the Association's projects, the Board voted unanimously to ask the Corporate Law Section to look into the creation of a program like the California Minority Counsel Program for getting more minority lawyers into corporate counsel roles.

Committee of Bar Examiners: Chair Frank Slak, several committee members and all three Washington law school deans took part in a symposium of sorts with the Board on how links between the WSBA and law schools could be improved, ranging from better student preparation for the bar exam to using faculty in WSBA committee and section projects to having law school reps join the Board's camp followers each month. The president appointed three governors to liaison positions with the law deans: Jeff Tolman with Wallace Loh at UW, Don Curran with James Vaché at Gonzaga, and Monte Hester with Jim Bond at UPS.

Chris Kinzell and Connie Gent of the Washington Association of Legal Secretaries came over from Yakima to review the activities of their organization and explore ways the Association could forge closer working relationships with the WSBA.

Saturday, governor Ron Gould reported to the Board on his rotation duty attending the recent meeting of the Superior Court Judges' Association. Governor Tom Chambers reported on his testimony before the Legislature on the package of bills seeking to implement the recommendations of the Washington Commission on State Courts. He and governors Gould and Tubbs were detailed to do some followup as the bills move along.

Bellingham lawyer and ABA delegate Frank Chmelik reported to the Board on the work of the ABA House of Delegates at their February midyear meeting in Seattle, also on Saturday.

There were other reports, too, but they get their own headings, below. Back to Friday.

The Bar Examiners/Law Deans portion of the program bracketed lunch with the East King County Bar Association, well attended as always when the governors come to town. Governor Tom Chambers gave some particularly interesting remarks on the role of lawyers in society and American history prior to introducing the board and the president, who in turn pitched a number of his program initiatives to the locals. They, in turn, gave the Board several reports on EKCBA activities, including their legal services to the poor programs, which the President predicted will become a

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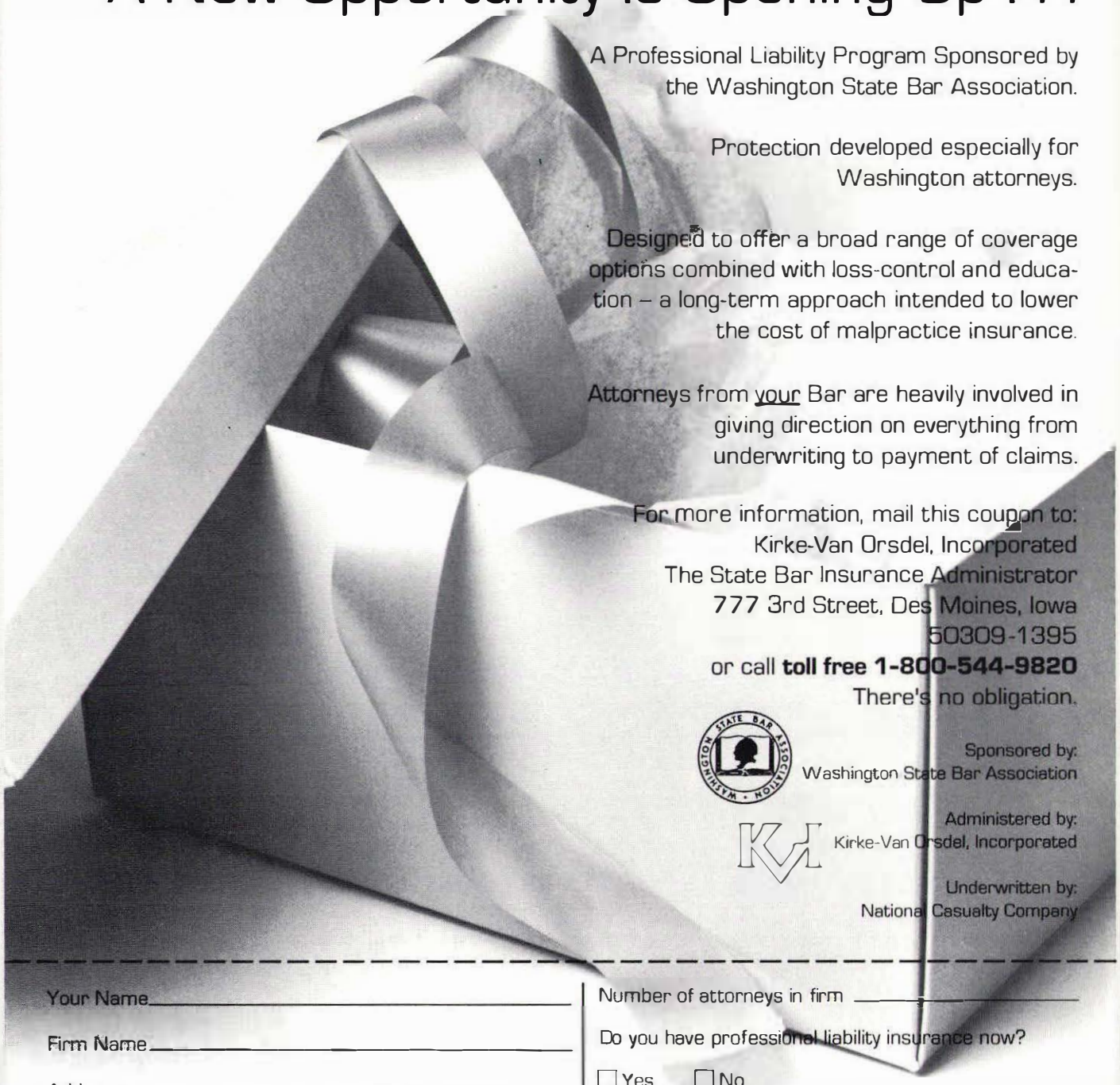

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If The Shoe Fits, Wear It, But If It's Another Bar Association's Moccasins, Walk a Mile First, Then, If It's A Federal Appointment...Ah, Never Mind: Richard Jones and Mary Fairhurst, co-chairs of the Minorities in the Legal Profession Committee, came to the Board with a resolution calling on everyone from President Bush down to do more to appoint ethnic minorities, women and physically challenged attorneys to the judiciary at all levels.

Governor John Schultz thought the resolution overbroad because it included federal judicial appointments, which are beyond the scope of the WSBA's bylaws provisions governing comment on judicial appointments and governed by a scheme set out in the federal Constitution. Governors Lem Howell and Jeff Tolman proposed various amendments, and there was some discussion over whether parts of the resolution were argumentative and intended to beat counties with few or no minority lawyers over the head for not having any minority judges. SKCBA Trustee Geoff Revelle thought the notion the Association can't advise on federal judicial appointments specious. "You pass resolutions all the time telling Congress what you think they should think about things," he said. "Why not judgeships?" In the end, the resolution passed without the federal parts, and unanimously at that.

WSBA Young Lawyers Division president Robb Bakemeier got involved in the discussion with a separate proposal for the WSBA to adopt a mechanism for creating an advisory committee for Washington's U.S. senators any time a federal judicial appointment comes open. The committee would be composed of the usual representatives of the usual groups, and once constituted, would sit there while a message was sent to the senator telling him it was ready to serve. If the senator declined the offer, the Board of Governors could ask it to make a list for the appointment.

Governor Schultz noted that when Judge McNichols announced intention to retire in the Eastern District, Senator Gorton had contacted then-WSBA president Jim Vander Stoep about WSBA input on the nomination, and that Vander Stoep had told him such activity was outside the Association's authority. Gorton had then chosen Spokane attorney Joe Delay to compose an ad hoc advisory committee. This time, with the retirement of Judge Jack Tanner, Gorton consulted the Federal Bar Association and with its advice appointed an ad hoc committee of southwest Washington lawyers.

What most of this boils down to is the intensely political nature of federal judicial appointments and the fact that Tanner, a minority member appointed by a Democratic president, will be succeeded by the appointee of a Republican president, and how much pressure to try and apply to the process. Opinion on the Board was divided. Governor Tom Chambers thought enacting the Bakemeier plan would seem "peevish" and thought having several bar leaders—Republican ones—approaching Gorton with a suggestion that the Association be consulted more next time, would work better. Governor Don Curran thought the Board would be in the unseemly position of competing with the ad hoc committee. Ron Gould thought the Board could comment and make recommendations on federal appointments, but wanted time to consider the matter, not listed on the agenda, further. There was a motion to table the matter until April; it passed 9-3, governors Hester, Howell and Long voting no.

Then Gould moved to table the matter indefinitely. That led to a long discussion of the procedure posture of the motion. Parliamentary procedure is not the Board's strong suit. In the end, the Board split on the vote. Governors Curran, Gould, Schultz, Slater and Tolman voted to table. Governors Hester, Howell, Long, Tubbs and Chambers voted nay. The president voted nay, and the matter is tabled only to next month.

Given the Likely Attendance, Why Not Call It Cocoon III? The Board's Convention Committee and Dennis Harwick reported on plans for the WSBA conclave in San Diego this coming September. They've budgeted for an attendance turkey, estimating attendance at 500 and costs to match. If anyone else shows up, they'll be heroes. Eldon Rosenthal, who tried the recent case in Portland against white supremacist Tom Metzger, will speak, as will Harvard law professor Arthur Miller. The party will have a Hollywood theme, which will be carried to the CLE session titles. The professionalism seminar, for example, will be called "Dances With Wolves."

Harwick announced that the $1,800 a night hotel suite, made much of by opponents of the event at the Spokane convention, notwithstanding the untidy fact it hadn't been booked for the San Diego event, has, in fact, still not been booked, and the number of other suites available for members inclined to book them has been reduced from thirteen to six.

This discussion led into when to have the September Board meeting. Since the bylaws require the Board meeting to be the day before the annual meeting, and the annual meeting had beenset previously for September 6, 1991 in Seattle, September 5 in Seattle became the pretty inescapable conclusion, and that's when the Board voted unanimously to have it.

A Break for Bar Examinees: A fellow who took the bar exam more than once wrote the Supreme Court, objecting to the fact that an applicant who has previously passed the ethics part of the exam has to pay the full exam fee of $350 while someone who passed the long part and has to retake the ethics exam only pays $125. Bar counsel Bob Welden analyzed the matter and recommended a reduction for repeaters who take the "substantive" part—down to $250. The board approved the recommendation.

We're Still In Favor of It: Artist Linda Hawkin-Israel made her annual visit to the Board to bring them up to date on the progress of her plan for a Women in Law Stamp. In one of the few instances where The Board's Work can offer its readers visual aids, the proposed design is on the cover of the June 1988 *Bar News*. The Board, which previously endorsed the project, endorsed it anew.

But It Only Took Six To Spend $25K on the Centennial Videotape: The last Friday item set the tone for Saturday. After moving to approve a contingency fund

appropriation for a pro bono survey and granting CLE vouchers for lawyers volunteering in county pro bono programs, the Budget Committee came out of left field with a non-agenda item to amend the Association bylaws to raise the number of members' signatures required for a referendum from the current 250 to ten percent of the membership. Referenda cost upwards of $16,000, they said, and we can't budget for them. If we get several in a year, we've seriously disrupted the budget. "Should 250 people be allowed to dictate the spending of $16,000?" one asked.

This was a touchy business. It would be easy to conclude this was an attempt to react to the 1995 convention referendum by making future votes harder to get off the ground. Governor Lem Howell moved to put it off to next month. Alva Long agreed. Once we know what the result of the convention vote is, we can proceed with this more clearly, he thought. He also felt a percentage a bad thing, given the number of active members who live out of state or don't practice. Ten percent of the truly active members could actually be a much higher number than ten percent of the active members on paper. He could live with 1,000 signatures, though.

The committee countered that a percentage would let the number required keep pace with the growth of the bar: 250 was once a reasonable percentage, they maintained, but the bar outgrew it and now it's so low as to make the whimsical possible in the voting booth. Governor Don Curran said "Now would be a glorious time to appoint a committee," perhaps hoping the topic would go away and collect itself. But matter then spun out into a long digression about whether to rewrite the bylaws in whole or in part, then back to whether the real solution to the referendum issue was to raise the number required but give proponents more time to collect the signatures.

The discussion dragged on for some time, during which no one thought, apparently, of calculating the percentage of membership that would approximate 1,000 members and compromising on something everyone could have lived with. The Board gave up at 5:15 p.m.

Then Came Saturday: Having to write about a bad Board session is like having a hangover without having had any of the fun of getting drunk. (The editor, invoking the spirit of H.L. Mencken, will now grant a short pause in the proceedings for prohibitionists, PC thinkers and the seriously humor-impaired to dash off letters to the *Bar News* about the tasteless incorrectness of that comparison:

{.....}

It's no fun, but, hey—they pay me to do this, good or bad.

The problem was that no one seemed to be able to stay on target. People interrupted each other and talked over each other. Noteworthy was one governor who'd drown out others repeatedly by raising his voice until there was no one left to be heard, and then, almost in the next breath, object to being interrupted. A testy edge crept into people's comments, followed, as the day trudged along, by fatigue, and boredom. Maybe it was the smelt. Maybe it was a lingering fractiousness from the reportedly raucous, multimonth attempt to elect the new president of the Association.

Thing started well enough. The Board confirmed some

appointments to the Statute Law and Court Rules and Procedures Committees, passed a resolution thanking retired UW Professor Victor Hanzeli for his service as chair of the CLE Board, and appointed Dillon Jackson (the subject of the funniest roast no one ever attended at the 1989 WSBA Convention) to succeed him.

There was supposed to be an item relating to that hardy perennial, the unauthorized practice of law, but the Board decided to put it off a month. The Board then discussed seeking nominations for the various awards the Association gives at the annual convention. For a list, see "The Corner Office," *Bar News*, May 1990, at p.6). They decided to add one honoring the person or institution most advancing affirmative action for minorities and the handicapped (a trying PC discussion ensured over whether handicapped is too outré to use. "Physically challenged" is preferred, it seems. "But what about the mentally handicapped?" someone ventured, risking solecism. There was no answer).

The Board then approved selling deskbooks to judges at 59% of their retail cost after dissecting at some length how 59% was arrived at. Then Nancy Gibbs gave a report on the recent activities of the Legal Foundation of Washington. Declining interest rates are cutting into their grant income.

A report by Governor Steve Tubbs on computerization projects in and out of the bar was good for a long review of the hydra-like beast computerization has become, what with the state courts' connectivity committee, the WSBA bulletin board project and computerization task force, the Washington Digital Law Library's projects, and the ritual bashing in absentia of the Reporter of Decisions who won't hand over the state appellate reports for free. Are they public records or aren't they? was the feeble cry, echoing innumerable past discussions on the same topic. But this time governor Ron Gould had a new idea: let's wade in there and sue somebody. This is nothing a declaratory judgment action can't fix, he said.

The president said he'd ask the computerites for a final report in April and see if that produced anything.

Governor Don Curran then gave a report to the Board on the first use of its plan for having volunteer local counsel take over the cases of suspended or vanished lawyers. One of his partners had done it recently. He proposed a motion to set up disciplinary case processing timetables, to develop a policy as to what governors can say about pending disciplinary matters when their subjects ask about them, and to develop an expanded docket of information on pending cases for the public's information. After some discussion about the matter, the motion passed unanimously.

A list of CLE topics for the coming year came up next, and was approved. The president announced that the ballots for the 1995 convention referendum would be counted April 2, and set up a committee of counters/ verifiers. There was a diverting, short debate about whether the referendum had gotten the 50% response needed to be valid. No it hasn't. Yes it *has*. Maybe it will.

Governor John Schultz then gave a report on the Western States Bar Conference. Allowing as he had thought the matter a boondoggle, he found it very useful, and spent some time going over things he learned there which assist him in being a better governor. Generally speaking, the interchange between bar leaders at such an event, the discussion of common and uncommon issues facing state

bars, is helpful, Schultz told the Board. His comments were echoed at some length by other governors who went this year. Lem Howell wanted everyone to know that the weather in Santa Barbara was terrible and the hotel was nothing to write home about.

Welcome Aboard, Sir, You're in Row 238B, Next to The Man With the Goat: The end of the agenda seemed further and further off, and then the governors got into a long, irritable discussion about their recently adopted reimbursement policies. They started tinkering with them to make points, either to justify how hard they all work, or how, as Lem Howell put it, compared to many other states he'd surveyed, they were cutting themselves a fat slice of the hog still.

There were motions to take away the previously granted right of the president and executive director to fly first class (approved), to allow reimbursement for meals to include gratuities (approved), to allow sections to pay honoraria to speakers without approval of the executive director (denied), whether to have people put in for reimbursement for meals at Board meetings or just bill it through the master billing account (the former; it gives more control), whether to include reimbursement for gubernatorial use of telephone credit cards (yes!yes!), whether to reimburse governors for one night or all nights at bar conventions generally or San Diego in particular (all nights by vote of 6-4, Howell, Long, Slater and Schultz in the minority), to not reimburse members of the Supreme Court for attending unless they were part of the program (died for want of a second; maybe the Court will "do the right thing," one governor said), whether to waive convention registration fees for the president, president-elect and governors (yes, unanimously), whether to turn the whole issue to a sort of j.g. congressional pay raise commission (no interest), whether the outgoing governors (Curran, Gould and Tolman) ought to be reimbursed for anything since they would leave office at the end of the annual meeting the week before the convention (but of course, with a chorus of protests of wounded propriety), and whether to thank governors Howell, Gould and Tubbs for all their hard work in developing the reimbursement policy (yes, unanimously, though Gould said the other two really did all the work).

It dragged on through lunch, which was hauled in from another room and set about the governors' table, where all the observers squeezed in and the ambitious doubtless savored a moment close to the sandwiches of the powerful. Then there was a proposal to cover the *Bar News* editor for the cost of attending ticketed convention events (yes, socializing is important, too, and ought to be covered), whether paying for the Supreme Court to attend the convention wasn't just a bribe waiting to be taken (quickly withdrawn by its proponent as a bit of overstatement in the heat of the discussion). It was enough to make you want to reach for a gun, but just in time the reimbursement topic expired unassisted and the Board trudged on to a discussion of the reimbursement of members under *Keller v. State Bar of California* (see this space last month). No, let's do that in April, someone said, and that's what they decided. The president then announced he'd appointed some people to the Domestic Relations Task Force, and after reviewing the agenda for next month, the Board went home.

See "Calendar," this issue at p. 33 for coming meeting dates.

Board of Governors Elections Due

Lawyers residing in the First and Fifth Congressional Districts, as well as in King County, please note:

Members of the Board of Governors of the State Bar to represent those districts, for three-year terms ending in September 1994, are due to be elected this year. Expiring in September 1991 are the current board terms of Jeffrey L. Tolman (First District), J. Donald Curran (Fifth District) and Ronald M. Gould (King County at Large).

Article III of the Association Bylaws provides that any active member in good standing, except a member previously elected to the Board of Governors, may be nominated for the office of governor from the district in which he or she resides upon a petition signed by at least twenty, but not more than thirty, active members also residing in the district.

Nominating petitions may be obtained from the Bar office, 500 Westin Building, 2001 Sixth Avenue, Seattle, WA 98121-2599. The petition must be filed with the executive director at the Bar office by 5 p.m. on Tuesday, April 30, 1991.

April

4-5 Midyear Environmental Law and Management Conference, Seattle.

5 Growth Management, Seattle. *Sponsored by:* WSBA CLE and Real Property, Probate & Trust Section. *For information:* (206) 448-0433.

6 Washington Association of Legal Secretaries Annual Legal Education Seminar Workshop Series, SeaTac. *For information:* Elizabeth Smith, (206) 223-1313.

12 Understanding the New Guardianship Act, Spokane. Also presented April 19 in Seattle. *Sponsored by:* WSBA CLE and Real Property, Probate & Trust Section. *For information:* (206) 448-0433.

12 Auto Cases: Winning Is No Accident, Seattle. *Sponsored by:* WSTLA. *For information:* (206) 464-1011.

13 Advising Clients on Steps Necessary to Comply With the Americans With Disabilities Act, Seattle. *Sponsored by:* UW CLE. *For information:* (206) 543-0059.

13 Land Reform in Third World and Centrally Planned Economies, Seattle. *Sponsored by:* UW CLE. *For information:* (206) 543-0059.

15-18 Association of Legal Administrators (ALA) 20th Anniversary Educational Conference, Nashville. *Sponsored by:* ALA. *For information:* John Marquart or Nancy Guthrie, (708) 816-1212.

19 Understanding the New Guardianship Act, Seattle. Also presented April 12 in Spokane. *Sponsored by:* WSBA CLE and Real Property, Probate & Trust Section. *For information:* (206) 448-0433.

19-20 WSBA Board of Governors' meeting, Winthrop. *For information:* (206) 448-0441.

20 Washington Association of Legal Secretaries Annual Legal Education Seminar Workshop Series, Spokane. *For information:* Elizabeth Smith, (206) 223-1313.

20 Board of Directors' meeting, Evergreen Legal Services. *For information:* Bev Miller, (206) 464-5933 or (800) 542-0794.

20 Law of the Elderly, Seattle. *Sponsored by:* UW CLE. *For information:* (206) 543-0059.

24 Advanced Workers' Compensation in Washington, Seattle and Spokane. *Sponsored by:* National Business Institute, Inc. *For information:* (715) 835-7909.

24 Washington Construction Law, Seattle. *Sponsored by:* Federal Publications, Inc. *For information:* (202) 337-7000; fax (202) 223-0755.

25 Demonstration of a Trial, Tacoma/Fife. *Sponsored by:* WSTLA. *For information:* (206) 464-1011.

26 Head Injury Cases, Seattle. *Sponsored by:* WSTLA. *For information:* (206) 464-1011.

26-28 Efficiently Handling the Small Matter, WSBA YLD Midyear Meeting and Seminar, Chelan. *Sponsored by:* WSBA CLE and Young Lawyers Division. *For information:* (206) 448-0433.

27 Defending DWIs—Winning Strategies for the Nineties, Seattle. *Sponsored by:* UW CLE. *For information:* (206) 543-0059.

29-May 2 Tacoma-Pierce Co. Bar Assn. free legal advice booth, Tacoma Mall. *For information:* Julie Weigand-Johnson, (206) 383-3791.

May

1 Washington Elder Law: The Basics and Beyond, Seattle. *Sponsored by:* National Business Institute, Inc. *For information:* (715) 835-7909.

2 Washington Elder Law: The Basics and Beyond, Spokane. *Sponsored by:* National Business Institute, Inc. *For information:* (715) 835-7909.

2 Civil Procedure Before Trial, Seattle. *Sponsored by:* WSTLA. *For information:* (206) 464-1011.

3 Financial Planning for Lawyers, Accountants and Their Clients, Seattle. *Sponsored by:* UW CLE. *For information:* (206) 543-0059.

3 Tacoma-Pierce Co. Bar Assn. reception, Tacoma Sheraton. *For information:* (206) 383-3432.

11 Fifth Annual Family Law Institute, Seattle. *Sponsored by:* UW CLE. *For information:* (206) 543-0059.

17-18 WSBA Board of Governors' meeting, Spokane. *For information:* (206) 448-0441.

18 Securities Regulation for the General Practitioner, Seattle. *Sponsored by:* UW CLE. *For information:* (206) 543-0059.

June

1 Commercial General Liability Insurance—Selected Issues in Primary and Excess Coverage, Seattle. *Sponsored by:* UW CLE. *For information:* (206) 543-0059.

8 Maritime Commerce in the Puget Sound Region, Seattle. *Sponsored by:* UW CLE. *For information:* (206) 543-0059.

21-22 WSBA Board of Governors' meeting, Kelso. *For information:* (206) 448-0441.

22 Buying or Selling a House, Seattle. *Sponsored by:* UW CLE. *For information:* (206) 543-0059.

27-30 WSTLA Annual Meeting and Convention, Whistler, B.C. *For information:* Gerhard Letzing, (206) 464-1011 or (800) 732-9251.

July

19-20 WSBA Board of Governors' meeting, Blaine. *For information:* (206) 448-0441.

27 Board of Directors' meeting, Evergreen Legal Services. *For information:* Bev Miller, (206) 464-5933 or (800) 542-0794.

August

23-24 WSBA Board of Governors' meeting, Leavenworth. *For information:* (206) 448-0441.

September

11-14 WSBA Board of Governors' meeting and State Bar Convention, San Diego. *For information:* (206) 448-0441.

October

19 Board of Directors' meeting, Evergreen Legal Services. *For information:* Bev Miller, (206) 464-5933 or (800) 542-0794.

Assistant CLE Director. The Washington State Bar Association seeks an assistant director of continuing legal education with strong marketing skills. Prefer applicants with experience in market research and with law degree. Send cover letter, resumé and salary requirements to: Diane de Ryss, CLE Director, WSBA, 500 Westin Bldg., 2001 Sixth Avenue, Seattle, WA 98121-2599, *by April 22, 1991*. EOE.

("Calendar" carries information on events of interest to members of the Association. Please send event notices to Lindsay Thompson, Editor, Bar News, *7414 N.E. Hazel Dell Avenue, Suite A, Vancouver, WA 98665. Deadline is the* ***15th*** *of each month for the second issue following.)*

Notices of Interest to WSBA Members

Nondisciplinary Notices

Credentials Declared Void: The bar credentials of Seattle attorney **Claire A. Merrit,** also known as Claire O'Shea, WSBA #17244 (admitted 1987) have been rescinded and declared null and void by Supreme Court Order entered January 10, 1991. The order was based on state bar counsel's Motion for Declaration of Nullity and evidence that Merrit/O'Shea had submitted the law school graduation credentials of a third party in her application for membership in the Washington State Bar Association.

Reinstatement: By order dated February 4, 1991, the Supreme Court of the State of Washington reinstated Tacoma attorney John D. Karna to the active practice of law, effective immediately.

Interim suspension: By Supreme Court order entered February 4, 1991, Newport attorney **Louis Musso III** (admitted 1980) was ordered suspended from the practice of law pending the outcome of disciplinary proceedings against him.

Seattle attorney **Michael A. Barford** (admitted 1987) was ordered suspended from the practice of law pending the outcome of disciplinary proceedings by Supreme Court order entered February 4, 1991.

Interim suspension is pursuant to RLD Title 3 and is not a disciplinary sanction.

Public Notices

"Usury rate": In re RCW 19.52.120(1): Legal Interest Rates: The average coupon equivalent yield from the first auction of 26-week treasury bills in March 1991 is 6.36%. The maximum allowable interest permissible for **April 1991** is therefore **12.00%**. Compilations of the average coupon equivalent yields from auctions of 26-week treasury bills appear in the *Bar News* on page 39 in October 1987 for 1982-1984; on page 37 in June 1989 for 1984-1985; and on page 51 in June 1990 for 1985-1990.

Court Rules: When it reconvenes in October 1991, the Court Rules and Procedures Committee of the WSBA is scheduled to review the Civil Rules for Superior Court (CR) and for Courts of Limited Jurisdiction (CRLJ). Comments and suggestions about these rules are invited. They should be sent to Steven Rosen, Staff Attorney, WSBA, 500 Westin Building, 2001 Sixth Avenue, Seattle, WA 98121-2599.

Harrison Tweed Award: Nominations for the 1991 Harrison Tweed Award will be accepted through June 3, 1991. The award is presented annually to bar associations that develop or significantly expand civil or criminal legal services to poor persons. Nominations can be made by pro bono programs, legal service offices, public defender programs, individual lawyers and members of the public. Bar associations may nominate their own programs. For information on nominating packets and procedures, contact Dorothy Jackson, ABA Division for Legal Services, 541 N. Fairbanks Court, Chicago, IL 60611-3314.

SPONSORED BY THE LAW OFFICE ECONOMICS AND MANAGEMENT SECTION

The "Two-Foot" Library

by **Gregory S. Morrison**

A great way to save time and increase your efficiency is to have the books that you use most often located right at your desk. Of course, every area of the law has its own set of books that are usually promoted by their publisher as being "absolutely indispensable." But what about the rest of us? What are the books all lawyers, regardless of their area of emphasis, should have on or near their desks?

In order to answer this question I took the liberty of dropping in on several esteemed lawyers to see what books they had, or didn't have, adjacent to their desks. What I discovered was surprising. Some of the more obvious books weren't there, while some obscure books occupied positions of prominence. When I inquired as to the reasons for this discrepancy, the usual response was, "I dunno, they've just always been there." So let's give this some thought and ascertain what I'll refer to as the "two-foot" law library.

The criteria for a book to be a part of the two-foot law library were as follows: It must be of general importance to all lawyers. It must be a book that is referred to on a fairly regular basis. It must be there to enlighten the lawyer rather than to impress the client. In other words, if it has to be dusted regularly, then it probably doesn't belong on or near your desk.

The single most-important book that all lawyers should have at their desks isn't a law book at all. Would you like to take a guess? How about the phone book? Yes, the perennial white and yellow pages are the books that should never be farther away than the length of your arm. You probably use the phone book on a daily basis. Therefore, if you find yourself always having to hunt for it or having to retrieve it from your secretary, then you are wasting a lot of billable time.

The second most-important book would probably have to be a standard dictionary. Again, although not a law book, a dictionary is a great tool for helping us be better lawyers. Since so much of what we do involves words, and the precise use thereof, it seems only reasonable that the exact definitions for those words never be far from us. A dictionary will also help you avoid those pesky spelling errors that can otherwise overshadow your brilliance. Also, be sure your dictionary is an edition suitable for professional use, since many dictionaries are inadequate for the sophisticated demands of lawyers.

It only makes sense at this point to include a law dictionary. The standard for the practice is *Black's Law Dictionary*. If you don't already have a well-worn copy of this valuable tome, then get one today. Every advantage noted above for a standard dictionary also applies to a law dictionary.

The court rules for any and all courts that you commonly practice in should also be a part of your desktop library. Even if you don't spend any time in court, it makes sense to know what may be required of your clients if they do end up in court. The common editions of the court rules for Washington also include helpful sections on the Rules of Professional Conduct and the Rules of Evidence.

Resources, which is published by the WSBA as a service for its members, is a valuable "deskbook" of information about and relating to the legal profession in Washington.

The *Washington Lawyer Practice Manual*, published by the Seattle-King County Young Lawyers, is a bargain at any price. In just a few volumes, using text and forms, it takes you through almost every standard legal procedure that would confront a general practitioner. Although it isn't as encompassing as *Washington Practice*, it also isn't as voluminous or as expensive.

How to Start and Build a Law Practice, by Jay Foonberg, is a personal favorite. It never lets you forget that the practice of law is a business, and it illustrates the best ways for getting the most out of your business. This is a book that you should read again and again.

The last book in your two-foot law library should be your personal favorite. Maybe that's the softbound version of the RCW, published by Book Publishing Company. Or perhaps you have a highly specialized treatise in mind. But may I suggest that your last book be one tailored just for you. Don't be embarrassed to have a photo album of your family, or of your vacations, or anything that allows you to take a short mental vacation. You might be surprised that you refer to that one the most!

This column is a clearinghouse for better ways to run the law office. Contributions are solicited from all members of the Bar and should be sent to: Gregory S. Morrison, Tips Editor, The Flour Mill Penthouse, W. 621 Mallon, Spokane, WA 99201.

A Lawyer's Guide to Finding Goodwill Minority Discounts and Going-Concern Value

by **James M. Lansche**, *MBA, AM*

When an attorney represents a client in a marital dissolution where a business or professional practice is involved, the question of valuation is often an issue. As a brief overview describing some methods of valuation, this article is intended to be used as a divorce lawyer's guide for valuing professional practices and commercial businesses.

Professional Goodwill

It is well known that professional practices either are not salable or typically sell at a price much lower than that of a commercial business generating similar returns. This is because factors which create professional goodwill are often not readily transferrable (e.g., lawyers' clients). However, in the context of a marital dissolution, the marketability or salability of goodwill is of little or no consequence. The test is not whether the goodwill of a professional spouse's practice can be sold, but whether it has value to the professional spouse. In other words, professional goodwill is commonly defined as the expectation of continued public patronage. In *Re Marriage of Fleege*, 91 Wn.2d 324, 588 P.2d 1136 (1979).

The concept of professional goodwill is best envisaged through an example cited in *Re Marriage of Lukens*, 16 Wn.App. 481, 558 P.2d 279 (1976). When a salaried doctor decides to take a position in another state, that person takes with him his earning capacity (i.e., a finite number of professional services which he can render) for a specific compensation package or salary. However, if a doctor in private practice were to abandon his practice and move to another state, that doctor should anticipate a shortage of business, even though his practice consists of the same physical assets and presumably the same degree of skill. All other things being equal, the shortage must be attributed to his not having developed in the new locale a reputation as to skill, efficiency, and other elements comprising goodwill.

The fact that a professional does not hold an ownership interest in a professional practice does not necessarily eliminate the existence of professional goodwill. For example, in *Re Marriage of Kaplan*, 23 Wn.App. 503, 597 P.2d 439 (1979), the appeal court held that a special partner of a law firm (who did not have an ownership interest in the firm) did have goodwill as a distributable asset. Furthermore, a manufacturer's sales representative business was held to have goodwill despite having no physical assets and not being a salable enterprise. In *Re Marriage of Campbell*, 22 Wn.App. 560, 589 P.2d 1244 (1978).

When does professional goodwill not exist? A salaried professional is held not to have professional goodwill. In *Re Marriage of Nordby*, 41 Wn.App. 531, 705 P.2d 277 (1985), the courts found that no goodwill existed for an anesthesiologist in private practice who received work exclusively on a rotational basis and would otherwise have had no contact with patients.* Furthermore, in a recent unpublished appeal involving a stockbroker, the appeal court found that the stockbroker's spouse failed to establish the presence of goodwill which was independent of the stockbroker's employer and that any goodwill belonged to that employer.

Goodwill is not synonymous with the expectation of future earnings. It should be measured based on past results and not by postmarital efforts of the professional spouse. (However, that in making a *property distribution* a person's earning capacity can be separately considered.) In *Re Marriage of Hall*, 103 Wn.2d 236, 692 P.2d 175 (1984). Therefore, when determining the value of goodwill, forecasts or projections of income are to be avoided.

According to *Hall*, once the existence of professional goodwill has been established, one or more of the accepted methods of valuation must be employed. These methods can be broken down into two groups, capitalization methods and other methods.

Capitalization of Income

To capitalize means to convert an income stream into an indication of value by dividing the selected definition of income by some factor, called a capitalization rate. Technically, a capitalization rate is a divisor; however, it is common to refer to capitalization in the context of a multiplier. A capitalization multiplier is simply the reciprocal of the capitalization rate (i.e., the value 1 divided by the capitalization rate). For example, if an income stream of $50,000 per year were capitalized at a rate of 20 percent, the capitalization multiplier would be 5 (1 divided by 20

percent) and the indicated value would be $250,000 ($50,000 x 5). If the capitalization rate were 50 percent, the indicated value would be $100,000, a difference of $150,000. The capitalization rate is inversely related to the indicated value (as the capitalization rate increases, the indicated value decreases), and the indicated value is sensitive to the capitalization rate.

A word or two about capitalization rates: in *Hall*, a capitalization rate of 20 percent is used in examples of capitalization methods. While this rate may be appropriate for a particular person, it is not applicable to all professionals. In the choice of an appropriate rate, qualitative factors such as the practitioner's age, health, reputation in the community for judgment, skill, etc. (often referred to as the *Fleege* factors) should be considered. While the determination of an appropriate capitalization rate is beyond the scope of this article, as a simple rule of thumb, capitalization multipliers typically range from 1 to 5. As a general rule, the greater the excess income (defined below) and the younger an individual, the lower the capitalization rate (higher the multiplying factor). On the other hand, the less an individual makes and the older and/or infirm she is, the higher the capitalization rate (lower the multiplying factor).

The capitalization method specifies that a single measure of income be capitalized. For marital dissolutions, an average of five years' income (which can be examined using both before- and after-tax measures) is typically used. Two methods of averaging income streams are common. The first is a simple average; five years of income are summed and then divided by five, with the result deemed appropriate for capitalization. The second method involves a weighted average. Under a five-year earning scenario, the most-recent income is weighted by 5/15, the next-most-recent income by 4/15, and on back until the first year, which is weighted by 1/15. The weighted incomes are summed and the total deemed to be the appropriate income measure for the capitalization. The weighted average method places more emphasis on recent earnings.

Valuation Methods

Three capitalization methods outlined in *Hall* are: straight capitalization, capitalization of excess earnings, and the IRS variation of excess earnings. Under the *straight capitalization method*, average net income of the professional practice is determined, and this figure is capitalized at a definite rate. This result is considered to be an indication of the *total value* of the professional practice including both tangible and intangible assets.

The most commonly used method is the *capitalization of excess earnings*. This method involves finding the average net income of the professional practice. From this figure, an annual salary of an average employee practitioner with like experience is subtracted. The remaining amount is capitalized at a fixed rate and deemed to be an indication of *professional goodwill*. In addition, professional goodwill can also be approached by a comparison of the compensation of the professional spouse with that of the newest associate, and the capitalization of the difference at an appropriate rate.

The IRS variation of capitalized excess earnings method takes the average net income of the professional practice and subtracts a reasonable rate of return based on the practice's average net tangible assets. From this amount, a comparable net salary is subtracted. Finally, this remaining amount is capitalized at a definite rate.

What are net tangible assets and what is meant by an appropriate rate of return? An asset is anything owned by a business that has commercial or exchange value. "Operating assets" may consist of the specific properties (e.g., desks, inventory, computers, etc.) used in operation of the practitioner's business. Care must be taken to properly define operating assets. For example, inclusion of an extensive artwork collection or accounts receivable may or may not be appropriate. In the context of a marital dissolution, operating assets are valued at their current fair market value exclusive of accumulated depreciation.

Net tangible assets are defined as operating assets less "operating" liabilities. Simply stated, "operating" liabilities are the debts incurred in the normal course of business. From net tangible assets a figure representing an appropriate rate of return is calculated. As a rule of thumb, an appropriate rate of return usually varies from 10 percent to 15 percent, depending on the relative proportion of cash within the firm's operating assets (i.e., the greater the proportion of cash within total assets, the lower the appropriate rate of return).

The other valuation methods cited in

Hall include the market value approach and the examination of existing buy-sell agreements. The *market value approach* sets a value on professional goodwill by establishing what fair price would be obtained in the current open market if the practice were to be sold. The method necessitates that a professional practice has been recently sold, is in the process of being sold or is the subject of a recent offer to purchase. Otherwise, the value may be manipulated by the professional spouse. It is often difficult to find comparable information on professional practices; however, *The Goodwill Registry* (Healthcare Personnel Consulting, Inc.) tracks sales of medical practices and provides information on value of goodwill as a percentage of gross receipts.

The *buy/sell agreement method* values goodwill by reliance on a recent actual sale or an unexercised existing option or contractual formula set forth in a partnership agreement or corporate agreement. Since agreements may have been influenced by factors other than fair market value, courts relying on this method will inquire into the arm's length nature of the transaction. According to *Suther v. Suther*, 28 Wn.App 838, 627 p.2d 110 (1981), a buy-sell agreement should be taken into consideration but does not, by itself, determine value. *In Re Marriage of Brooks*, 51 Wn.App 882, 756 P.2d 161 (1988) professional goodwill in a law firm was found to be community property, even though a buy-out agreement provided that goodwill had no value.

Another method which has been accepted by the courts includes a *replacement cost method*. For example, if a professional had recently established himself as a sole practitioner, from which he had received little or no compensation, valuation of professional goodwill could be approached by determining what it would cost to hire a professional and start a similar practice. This method is similar to the concept of *going concern value*. Under this concept and excluding debt, a rule-of-thumb estimate on the minimum cost of a start-up business or professional firm would be $10,000 (to cover expenses such as rent, utilities, telephone, advertising, business lunches, etc.).

Closely Held Businesses

Valuing a commercial enterprise can incorporate the same methods described above as well as some of the concepts of "fair market value." Fair market value is defined as the value a willing buyer and willing seller would agree upon if neither were under any compulsion and both have reasonable knowledge of the relevant facts. Again, emphasis should be placed on historical earnings of the business rather than projections or forecasts. Nonmarketability of the company is not an issue. Appropriate capitalization rates can be derived from an industry source such as *Value Line*.

To my knowledge, no Washington case law exists regarding the issue of minority discounts (i.e., discounts for owning 50 percent or less of a company's stock). However, in *Propstra v. United States*, 680 F.2d 1248 (1982), the federal court accepted a 15 percent minority discount. While 15 percent may be appropriate, there is a substantial body of empirical evidence suggesting that minority discounts can exceed 35 percent.

Six generally accepted methods of finding the value of professional goodwill have been discussed, and each usually provides a different indication of value. To determine a single value for professional goodwill, many quantitative and qualitative factors must be carefully considered, and each case must be examined individually. Undoubtedly, it is a challenging process to choose and support a single value for goodwill.

*Nordby is to be approached cautiously because the issue of goodwill was not fully argued. As a counterargument, serving several hospitals may give rise to public patronage. This, in turn, may be a basis for the establishment of professional goodwill. □

***James M. (Jake) Lansche** has testified as an expert witness, holds an MBA degree, and is an Accredited Member of the American Society of Appraisers. He is president of the Seattle office of Houlihan Dorton & Lansche Inc., a professional firm specializing in business valuations and valuation related studies.*

Edited by Professor **William B. Stoebuck**
University of Washington School of Law

Community property. Husband worked for employer before marriage, during marriage, and during separation preceding dissolution. Employer provided retirement plan fully funded by employer contributions. *Held*, when husband retired, wife should be paid that portion of his retirement benefits that equals the ratio of his months of employment during marriage to his total months of employment. ***Bulicek v. Bulicek***, 59 Wn.App. 630, 800 P.2d 394 (Div. 1, 11/26/90).

—T. R. Andrews

Contracts. Resolving a conflict in prior Washington decisions, court adopts "context" rule of contract interpretation instead of "plain meaning" rule. Thus, extrinsic evidence may be admitted to show entire circumstances under which contract was drafted, to show meaning parties attached to language in it, regardless of whether language is ambiguous. Court specifically adopts Restatement (Second) of Contracts §§ 212, 214(c) (1981). ***Berg v. Hudesman***, 115 Wn.2d 657, 801 P.2d 222 (12/6/90).

—W. B. Stoebuck

Evidence. In prosecution for possession of controlled substances, defendant had summoned ambulance when she became ill, and told paramedics she had taken "crank." On basis of this statement, police obtained search warrant and found drug paraphernalia in defendant's home. Defendant argued that her statement to paramedics was protected by physician-patient privilege and should not have been used to obtain warrant. Appellate court, though acknowledging that physician-patient privilege extends to conversations with physician's agent, held the privilege inapplicable in this case. Court reasoned that (1) privilege was inapplicable because paramedic was not agent for physician; and (2) even if privilege did apply to bar testimony, it would not prevent use of information to obtain search warrant. Court cited analogous decision on husband-wife privilege. ***State v. Cahoon***, 59 Wn.App. 606, 799 P.2d 1191 (Div. 3, 11/13/91).

—K. B. Tegland

Planning and zoning. County hearing examiner heard plaintiff's application for use permit for surface gravel mine. After hearing, examiner entered detailed findings and granted permit, subject to conditions. This was not merely recommendation to county council, but was final decision, subject to appeal to council. Upon appeal, without making new findings, council concluded project would cause traffic and safety problems and denied permit.

Held, reversed and remanded with instructions to issue permit. Since examiner's decision was not merely recommendation, council, on appeal, had to accept his findings if it made no new findings. Since his findings did not support council's reversal, council's decision was erroneous, arbitrary, and capricious. ***Maranatha Mining v. Pierce County***, 59 Wn.App. 795, 801 P.2d 985 (Div. 2, 12/10/90).

—W. B. Stoebuck

Real property. (*Case 1.*) In 1887 defendant's predecessor in title gave deed to railroad granting "right-of-way." In 1985, after railroad ceased operations, Interstate Commerce Commission issued certificate of abandonment. King County now claims public recreational trail over railroad bed. *Held*: (a) Deed granting "right-of-way" conveyed railroad easement, not an estate in land. (b) Abandonment of railroad terminated railroad easement. Use as recreational trail was not within scope of railroad easement. Therefore, county may establish recreational trail only by condemning new easement for that purpose. Court follows Washington's leading decision in *Lawson v. State*, 107 Wn.2d 444, 730 P.2d 1308 (1986). ***King County v. Squire Investment Co.***, 59 Wn.App. 888, 801 P.2d 1022 (Div. 1, 12/20/90). (*Case 2.*) Leasehold tenant assigned leasehold to Assignee 1 (A-1), who assumed to landlord obligation to pay rent. A-1 reassigned to Assignee 2 (A-2), but in effect reserving right to re-enter if A-2 failed to pay rent and to do certain other things. When A-2 failed to pay rent, landlord sued both A-1 and A-2 for possession and rent. Issue is whether A-1 is still liable after assignment to A-2. *Held*: (a) A-1 is liable under "privity of estate." There was not an assignment to A-2 but only a sublease, because A-1, retaining a right of re-entry, did not make a complete assignment of its entire leasehold estate. Thus, A-1 remained in privity with landlord. (*Comment.* This is a minority position in the United States. Its soundness is open to question. — W.B.S.) (b) Assuming, however, that there was a complete assignment to A-2, A-1 still remained liable to landlord under "privity of contract," based upon A-1's assumption of duty to pay rent. (*Comment*: This sounds better. — W.B.S.). ***Port of Pasco v. Stadelman Fruit, Inc.***, ___ Wn.App. ____, 802 P.2d 799 (Div. 3, 12/27/90).

—W. B. Stoebuck

Real property security. This is a commentary on a subsequent development in *Washington Mutual Savings Bank v. United States*, 115 Wn.2d 52, 793 P.2d 969 (En Banc, 7/12/90), which was reported in the November 1990 *Bar News*, page 36. The principal holding in that case was that nonjudicial foreclosure of a senior deed of trust not only extinguishes all junior liens (which the deed of trust statute provides), but also forbids the juniors from thereafter obtaining "deficiency judgments." It happened in the case that the junior lienor, Washington Mutual, holder of a second-priority trust deed, had purchased at senior's foreclosure sale, to protect its interest. However, a careful reading of the court's opinion shows that, in announcing the rule against the junior's deficiency, the state supreme court did *not* limit its holding to the situation in which the junior purchases. Of course this decision created consternation among lawyers for lending institutions, which have in recent years engaged extensively in lending secured by junior-priority trust deeds and mortgages. Taken at face value, the court's announced holding means that nonjudicial foreclosure of a senior deed of trust wipes out, not only the junior liens, but *also the junior debts* those liens secure. The threat this poses, not only to lending institutions, some of which are already struggling for survival, but to the economy of the state is hard to overemphasize. Some bank counsel have assumed that junior obligations would be wiped out only if the junior purchased at the senior's nonjudicial foreclosure sale, since that fact was in the *Washington Mutual* case. However, the court's stated rule would wipe them out whether or not they purchased. On 26 November 1990, the unanimous supreme court issued an "order clarifying opinion," which reads in full as follows: "We do not herein address the matter of a junior deed of trust holder's continued *right to sue the debtor on the promissory note* because it is not before us." (Emphasis added.) 800 P.2d 1124. So no one will miss how this "clarification" compounds the problems the original decision created, the phrase "right to sue the debtor on the promissory note" is a synonym for "deficiency judgment."

—W. B. Stoebuck

Donald S. Voorhees: a Memorial

Friends of the late United States District Judge Donald S. Voorhees of the U.S. District Court for the Western District of Washington at Seattle have organized a committee to honor the memory of Judge Voorhees by raising funds for visitors' facilities at Discovery Park. Voorhees served as a federal judge in Seattle from 1974 until his death on July 7, 1989. He had a long and distinguished career, first as an attorney with the firm that is now Riddell, Williams, Bullitt and Walkinshaw, and later as a federal judge, but the work he was most proud of was his contribution to the creation of Discovery Park.

The Seattle City Council recognized those contributions in an ordinance passed last year, establishing the Discovery Park Memorial Account for the purposes of accepting, on behalf of the city of Seattle, gifts in memory of Voorhees and other donations to provide permanent visitors' facilities and exhibits that enhance Discovery Park as an urban refuge. The ordinance cites Voorhees' major contributions to the creation of the park.

Donald Voorhees was known as a gentleman of unvarying civility and impartiality. Attorneys who appeared before him may not have realized how hard he fought for the park prior to his appointment to the bench. In many ways, he was the father of Discovery Park. On June 9, 1968, he organized the "Citizens for Fort Lawton Park," as it was then known. The citizen group was made up of 25 environmental, community and civic groups. At that time, the Department of Defense wanted the anti-ballistic missle base headquarters for the entire west coast to be located there. After convincing the Department of Defense not to build on that site, Voorhees had to contend with METRO's plans for expansion of the Westpoint sewage treatment plant. He was the first to suggest that the plant be built off-site by expanding along the shoreline.

He also had to fight an initiative that would have turned the facility into an 18-hole golf course, and he was deeply involved in discussions with the Native American group which finally resulted in the United Indians of All Tribes Foundation lease for the Daybreak Star Indian Cultural Center. The city did not have enough money to buy the land, and no federal law allowed surplus property to be given for parks and recreation. Voorhees worked with Senator Henry M. Jackson to introduce the Fort Lawton bill, a federal statute which, for the first time, allowed cities to obtain surplus federal property without charge if the city had originally donated the property to the federal government. Voorhees organized national groups in support, and he garnered that of the Washington State Congressional delegation. Approximately 15 percent of the Seattle park system was added under the terms of this law, and hundreds of other cities have benefited from it as well.

Voorhees served on the Seattle Park Board from 1969 to 1974, and from 1971 to 1974, he served as chair of the Citizen's Advisory Committee that developed the 1972 master plan for Discovery Park and the 1974 revision. His early work led to the city's acquisition of the park, and he suggested the name "Discovery Park," after Captain Vancouver's ship, the "Discovery," and to reflect the sense of new discoveries that visitors might make while exploring the park. He shared the Olmstead brothers' reverence for open spaces, and he articulated his vision of the park as an "open space of quiet tranquility for the citizens of this city—a sanctuary where they might escape the turmoil of the city and enjoy the rejuvenation which quiet and solitude and an intimate contact with nature can bring." He also participated actively in the Friends of Discovery Park by giving the city advice and guidance; he assisted in acquiring acreage for expanding the park.

After Voorhees' death in 1989, many friends wished to honor him and suggested that an enhancement of Discovery Park would be a fitting way to both do that and renew interest in the park and the ideals that created it. That impulse led to the creation of the Discovery Park Memorial Account last year, in the hope that it might encourage the Park Department to build a much-needed visitors' center and name it after the judge.

The Friends of Discovery Park hope that the visitors' center will make the unique beauties of the park more accessible to the young, the disadvantaged and others who might not otherwise have those opportunities.

The Park Department does not have the necessary funds. Although some substantial donations have been made to the memorial account, more are needed. In January 1991, the City Council approved a settlement with METRO which will result in the city's receiving approximately $25 million to spend on waterfront parks. The money is in compensation for allowing METRO to expand its sewage treatment plant at Westpoint and Discovery Park. Final plans have not been made for use of the funds, but, since Discovery Park is the most directly impacted by the sewage treatment plant, the Friends of Discovery Park are hopeful that sufficient amounts will be dedicated to the visitors' center.

Under the terms of the City Council ordinance that created the memorial fund, the Superintendent of Parks is required to consult with the Friends of Discovery Park and representatives of the Voorhees family before expenditures from the memorial account are authorized from donations received before December 31, 1992. If sufficient funds are received, we hope that we will be able to not only enhance the visitors' center facilities, but also remind people of the difference an individual can make to the life of the community and honor the memory of a remarkable man. The goal is to honor Donald Voorhees, not with his name on a plaque, but with revitalized community support for a unique treasure.

The year 1992 is fast approaching. It is not only the end of the consultation period with the park board, it is also the 200th anniversary of Captain George Vancouver's entry into Puget Sound in the Discovery, and the 20th anniversary of the creation of Discovery Park. We have about one year to raise funds for the visitors' center. The Friends of Discovery Park plan to honor Voorhees and his contributions to the park at their annual meeting in late September 1991. For more information, contact Robert Kildall at (206) 522-0033.

If you would like to make a financial contribution, donations to the Discovery Park Memorial Account should be sent to the Seattle Department of Parks and Recreation; c/o Holly Miller, Superintendent; 210 Municipal Building; 600 Fourth Avenue; Seattle, WA 98104. For additional information, please contact Pat McVey at (206) 624-3600. ☐

Pension Benefits In Divorce: The QDRO Basics

by **Robert A. Bohrer**

Divorce settlements frequently call for division of retirement plan benefits between the parties. Many divorce practitioners and pension plan administrators are familiar with Qualified Domestic Relations Orders (QDROs); however, some are either not aware of, or are intimidated by, QDROs because the statutory framework is complex. Prior to the Retirement Equity Act of 1984, a retirement plan might or might not accept a divorce decree allocating the payment of retirement benefits between a divorcing husband and wife, but that act establishes a statutory framework that must be followed in order to validly divide retirement benefits. The statutory basis is set forth under the Employee Retirement Income Security Act of 1974 § 206(d)(3), 29 U.S.C. § 1056(d)(3). Early compliance with this statutory directive assures both the divorcing parties that the retirement benefits will be divided as they have agreed and the pension plan administrator that it will not be sued by a party who was denied a distribution.

QDRO Basics

A QDRO is a court order that awards a portion of a retirement benefit to an "alternate payee"—the pension plan participant's divorced spouse—and it must comply with statutory requirements. Such orders issued by a divorce court apply to defined benefit and defined contribution plans sponsored by single employers and to joint labor-management retirement plans.

A QDRO must be a court order, judgment, decree or other form of judicial directive relating to the division of marital property. Informal agreements between the parties, but not actually or formally approved by a court, are not acceptable and do not constitute a QDRO. A QDRO must clearly state the following basic information:

- *Name of each plan to which order applies.*
  The court order must clearly identify the retirement plan. An early inquiry with the parties and their retirement plans will identify the actual name which should be included in a QDRO.
- *Name and mailing address of participant.*
  The QDRO must state the last known mailing address of the participant and the alternate payee.
- *Allocation of Benefit.*
  The QDRO must either specify the amount or percentage of the benefit to be paid to the alternate payee or sufficiently specify the manner in which the division is to be calculated so as to permit administration by the retirement plan administrator.
- *Benefit Payment.*
  The QDRO must specify either the number of payments or period of time to which the order applies.

Retirement plan administrators have important safeguards against onerous administrative burdens caused by improper domestic relations orders. Under the statute, a retirement plan administrator is not required to accept a QDRO if it includes certain provisions.

Benefits Not Available From the Plan

A QDRO cannot direct a retirement plan to pay benefits not otherwise available or not offered under the written retirement plan. A QDRO does not comply if it directs the administrator to make a lump sum payment where no lump sum option is available under the retirement plan. Furthermore, a domestic relations order cannot direct payment to an alternate payee in the form of a joint and survivor annuity, where the alternate payee's new spouse is a beneficiary, although a QDRO may require payment to an alternate payee before the plan is required to pay a benefit to the participant.

A common feature found in nonqualified domestic relations orders is a provision requiring a single-sum payment disbursed at the time that the participant terminates employment. Such an order does not qualify if the participant is not yet of retirement age under the terms of the plan.

Increased Benefits From A Plan

A divorce decree cannot direct to the alternate payee the payment of benefits that are greater than would be available to the plan participant. For example, the court order cannot direct payments with a value of $25,000 to an alternate payee if the value of the participant's benefit is only $15,000. A QDRO can apportion benefits or benefit accruals earned by the participant after the date of divorce. A QDRO is valid even if the plan participant is not vested; however, the parties should fully understand that retirement benefits will be paid only when and if the participant finally becomes vested in accordance with the vesting requirements of the retirement plan.

Death Benefits

A QDRO can provide for distribution from a defined benefit plan before a participant's retirement. If a participant dies before the earliest retirement date, the QDRO must have named the alternate payee as a "surviving spouse" for purposes of payment of a pre-retirement death benefit.

Impact of Other QDROs

A court order cannot supersede the terms of an earlier QDRO issued by a court concerning the payment of benefits to an alternate payee. Regardless of the dates of the marriages involved, it is the first court order received by the plan that is followed.

QDRO Procedures

A retirement plan administrator is

under a high obligation to comply with the required statutory procedures and can protect against liability from a participant or an alternate payee by following them. It is helpful to the divorcing parties if they or their attorneys confer early with a retirement plan administrator, who must acknowledge receipt of a QDRO and must, within a "reasonable period of time," respond to the parties advising whether the court order is a QDRO or whether it is determined to be nonqualified. Many plan administrators have procedures and forms available to the participant, the alternate payee and their attorneys, and some retirement plans may provide recommended language based upon the terms of the plan.

The most frequent problem encountered by administrators in administering QDROs is the ambiguity of the language in the court order. Clarity in terms and descriptions, as well as careful checking for omissions, will assure an orderly administration of a QDRO. The parties should therefore consider potential distribution of the retirement benefit in case the participant or alternate payee dies before the distribution date. They should also consider the naming of contingent beneficiaries. Other questions which could be explored with the retirement plan administrator before entrance of a QDRO are the availability of hardship withdrawals or plan loans under the terms of the plan. The parties should also explore the tax implications of early distribution from a retirement plan.

Government and Church Plans

The statutory directives set forth in the Retirement Equity Act of 1984 generally do not apply to governmental plans and church plans which do not otherwise elect to be covered by ERISA. Consequently, domestic relations orders directing the allocation of pension rights under a governmental plan or nonelecting church plan do not have to meet the QDRO rules

Conclusion

Parties in divorce litigation and a retirement plan administrator have the opportunity to confer early on the format and substance relating to the allocation of important retirement benefits. Early investigation of plan requirements and an agreement between the parties can avoid future disputes and assist plan administrators in minimizing administrative burdens. □

Suggested further reading:
"The QDRO: New Tool for Divorce Settlements," by Jeff Belfiglio, October 1985 *Bar News*, page 21.

Robert A. Bohrer is.a Seattle attorney whose practice emphasizes labor law.

Theodore A. LeGros died on December 27, 1990. He was an able lawyer, a fine bridge player and a good friend. Since he was one of the deans of the admiralty bar, I think it appropriate to salute his memory with

The Odd John Case

by **John N. Rupp**

About 35 years ago, there was in the Seattle area a man named Odd John Solnordahl to whom we are indebted for two unusual incidents, one involving the sinking of a vessel and the other involving a criminal prosecution.

Odd John owned a fishing vessel named "Black Douglas." She was a good and expensive vessel and, quite properly, was adequately insured against the perils of the sea. One day Odd John and another man were taking Black Douglas from Seattle to Tacoma. Somewhere off Point Pully (now known as Three Tree Point) she sank. Odd John and his companion were able to get in her tender and get ashore. They said they had been steaming along in the ordinary way when suddenly the ship struck a heavy obstacle and sank very quickly. The water there is quite deep, some 750 feet, so Odd John concluded that the ship could never be raised and salvaged, and he put in a claim to his marine underwriters for her full value.

The underwriters heard of the sinking almost immediately. They could not find any heavy object drifting about in the area. But divers could not work in water that deep, and it appeared that there was no way ever to see Black Douglas again.

Ah, but there had recently been developed an underwater television camera which could be lowered to great depths and could send continuous pictures to the surface. Odd John did not know of this device, but some alert person among the insurers did, and the underwriters decided that the curious circumstances and the amount of the claimed loss justified the considerable expense of employing the people with the camera equipment. So they did, and sure enough, after awhile the camera found Black Douglas lying on the bottom. Guided by the camera, a salvage crew was able to slip cables under the vessel and slowly and carefully mover her into shallower water. Soon they were able to bring her to the surface and ultimately to get her to drydock. Such a salvage job had never been done before. And now the ship could be inspected.

"Well, hullo," said the inspector, "Here's an odd thing. There is no hull damage at all. What do you suppose made her sink? Why for heaven's sake, look here and here and here---every single seacock is wide open. That would make her sink, all right. Charley did you ever hear of a collision that didn't make a mark on the hull but made all the seacocks screw themselves open?"

"No, sir, can't say I ever did. Somebody should talk with Odd John about this."

"Good idea, Charley."

Odd John and his companion stuck to their collision story, but (1) the underwriters refused to pay the claim, and (2) the whole matter was reported to the United States Attorney for the Western District of Washington. In due course there was filed in U.S. District Court a criminal case, *US. v. Odd John Solnordahl*, charging the defendant with all sorts of violations of the law of the sea and with attempting to defraud the insurance underwriters.

Odd John said he had no money, so Judge John C. Bowen appointed an attorney to defend him. A lawyer may not decline such an appointment and, at that time, he would receive no pay for his services. Bowen appointed Theodore A. LeGros, of Seattle, for the defense, a good appointment because LeGros was an able and skillful trial lawyer with a wide experience in admiralty matters. And Ted had help. Lane Summers, the senior partner in Ted's law firm, told me that the whole firm turned to work on the case. "It made a mess of the office for awhile," he said, "but it was an interesting case, and we wanted to do the best job we could."

And that they did. Their difficulties were double: the facts were decidedly against them and, more annoying, Odd John was a most difficult client. Here he was, with able counsel whose work wasn't costing a cent, but he kept up a steady attack on his attorney. It seemed to me that about every day during the trial Odd John had a new complaint to make to Judge Bowen about the way LeGros was representing him—incompetence, stupidity, double-dealing, conspiring with the prosecution, were all asserted, and each complaint was accompanied by a request to have Ted removed and someone else appointed. That tactic became fairly common in the 1960s during the uncivil unrest of the times, but the Odd John case preceded that decade by some years, and the ploy was then quite unusual. But the judge hung tough and refused all the requests for Ted's removal.

In the end Odd John was convicted and sentenced to prison. He was a citizen of Norway and so was eventually deported. I do not know where he is and, so far as I know, that case is his only contribution to the folklore and history of the Puget Sound region. □

***John N. Rupp**, former editor and founder of the* Bar News *and renowned writer of anecdotes, is of counsel to Preston Thorgrimson Shidler Gates & Ellis in Seattle.*

NEWS FROM HOME

Two Washington lawyers were nominated for the American Bar Association's Board of Governors at the February midyear meeting in Seattle. King County District Judge **James A. Noe** has been nominated to represent the Judicial Administration Division. Former WSBA Young Lawyers Division president **John McKay** of Seattle has been nominated by the ABA Young Lawyers Division. The two, along with a number of other nominees, will be voted on at the ABA's annual meeting in Atlanta in August.

Darrell W. Scott and **Michael A. Maurer** have joined Lukins & Annis in Spokane. Scott will concentrate in litigation, insurance law, and commercial law. Maurer will concentrate in litigation and commercial transactions.

Gayle L. Troutwine of Portland has been appointed by Judge **Matthew Perry** of the U.S. District Court for the District of South Carolina to a seven-person steering committee representing all plaintiffs in the multi-district L-tryptophan litigation.

Frank Hayes Johnson of Spokane has been elected president of the Legal Foundation of Washington. A former member and former treasurer of the WSBA Board of Governors, Johnson was elected to the Legal Foundation Board after leaving the Board of Governors. **James E. Fearn, Jr.** of Seattle has been elected vice president; Court of Appeals Judge **Roselle Pekelis** was elected secretary, and **Nancy Gibbs** was elected treasurer.

CHELAN/DOUGLAS COUNTY REPORT

by **LARRY TOBISKA**

Lawyers from the Chelan/Douglas County Bar Association have been making a significant contribution towards the work of the Washington state legal community.

Gary Riesen, Chelan County prosecuting attorney, has just completed a term as president of the Washington Association of Prosecuting Attorneys (WAPA). **Judy McCauley**, Douglas County prosecuting attorney, is now the treasurer of WAPA.

Steve Crossland has just completed his term as the first chair of the new General Practice Section and feels very good about his experience. In fact, he was so intoxicated with positive feelings that he has accepted the

***Peter Greenfield** receives the Legal Foundation of Washington's 1991 Goldmark Award from **Margaret McKeown**, board member and past president. (See 'Exec's Report', page 9 of this issue.)*

position as chair of the newly founded Computerization of Law Division, which is a special division of the WSBA, cosponsored by the General Practice and the Law Office Management sections.

Grant Johnson is president-elect of the Young Lawyers Division.

Kristin Prater is executive secretary of the Family Law Council.

Dave Dorsey, T.W. (Chip) Small and **Bud Kight** are special district counsel for the WSBA disciplinary board.

Peter Spadoni is chair of the Tax Section.

Attorneys working on state committees include **Bud Kight** and **Pat Aylward** on the Legislative Committee; **Larry Tobiska** on the Judicial Case Processing Task Force for Title IV-D attorneys; **Peter Spadoni** on the CLE Committee, **Robert Nelson** on the Committee of Bar Examiners; and **Stanley Bastian** on the Legal Aid Committee.

EAST KING COUNTY REPORT

by **RANDOLPH I. GORDON**

Genderlect.

A college roommate calls up out of the blue and you extend the invitation to stay over for the weekend without first checking with your spouse. Checking with your spouse in advance would, you feel, cramp your independence. You don't want to have to say, "I have to get permission" since this makes you feel like a child, an underling, and deprives you of a free and spontaneous response.

A college roommate calls up out of the blue and you say, "I have to check with my spouse" before extending the invitation to stay over for the weekend. You enjoy the fact that your life is intimately bound up with that of another. It is only natural for spouses to check with one another since their lives are intertwined and the acts of one have consequences for the other.

Typical male. Typical female. In that order.

According to **Deborah Tannen**, Ph.D., in *You Just Don't Understand: Women and Men in Conversation*, the asymmetry in communication styles between men and women begins early in life with different patterns and purposes for communication. Men primarily seek to establish independence and hierarchy, while women primarily seek intimacy and interdependence. Telling. Sharing. Report-talk vs. rapport-talk. Public speech. Private speech. The difference in dialects between men and women - genderlects - helps explain why we appear to be talking at cross-purposes so often. We are. As Tannen puts it: "Different Words, Different Worlds."

Can you practice in both jurisdictions?

"But it makes me feel awful."

"You are trying to manipulate me."

"How can you do this when you know it's hurting me?"

"How can you try to limit my freedom?"

"Are you sure you know where you're

going? Shouldn't we ask?"

"I know where I'm going.... Okay, I'll pull over, *you* ask."

So what does effective communication have to do with that most venerable and enduring jurisprudential achievement, interminable litigation? Not much. But, it has a great deal to do with dispute resolution. Men, I'm not telling you what to do, but anyone who reads this book will have a leg up in negotiations. Women, my spouse and I really learned alot from this book.

Up until recent times, the law was an almost exclusively male preserve. Even today, men predominate in the upper levels of law firms and the lawyer-secretary roles are characteristically male-female roles. The peculiar language and logic of the law should be expected to evolve from historically male modes of speech and thought over the next decades. Fortunately, I am retrofitting myself and expect to achieve mastery of both legalese genderlects by the end of this decade.

As with any language skills, it is essential regularly to converse with individuals fluent in the dialect. It is my good fortune to be able to report that the Eastside legal community offers the opportunity to practice both male and female genderlect with a number of individuals including: **Diane L. VanDerbeek**, who has just relocated, with her associate **Tonya J. Gisselberg**, to 110 Pacific First Plaza, 155 - 108th Avenue N.E., Bellevue, WA, whose practices emphasize family law; **Valerie Knecht Hoff**, newly elected EKCBA Trustee and an attorney at the Bellevue firm of Revelle, Ries & Hawkins, P.S., with a family law practice and training as a mediator; **Janet Gray**, new principal of the Bellevue firm of Hanson, Baker, Ludlow and Drumheller, P.S., who earned her LL.M. in Taxation from N.Y.U. in 1986 and practices in estate planning, trusts and probate, corporate and general business, tax, and charitable giving; and **Larry C. Martin**, who joined the Bellevue office of Foster, Pepper & Shefelman as a partner and who has practiced land use, real estate and municipal law, and will be concentrating his practice in land-use and real property development.

As they say in the United Nations, "I waive consecutive translation."

KITSAP COUNTY REPORT

by **SHIRLEY KYDD NG**

Relief in Sight: In recognition of the impending recession, the Kitsap County Bar Association waived all dues for its members in 1991 and is refunding all money left in the treasury on a pro rata basis. "It seemed like a sporting thing to do," said **Mark Down**, KCBA treasurer. "Every member should get about $2.71, less postage."

Committee Reports: The KCBA is expanding its committee structure in 1991, adding an Entertainment Committee and a Leisure Activities Committee. Former Las Vegas Showperson-turned-lawyer, **Heidi Rodey**, will chair the Entertainment Committee. **Lee Ward** will be the Commodore of the Leisure Activities group, whose goal this year is to revitalize the Gorst to Redmond Yacht Race. Ward will be assisted by his new associate, **Sandee Beach**; they recently relocated their offices to the far left corner table of the Yacht Club Broiler.

Programs: The bar association program chair, local intellectual law attorney **Gray Mater**, announced an exciting schedule of speakers for future bar meetings. In May, county transportation head **Charles** (Chuck) **Hole** will speak on "Road Maintenance and Pothole Repair." June's program will be on "Tavern Liability," by the risk manager's staff member, **R. Spott. Patrick** (Red) **Wood** and **Doug Firr** will speak at July's program on "International Logging and Computers—Bark or Byte?" And the August meeting will be a swim party at the Bremerton YMCA to benefit the pro bono program with **Will E. Maykette** giving a demonstration on underwater CPR.

Judge's Union: In a stunning development, the local judiciary voted to join the Plumbers and Pipe Fitters Local 223. Labor attorney **Juss D. Serts** represents the judge's group and indicated the judges were tired of being pushed around and reassigned at will. "No cut" contracts and pencil quality were also high-priority items. To join Local 223, the judges made minor concessions in work hours and will now hold court from 6:30 a.m. to 3:00 p.m. Serts says that the earlier quitting time allows the judges to beat the Navy shipyard traffic, another bargaining point. "It might seem like an odd mix at first," stated Serts,"but everyone in this local has an enormous leverage on the community."

Inland Activists: A coalition of

Bainbridge attorneys has formed an ad hoc committee to study the local water movement and what can be done about it. "It's very upsetting," said committee spokesperson **Dee Mudd**. "Each night when I come home, the waterfront at my small bungalow is in a different place." Since every Bainbridge attorney has waterfront, the common cause drew interested volunteers like a magnet.

"Nothing is more important than property rights. We think there is a viable Fifth Amendment unreasonable taking issue here. We haven't determined if this is a state action or if the federal admiralty power applies. But something must be done about these tides," demanded **Anthony** (Rock) **Crabb**, to a cheering audience of 1,000.

A series of 126 meetings is scheduled for the month of May.

PIERCE COUNTY REPORT

by **GEORGE S. KELLEY**

The results of the Tacoma-Pierce County Bar Association election are in, and **Michael B. Smith** has edged out **Sandy Kindig** for the position of vice president/president-elect. The voters decided to retain Sandy as chair of her very successful continuing legal education committee, and they felt that Mike could be shifted from his duties as director of the annual golf tournament. One might note that the CLE programs return huge profits to the association,while the golf tournament, after purchase of trophies for every conceivable class of golfer, only breaks even.

John Orlandini was elected as secretary-treasurer. Selected for the board of trustees were **John R. Connelly** together with **A. Clarke Johnson**, whose election may be attributed to name familiarity and voter confusion arising out of a recent Supreme Court race. Another trustee is **Tom Jacobs**, who will be seated only if he can show that Puyallup, where he practices, is located in Pierce County and not stuck somewhere in the 19th century. Dan Hannula, as past vice president, automatically moves up to the job of president, a practice which should not be adopted by the federal government's executive branch.

All these folks, together with countless other officials, retired and active judges, state bar officers, trustees and other miscellaneous dignitaries were introduced at our 83rd Annual Lincoln Day Banquet. Some guests at past banquets claim to have seen Abe Lincoln himself. This year, Lincoln look-alike Ed Winskill shaved his beard as it was turning a paler shade of grey. This, and the fact that the traditional open bar turned no-host, may account for the absence of Abe sightings.

The featured speaker was Dr. Harold M. Hyman, professor of history at Rice University and a Lincoln scholar. His topic was "Lawyer Lincoln: Shyster or Statesman?" The answer to his query is, after a long evening of eating, drinking and speeches, who cares? Actually, his talk was very enlightening—it was the many remarks that preceded it which made the program seem overly long.

James Holman, formerly with Anderson, Holman & Houghton, is now a sole practitioner at the same address and phone number. **George M. Riecan** and associates are in new quarters at the Tacoma Mall Office Building and have added **John J. Meske**, former King County deputy prosecutor, as one of the associates to help pay the rent. Finally, Rush, Hannula & Harkins has made **Harold T. Dodge** a partner to do Hannula's work while he is taking care of bar association business.

WASHINGTON WOMEN LAWYERS, SEATTLE-KING COUNTY CHAPTER

Nineteen ninety-one promises to be a busy year for the Seattle-King County Chapter of Washington Women Lawyers. Many of our members are speakers at various CLEs. Some of the speakers featured are the following:

Mary Wolney, assistant supervisor of misdemeanors for the Public Defender's Association, spoke at the

seminar "Defending DWIs from Start to Finish" on December 14, 1990.

Darla Copeland Grosse was the program co-chair for "How to Probate an Estate and Handle Post-Mortem Matters," held January 18. Other speakers included **Carla J. Higginson, Barbara C. Sherland, Janet M. Watson** and **Janet Gray. Kathleen Kim Coghlan** was one of the speakers at the Seattle presentation of "Foreclosure and Repossession in Washington- How to Do It Right," on February 7.

An all-woman panel spoke at WSTLA's program "Persuasive Power: Advocacy Skills for Women in the 90s". Some of the speakers included **Laurie Kinerk, Mary McIntyre, Susan K. Ward, Carol L. Moody, JoAnne Tompkins, Sheryl J. Willert, Teresa V. Bigelow** and **Mary Anne Ottinger. Carolyn Cairns** and **Cady S. Marshall** were part of the panel on "Personnel Law Update" held March 18-19.

Mary C. Eklund and **Sally Carman** spoke at "Commercial Litigation: An Introduction" on December 14, 1990. **Laura L. Jaeger** and **Cheryl R. Robbins** were part of the panel for "Accident Law: A Case Study in Liability Issues, Insurance Disputes and Litigation Strategy" February 22, 1991. **Susan Thorbroggr** spoke at the Pacific Rim Tax Conference on March 14-17 held in Arizona.

Laura Treadgold Oles spoke at the Northwest Securities Institute Seminar in February.

Margie Lamarre has been elected secretary of the Loren Miller Bar Association. Congratulations!

Marcia M.J. Cavens spoke at the seminar on current employment issues under Washington law February 22 in Seattle.

Lynne Graybeal, Lauren Goldman Marshall, Heidi L. Sachs and **Karen Overstreet** were participants in the "Intellectual Property Issues in General Practice" seminar held February 28 in Seattle.

Lynda L. Brothers was part of the faculty for "Avoiding Environmental Liability in Washington" on March 19 in Bellevue.

Joyce J. Mitchelson gave an update on lender liability at the March 6-7 Seattle seminar on hazardous waste in real estate transactions.

Ruth Nielsen has become a shareholder of Carney, Stephenson, Badley, Smith & Spellman. Congratulations!

The chapter was one of the sponsors of a reception for the National Conference of Women's Bar Associations during the ABA midyear meeting in Seattle.

WASHINGTON WOMEN LAWYERS

The State Board of Washington Women Lawyers held their Annual Awards Dinner and Meeting on October 18, 1990 in Seattle. **Sharon Creedon**, a story teller with a law degree, presented a program called "The Quality of Mercy," stories of women and the law, including an oral history of Washington Women Lawyers.

Judge **Nancy Ann Holman** received a special appreciation award for her contributions as a groundbreaker for women lawyers in Washington. She was the first woman appointed to sit as a Superior Court Judge in Washington, June 25, 1970.

Mary Fairhurst received the WWL Board Member of the Year Award. As past president of WWL she was a respected liaison with the WSBA Board of Governors, and was a candidate for that Board in the Third Congressional District. She is currently Assistant to the Attorney General of Washington.

Capital Chapter selected **Nancy Krier** as their Chapter Member of the Year. Krier was president of the chapter through August 1990. A past president of the Government Lawyers' Association, Krier is now Legislative Liaison for Washington State University.

Kitsap County Chapter selected **Diane Russell** their Member of the Year. Deputy Prosecuting Attorney there, she has been active in the local chapter's work.

Pierce County Chapter selected **Meg Jones** as Member of the Year. Now president of the chapter, Jones is active in WWL, the Junior League and other community activities.

The King County Chapter chose **Lisa Stone, Jill Bowman** and the law firm of Stoel, Rives, Boley, Jones & Grey as their Members of the Year. They made a substantial commitment—more than 1,400 hours' pro bono commitment to protect women's access to medical facilities.

Denise George was named Member of the Year in Whatcom County, based on her leadership in the county bar during 1990, when she was the first woman president of the Whatcom County Bar Association.

WASHINGTON ASSOCIATION OF COUNTY LAW LIBRARIES

The Washington Association of County Law Libraries met February 7, 1991 for an all-day conference at the State Law Library in Olympia. County law librarians from King, Pierce, Spokane, Snohomish, Kitsap, Whatcom and Jefferson counties were present with the State Law Librarian to draft goals, objectives and standards for the organization.

WACCL was formed after a conference in Tacoma on May 12, 1990. The group will seek to raise the level of service provided by county law libraries which are open to the public; implement statewide standards relating to collections, equipment, space and personnel; raise awareness statewide about funding deficiencies in the state law library system; and develop programs for the benefit of the library-using public. For more information contact **Janet Gildenhar** at the Pierce County Law Library, (206) 591-7494.

IN MEMORIAM

(The following information was contributed by Roberta Shaffer, Assistant Dean of the University of Washington School of Law.)

It is with deep sadness that the University of Washington School of Law and the Washington Law School Foundation mourn the loss of **Ann Magee**, administrator of the continuing legal education program at the School of Law, on February 9, 1991. When Ann began to coordinate the Law School's CLE program in 1981, the program was a relatively small one, providing only half a dozen seminars per year to perhaps six or seven hundred lawyers in all. Over the course of the next decade, the program more than tripled in size, providing 28 seminars a year to nearly 3,000 lawyers. The successful growth of the CLE program was in no small part due to Ann. She was conscientious, loyal and an efficient administrator who helped the program grow and flourish. Moreover, Ann truly loved her work. She thoroughly enjoyed serving the many lawyers and judges who participated in the seminars and working with the innumerable friends she made in the bar and other organizations throughout the state.

Joe V. Churchill, 64, died February 7, 1991. A nonlawyer, he had served as East District Judge in Goldendale since 1982. In addition to graduating in the top of his class in legal courses, Churchill was one of 35 American judges selected for a National Judicial College pilot program.

Churchill had a distinguished military record. One of the original Navy Seals, he won the Navy Bronze Star, the Navy Cross, three Presidential Unit Citations, seven Purple Hearts and the Silver Star. He served seven tours of duty in Vietnam and also served in Korea.

Churchill was survived by his wife.

Donald McKnight Bushnell, 93, died January 24, 1991 in Newberg, Oregon. A 1920 graduate of Beloit College in Beloit, Wisconsin, Bushnell obtained his law degree from Northwestern University School of Law in 1926.

After graduation, Bushnell practiced in Chicago for three years. In 1930 he moved to Albuquerque, New Mexico for health reasons, and practiced there until 1944. That year he moved to Ferndale, Washington, where he practiced until his retirement in 1984. Bushnell moved to Oregon in 1986.

Active in community and bar association affairs, Bushnell was president of the Whatcom County Bar Association in 1964-1965; a member of Tau Kappa Epsilon Fraternity, the Ferndale Lions Club and First Congregational Church in Bellingham.

Bushnell's wife, Mary died, in 1969. Survivors include three children, six grandchildren and one great-grandchild. A memorial service was held in Bellingham on January 18.

Harry C. Hazel, Jr., 80, died January 20, 1991 in Yakima. Born and educated in Idaho and Seattle, Hazel graduated from the University of Santa Clara. Following his graduation from college in 1932, Hazel entered the University of Washington School of Law, but passed the bar examination as a first-year student.

Hazel practiced in Seattle and Chelan, served as Kitsap County prosecuting attorney and coroner, and as assistant attorney general of Washington. He later became assistant U.S. Attorney and moved to Yakima in 1943. Hazel entered private practice in 1946; from 1975 through 1986 he served as Yakima County Court Commissioner. After leaving the bench, Hazel practiced with his son, David, then served as a volunteer lawyer for Evergreen Legal Services and as a language instructor at Yakima Community College.

Hazel was admitted to practice in state and federal courts and belonged to a variety of law-related organizations. He was president of the Yakima County Bar association in 1967. Survivors include his wife, five children, seven grandchildren and one great-grandchild.

Lawyer-to-Lawyer

see page 25

Too late to classify: Job opening: Placement director, Gonzaga University School of Law. Interested candidates should call (509) 484-6816 (the Job Line) to leave their names and addresses for application packets.

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Mr. Dorfman was formerly a partner with
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February 1991

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