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Washington State **Bar
News**

Vol. 50 No. 7, July 1996

The official publication of the Washington State Bar

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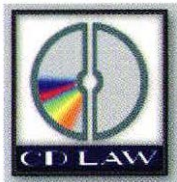
TOC Window

re certain-the beauty
of Mason County. It
and sea that sweeps
led Olympics then curves
of fir, hemlock, spruce
of salal, huckleberry,
erient wild shrubbery
, dappled with quiet
and changing by the
swift-flowing, sometimes peaceful, sometimes turbulent,
Skokomish, Lilliwaup, Hamma Hamma, Duckabush and Dosewallips
that enter it. Marked by broad and friendly beaches,
flanked to the east by the rugged, eternal peaks of the
Cascades and the verdant San Juan Islands to the north,
it is truly a land of charm and beauty. We take no risk
in pronouncing it a place of enchantment.

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Mason County in 1958, and, struck by the wonder of it all,
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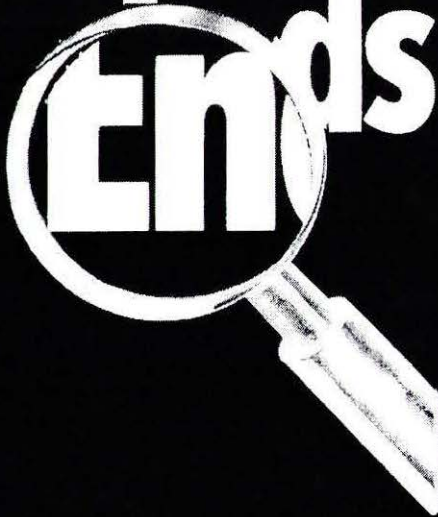
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The official publication of the Washington State Bar

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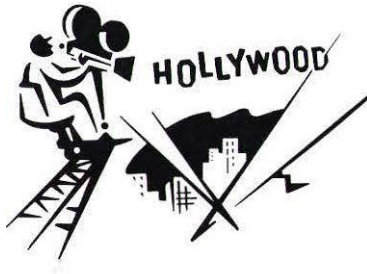
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Judicial Elections

Editor:

After having read the recommendations of the Walsh Commission article in the May edition of this publication, I felt the need to respond. It never ceases to amaze me that people, both appointed by politicians and self-appointed, feel the need to impose their all-knowing wisdom on the public at large. No doubt that these people act with the best intentions, but it is still arrogant to believe that restricting the public's choice in a judicial race is for its own good.

I would be the last person to claim that voters in Washington have a great system, that cannot be improved on, in selecting judges. Our current governor has built a reputation of awarding judge positions to political friends. Many of those were voted out of office by the people. Information is not available to people to make an intelligent informed decision. The solution is not more government or commissions.

One of the real causes to this lack of information for the public is CJC 7.B, which restricts what a judge or judicial candidate can publicly say. While one of the stated goals, keeping politics out of the courtroom, is worthy, the rule goes too far. Instead of restricting comments about how a judge would rule in a particular case, comments about beliefs on legal and political issues are prohibited. The effect of this is that the public would not know if they are electing a tough on crime judge, a civil libertarian, or someone in between.

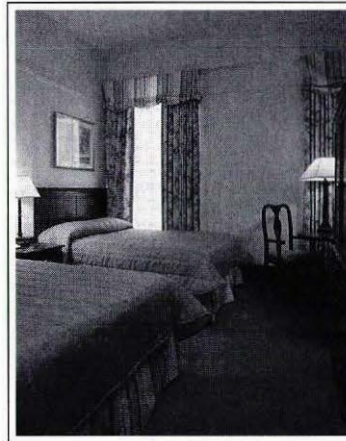
Some would argue that this protects the public from a judge who is deciding cases based on the polls. The reality is that politics sometimes still infiltrate the courtroom. The result of the rule is the phenomenon of a person being appointed to the bench and then winning election after election, either because no one runs

against him or her, or because the public knows of no reason to vote the judge out of office. The rule, in my view, accounts for the voter apathy in these elections. I view the rule as the incumbent's relief act.

This commission proposes instead to take from the public its right to directly select a judge in many cases. Instead, a commission would work to nominate candidates and rate them. I am sorry, but it

seems that the proposed solution for all of our social problems is yet more government taking away more of our freedoms, according to our officials, both elected and appointed. This approach is wrong, and it will only make the situation worse. Someone has to appoint the commissioners and rest assured, politics will play the dominant role. It also will serve to create another part of government that the taxpayers will have to pay for. It will

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do nothing but protect incumbents even more than the current system.

If there is truly the desire for reform, modify the rule so that candidates, both incumbents and challengers, can give more information about themselves. Note, I said "modify," not "eliminate." Allow them to give the reasons why they would make a better judge than the other person. That can be done without promising to do things in certain cases, or types of cases. Then the public would have the knowledge and interest to make an informed decision in an election. This is a much better approach than the additional governmental baby-sitting proposed by the Walsh Commission.

GEORGE A. STEELE
Shelton

Licensing Fee Increase

Editor:

During last year's referendum campaign, Ed Hiskes drew severe criticism from Bar officials for predicting an increase in licensing fees to pay for the Client Security Fund and an expanded lawyer discipline program.

To quote then President Gould from a letter he circulated among the membership:

[Hiskes'] assertion about a 'Proposed Dues Increase' is a misrepresentation. Improvements to our discipline system are being handled through funds generated under our current dues structure. . . . I repeat: No dues increase has been proposed by the Board of Governors.

I therefore note with interest what Chief Disciplinary Counsel Barrie Althoff said about the cost of implementing an expanded lawyer discipline program in this April's *Bar News*:

Since the Bar's current revenues barely cover existing operating costs, however, funding is unlikely to be available without an increase in revenues (including Bar dues) to cover the expected costs of the new program.

This follows on the heels of the new mandatory assessment to fund the Client Security Program, an assessment the Supreme Court enacted last year on the

recommendation of the WSBA's Board of Governors.

I was in a good position to witness the pressures the WSBA brought to bear on Mr. Hiskes last year, not the least of which was a threatening letter from the Bar's general counsel. Imagine what the WSBA's leaders might have said to or

about him if the predicted increase in licensing fees had not been true.

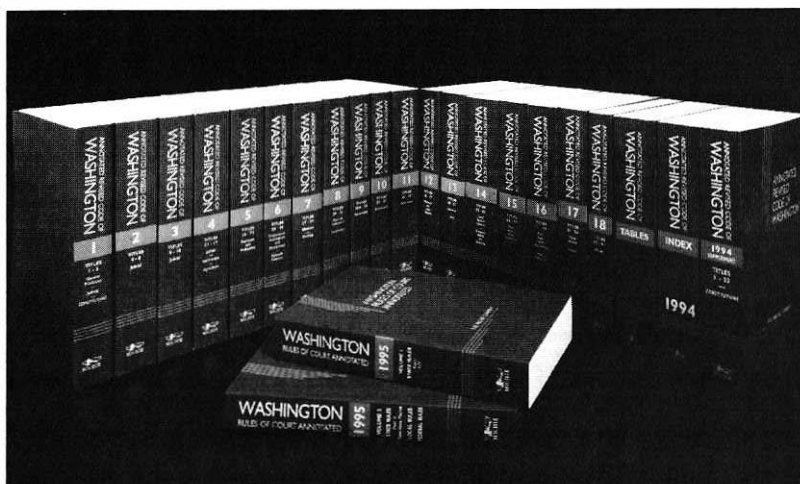
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A New Division?

Editor:

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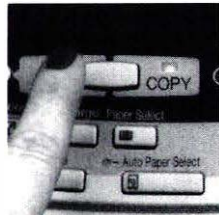
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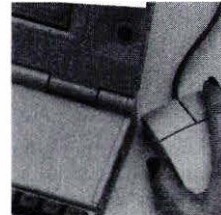
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the overwhelmingly large and congested Federal 9th Circuit Court of Appeals that has been dominated by California, the State of Washington should consider a similar split for Division I of the Court of Appeals. Four reasons prompt my suggestion:

1. King County dominates Division I. Presently, King County has all but three of the judges on Division I.

2. A new Division IV would be larger than Divisions II and III when they were first created. Twenty-five years ago, when the Court of Appeals was created, Divisions II and III were created with three judges apiece.

3. A new Division IV might reduce the caseload on Division I. Adding Clallam and Jefferson to a new Division IV might help reduce the case load on Division II.

4. Convenience. Going to Everett would probably be more convenient for lawyers and parties from Clallam and Jefferson than going to Tacoma. Those from North Puget Sound wouldn't have to drive through Seattle traffic and find parking in downtown Seattle.

I hope the State can be proactive—the need and desire are bound to grow!

SCOTT BADER
Everett

P.S. Maybe it's also time for the federal government to consider a federal courthouse in Everett. Snohomish County is now the largest county west of Detroit and Atlanta (outside of California) without a federal courthouse.

Courthouse Security

Editor:

I read Thomas M. Donahue Junior's letter questioning the wisdom of courthouse security. To it I might add that the Fourth Amendment guarantees: "The right of the people to be secure in their persons . . . against unreasonable searches . . . shall not be violated, and no Warrants shall issue, but upon probable cause . . ."

Where is the probable cause to justify a search of me every time I enter a courthouse? There is none, but I undergo these illegal searches because I consent to them, yet I assure you, my consent is most grudgingly afforded. I endure these intrusions because somebody wants to protect the public from thugs. I'm sorry, but I'd

rather be shot by a bandit than be searched in every courthouse.

STEFFAN M. BERTSCH
Lake Stevens

Editor:

We read with great interest Edward Shea's article "Common-law Courts?" It is ironic that this article appeared in the same issue as Thomas Donahue's letter to the editor opposing increased courthouse security. [May *Bar News*]. We are government attorneys whose sole practice is collection of child support, primarily through civil contempt actions. In the past eight or nine months we have been actively picketed by a person (whom we are not prosecuting, by the way) with a history of behavior and beliefs very similar to those of the Posse Comitatus. The picketing began *after* he had been barred from the courthouse for causing disturbances inside and outside the courtroom.

Additionally, two of us, as well as two family court commissioners, have been sued in Federal District Court by a person we *are* prosecuting, who is alleging that we are violating the person's constitu-

tional right "not to work" by requiring him to pay child support. In one of the pleadings filed by the plaintiff in the lawsuits, he alleged that our "crimes" are punishable by death. The lawsuits were dismissed on summary judgment, which is being appealed to the 9th Circuit. In another similar lawsuit, the process server attempted to barge into the commissioner's chambers without identifying himself — or the package he was carrying — on April 19. In our contempt actions, we have been served with pleadings by a number of persons who claim to be citizens of the sovereign state of _____ (fill in the blank — Texas, Washington, New Jersey, Florida) and who do not recognize the jurisdiction of the superior court of our county. One person alleged that we are "foreign agents"! Two other persons have alleged that we served them improperly because we spelled their names in all capital letters.

We can attest that these Posse Comitatus or Constitutionals, or whatever group affiliation they may claim, are alive and active in the state of Washington. Probably the vast majority of the followers of

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these groups are well-meaning persons who are basically peaceful, but just have a different philosophy of "government." And, on first blush, their arguments seem so silly that one's attitude is to not take these people seriously. The terrifying truth, however, is that these groups tend to attract the McVeys and Kaczynskis of this world.

As stated in Mr. Shea's article, the price of public service *is* becoming more and more costly. We challenge Mr. Donahue to walk into a courtroom that has minimal or no security and stand a foot away from a person he knows has threatened his life and recommend the court send that person to jail. As attorneys and judges, we have a duty to seek and serve justice. But justice will cease to exist if the participants fear for their safety in the process.

SHERRY WILSON
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Racism

Editor:

Here they go again.

The *King County Bar Bulletin* proudly touted the "King County Minority Counsel Referral Program" in its May 1996 issue — the newest, most blatantly racist creation of the King County Bar Association and the Loren Miller Bar Association.

But the *Bar Bulletin* didn't tell you that if your innocent son or daughter made the mistake of being born White, the punishment of automatic exclusion from the program will be inflicted upon them. Why? Because in order to qualify to participate in this flagrantly racist program, all applicants must sign and date an "Individual Certification" that states:

"I certify that I am African American, Hispanic, Asian/Pacific Islander, or Native American."

In other words . . . don't bother to apply if you are White.

Under this racist program's criteria, an impoverished, brilliant White son or daughter would be automatically excluded in favor of a far less meritorious, rich child of color, based solely on skin color. Is that fair, right or just? If that's not racism, then I ask you, what does it take?

I find it singularly ironic, and tragic,

that some people — many of whom may have personally experienced the horrors of bigotry and racism — have now turned to racism and bigotry against innocent White children to advance the interests of people of color.

And I find it pitiful and pathetic that the King County Bar Association and the Loren Miller Bar Association, which should be dedicated to achieving the golden goal of equal rights for all under the law, will instead first check the color of your sons' and daughters' skin, to be sure they are not White, before they will let them enjoy the fruits of this racist program.

Do the King County Bar Association and the Loren Miller Bar Association really believe that it is perfectly okay to practice blatant racism and bigotry — as long as they are only directing their venom against innocent White children? Do they really believe that only the sons and daughters of people of color shed tears when they are the victims of racists and bigots?

I guess your White sons and daughters must be subhuman in their eyes, since they are unwilling to treat them with the same humanity, rights, dignity and justice that they selectively accord only children of color.

Martin Luther King said it best more than 30 years ago on a hot summer day in August 1963 at the Civil Rights March in Washington, D.C. —

I have a dream that my four little children will one day live in a nation where they will not be judged by the color of their skin but by the content of their character.

I guess that, shamefully, the King County Bar Association, the Loren Miller Bar Association and the *Bar Bulletin* just don't get it yet.

But, oh Lord, how long must we wait?
GREGORY W. MOROVAN
Bellevue

Affirmative Action

Editor:

Thank you for your editorial in the February issue of the *Bar News*. Please excuse the tardiness of my letter, but the mail to the mid-Pacific is slow, and I only just received the April issue where Jan Peterson, one of the Board of Governors

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who was responsible for the awards in question, and his partner, Kelby Fletcher, seemingly took you to task in separate letters for your editorial views. As a counterpoint, I would like to compliment you for having the courage to question the Bar leadership's action in giving awards to people because they support affirmative action and because they work against the death penalty. Your article was particularly refreshing having appeared in a significant publication for lawyers and not having taken the standard ultra-liberal line so common in such publications.

I recall when affirmative action was first advanced as a *temporary*, remedial measure. I can also recall when Southern racist politicians defended their discriminatory practices as not being against blacks, but, rather, only in favor of whites. Affirmative action is now defended by the ultra-liberals as only favoring those in need (politically favored racial and ethnic groups) and not against anyone (politically disfavored ethnic groups). I find it difficult to understand why the son or daughter of a tenth-generation Spanish-American should be given job or college admission preference over a second-generation Italian-American or the child of a timber worker descended from early English or Scandinavian settlers.

My grandfather arrived in the USA in 1919 with six years of schooling (the maximum publicly funded in Italy at the time) and \$20. I fail to see how he was advantaged over other Americans. I know that many of your readers have similar family histories, but their family members were not the beneficiaries of affirmative action when they applied to college or sought employment. As for discrimination, who has not been hurt by it? I was told by my WASP and Jewish college classmates that a "Guinea," such as I, was just barely above a "n—." Most of us have family which has had to overcome prejudice of one kind or another, and they were able to do so in a nation based on meritocracy rather than preference. Affirmative action seeks to legalize and perpetuate discrimination.

Incredibly, the supporters of affirmative action seek votes from women by telling them that their daughters should receive preference over their sons. Most women, including one who wrote to you, see through this patronizing appeal to envy over equality, the standard approach

by ultra-liberal Democrats. Diversity has replaced affirmative action as the byword used to perpetuate its blatant discrimination. There is much to be said in favor of diversity in college admissions in a pluralistic society, but diversity based on different backgrounds can be achieved without making race a criterion. In fact, we should not permit it to become a criterion if we are to remain a nation based on meritocracy instead of caste, family lineage, royalty, religion, or some

other nonsensical distinction. Our association loses the respect of and its credibility with the public when it advocates positions the legality of which are so patently subject to question, not to mention so overwhelmingly unpopular. I wonder which of our association's leadership would hire a black lawyer to litigate their dissolution because the lawyer was black rather than because the lawyer had a record of accomplishment?

I agree with you that the "Affirmative

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Action Award" was infinitely more disturbing than the "Courageous Award." As much as I support the death penalty, I agree that it is a just goal to ethically advocate for your clients even if they well deserve the death penalty. From what I have observed of the award's recipient, he is an ethical and strong advocate. Awards to recognize good work on behalf of clients are particularly significant in light of the apparent evidence-tampering and the request for jury nullification based on race (affirmative action's stepchild?) by criminal defense lawyers in some recent, highly publicized cases. But when was the last time our association recognized the good work of those who seek the death penalty or other strong criminal sanctions?

The award's recipient expressed concern for his personal safety whenever he opens a package. If that is the criterion for this award, perhaps our bar association's leadership should consider the many prosecutors who have received death or other threats in the course of their work? Regardless of their personal opinion with

regard to the death penalty or other strong criminal sanctions, our leadership should recognize that a strong advocate on behalf of the public is surely as deserving of our association's recognition as one who seeks to prevent society from imposing the ultimate penalty on vicious murderers.

Would the same WSBA leaders who praised the antideath penalty lawyer find the time or make the effort to recognize a courageous prosecutor? If they did, could they do it without political bias? My experience with our association's leadership... suggests that the answer is strongly to the contrary. Jan Peterson's self-serving mention that he also nominated a current Supreme Court Justice who represented clients who did not hold ultra-liberal views is hardly convincing... Anyone familiar with the partisan, ultra-liberal views of [some of our bar leaders] can only expect "politically correct" awards such as these. If a prosecutor were to be recognized by our current leadership, it would surely be a political liberal, almost certainly a Democrat, and one

politically allied with our leadership. This is the answer to your question of how could such quality leadership as we have sink so far below its usual level of excellence in giving an award which is an endorsement of a specific political stance.

Our bar association should serve the interests of our profession and the public seeking justice rather than the political views of its leadership. I would like to think that will change someday, and I hope that your editorial will have contributed to its happening sooner. I would nominate you, Hal, for a courageous award for speaking out against the leadership of your employer, albeit in words less strong than mine. For having used such strong words, I suppose that this letter will not be printed even with this last paragraph deleted, but I hope that you and others will continue to speak out against the "politically correct" views that seem to many citizens to be at odds with our nation's and our profession's tradition of equal justice for all.

DENNIS DeFELICE
Micronesia

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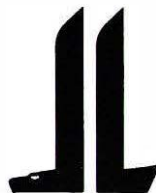
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The Bar Leaders' Conference

by Edward F. Shea, WSBA President

It was May and Mother's Day weekend at Lake Chelan. In Manson, several floats stood in line waiting for the parade to begin. With a pancake breakfast, quilt show, and sidewalk sales, crowds gathered. Rock jocks from the local radio station set up for a live broadcast on the main street announcing to everyone in earshot that it was a great day for the parade. In the orchards, the apple blossoms were in full bloom.

Ten miles down the lake at Campbell's, more than 40 bar leaders from around the state arrived for the annual Bar Leaders' Conference. About one-third of them were women. The conference began with a luncheon at noon on Saturday. Several of those attending brought their families anticipating a sunny May weekend. For most, this was a first time at the BLC. Organized several years ago, it has grown and evolved into a true leadership conference. Each county and specialty bar association had been invited to send its elected leaders (at its own expense) to engage in a broad discussion of the issues facing those associations, the WSBA and the legal profession. Many sent a representative; some sent two.

Leadership of our profession is a responsibility which the Board of Governors shares with the elected leaders of voluntary bar associations. Throughout the year the Board engages in dialogue with them. Many organizations send a liaison to the BOG meetings. The presence of those representatives ensures robust debate on matters coming before the Board. While productive, the interaction of bar leaders at the BLC is, by design, different. Perhaps the informal atmosphere is conducive to a sharing of ideas on the issues confronting our profession. It certainly was this year.

The panel presentations on various topics involved many of the attending bar leaders and some special invitees. The entire program was devised by a planning committee composed of several of the bar leaders. Topics included fund-raising for local legal-service programs, conducting CLEs, dues and nondues revenues, publishing a newsletter, conducting a judicial-preference poll, a judicial rating system and current WSBA issues.

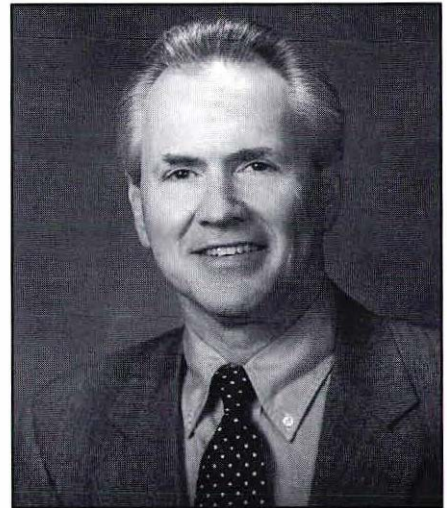
This year, Representative Marlin Appelwick (a Seattle lawyer and member of the Access To Justice Board), John McKay (chair of the Equal Justice Coalition), and Pat McIntyre (executive director of the newly formed Northwest Justice Project) kicked off the conference with a summary of the drastic changes in the legal-service programs in Washington and the possibilities for finding funding to supplement the sharply reduced federal allocations.

After several panels on different topics, President-elect Tom Chambers and some of the Association Governors reviewed the current state of revenues, governance, and discipline including the complete restructuring of the Legal Department. At the end of the day, families rejoined the participants for a group dinner.

Day Two, the participants changed the schedule to begin with a presentation of remaining State Bar issues including the recent racial harassment of several African-American law students at Gonzaga University Law School and the harassment of public lawyers and judges in central Washington by some "constitutionalists." With the approval of the presenters, the remaining programs were shortened to ensure that the conference was over with by noon. This enabled everyone to start home, where they could celebrate Mother's Day. Virtually everyone had a drive of at least three hours. "Longest drive" award (and sympathy) goes to Clark County Bar Association President Scott Collier and President-elect Mike Simon, who had to travel more than six hours to get to the meeting.

In spite of the wealth of material covered in the two half-day sessions, everyone adhered to the schedule both out of respect for the other presenters and out of a desire to learn as much as possible in the time there. In addition to excellent programs, there was an abundance of material to take home and review as needed.

While there are other suitable locations and months when the BLC could be held, May at Lake Chelan seems right. It enables current presidents to give presidents-elect the benefit of their experiences. For many bars, summer is when



Edward F. Shea

new officers take over. Summer is also often a time of reduced activity for many county and specialty bar associations. So it is timely for many reasons. The site is east of the Cascades, so it is about a three-hour trip for most of us — with apologies to those who must travel longer. Sunshine is the norm in May, although this year was less sunny than in past years.

The Bar Leaders' Conference is supported, but not subsidized, by the WSBA. The Association does set up telephone conferences for the planning committee, coordinate the event with the hotel and manage the meeting, but all participants pay their own way, including me and the Governors who attended.

With the loss of the Bar Convention to apathy several years ago, the conference offers the best opportunity to gather bar leaders from around the state to discuss current issues facing our profession, to learn from other bar leaders and to take this information and these skills back to the individual associations for the benefit of all. John Kenneth Galbraith in *The Age of Uncertainty* described the essence of leadership as the willingness of leaders to confront unequivocally the major anxiety of their people in their time. The BLC has enormous potential to do that and more for our members and for our profession. It is my hope that the bar leaders who attended this May will recognize that potential and encourage their successors to participate in the next conference, one focused on providing assistance to bar leaders and working together to discuss and act on the issues facing us all.

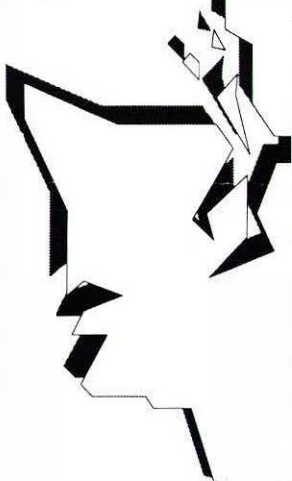
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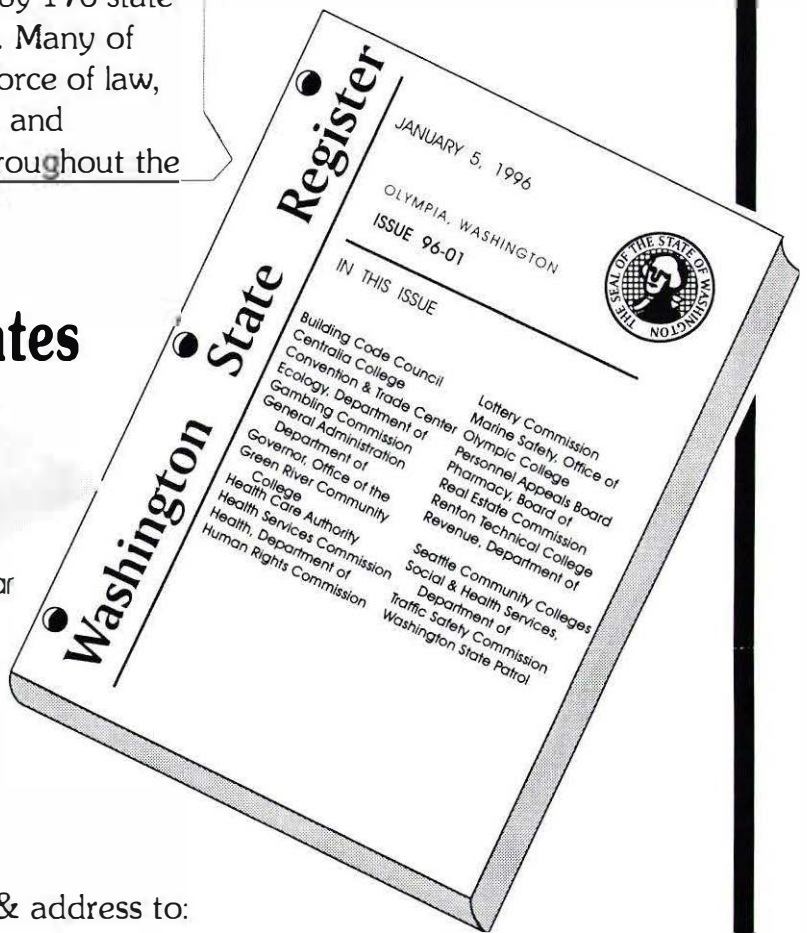
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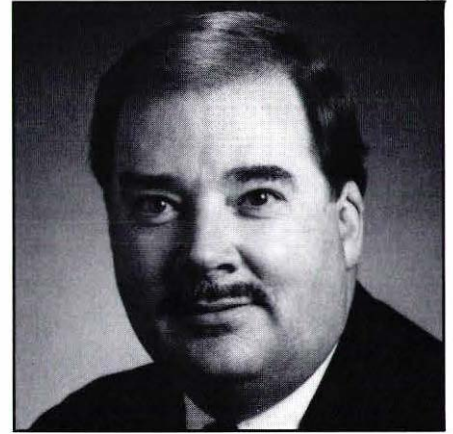
A Bar of Boomers

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

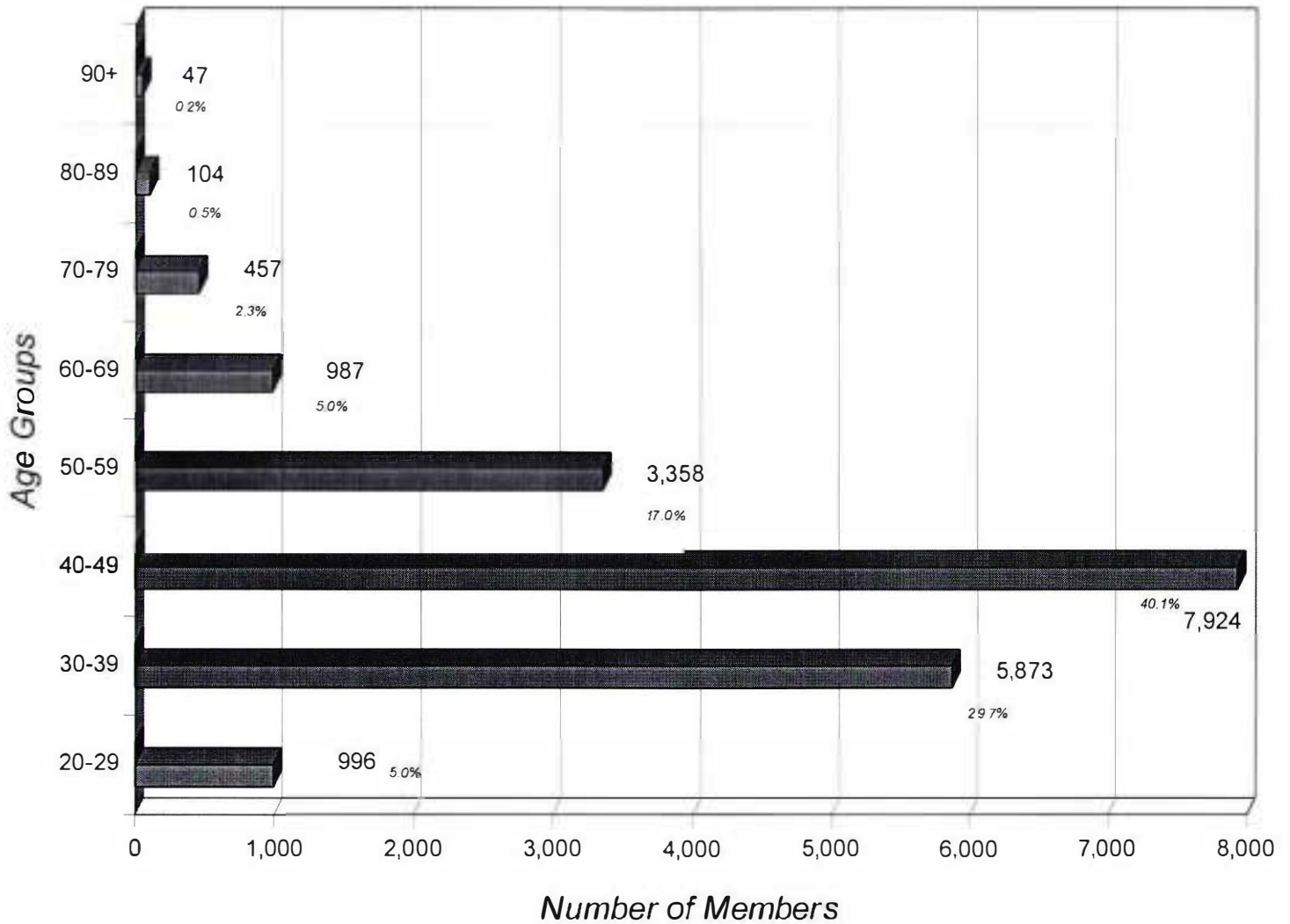
Who are we? If you've ever had the suspicion that the membership of the WSBA was a bell curve heavily weighted to the thirty- and forty-year-olds, you'd

be right! Good Lord! There's a thousand of us who are still in our twenties compared to a mere 47 who are in their nineties!

I thought you might find these statistics interesting. I don't know how useful they are, but interesting nonetheless.



Dennis P. Harwick



Admission of Out-of-state Attorneys

by Robert W. Martin, Jr.

Chances are that some time during the course of the last year, you read an article about "telecommuting."

Telefax machines, modems and 800 numbers all ensure that you cannot be sure of the location of the person at the other end of the telephone or the computer cable. Indeed, telecommuting makes a great deal of sense from a number of different public-policy standpoints, ranging from reduction of automobile exhaust fumes in major cities to the possible elimination of large public expenditures to support office complexes and business centers.

No one is quite sure where it will all lead, but if you have "surf-ed" the net, it is not difficult to envision the day when the need for supermarkets and large retail stores to showcase products will be unnecessary and may survive only as quaint glimpses of the past like Williamsburg, Virginia, or Old Sturbridge Village in Massachusetts.

What does all this have to do with the practice of law? If you have taken that tentative step onto the technological superhighway, you have noted that many law firms, from sole practitioners all the way to 500-person multi-office firms, have placed "web-pages" on the Internet. If you have access to the Internet, you have access to the "web pages" of — and sometimes direct access to — attorneys in law firms located in California, Alabama, New York or any state of your choice.

As long as those out-of-state lawyers make it clear in their advertisements that they can practice only in certain states, there seems little chance that they can be accused of the unauthorized practice of law. See e.g., Committee on Professional Ethics of the Illinois State Bar Association, Opinion 94-5 (7/94); Committee on Legal Ethics and Professional Responsibility of the Pennsylvania Bar Association, Opinion 92-51 (4/6/92); Committee on Professional Ethics of the Connecticut Bar Association, Opinion 91-24 (12/27/91).

The question addressed in this article is not whether an attorney sitting in New York who gives information over the Internet to a client in Washington is engaged in the unauthorized practice of law in Washington, but, rather, whether the time has come to recognize that the practice of law is, for many reasons, no longer an intrastate activity.

As technology allows lawyers to sit in their offices thousands of miles away from their clients, yet communicate as if they were sitting across the desk from each other, the pressure to allow interstate (or even national) practice can only increase. Moreover, like it or not, due to technology, the ability of an out-of-state lawyer to practice law in a state where he/she is not admitted is going to be much easier and almost impossible to detect. Instead of discouraging such out-of-state lawyers from seeking admission in those states where they have long-distance clients by interposing another bar examination, states should do all they can to encourage such admission so as to regulate the legitimate "character and fitness" issues and continuing-education requirements of lawyers practicing within their borders. By persisting in their efforts to regulate the quantity of attorneys practicing within their jurisdictions, some states may lose the ability to regulate quality.

A House Divided

At the present time, roughly half of the states allow relatively free admission to out-of-state attorneys who meet character and fitness requirements and have practiced a minimum amount of time in another jurisdiction. Alaska, for example, allows such relatively hassle-free admission.

The states which require that all attorneys, no matter how long they have been practicing, take the regular bar examination include Alabama, Arizona, Arkansas, Delaware, Florida, Georgia, Hawaii, Kansas, Louisiana, Nevada, New Hampshire, New Jersey, New Mexico, Oregon, South Carolina, South Dakota, and Washington State. See ABA/BNA

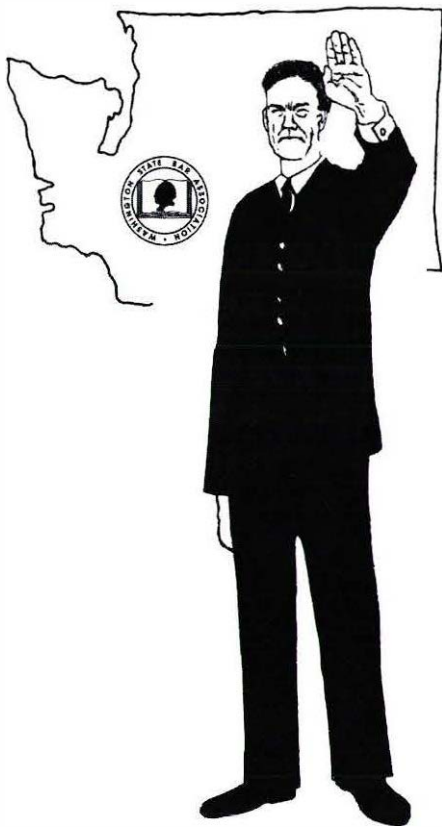
Lawyers' Manual on Professional Conduct, 21:2002. Most large states no longer have this requirement.

Some states, like California, Idaho, Maine, Maryland, Massachusetts, Mississippi, Montana, and Utah, have a shortened version of the regular bar examination for the applicant who has practiced for a period of time elsewhere and meets certain other requirements (which vary from state to state). *Id.*

This article is not meant to be a research source for individuals seeking to apply for out-of-state admission to another state's bar. The requirements vary from state to state and are ever-changing. For example, Wyoming recently instituted a rule which requires that any out-of-state applicants for admission in Wyoming must show that the state where they previously practiced accords similar reciprocity to Wyoming attorneys. If there are any requirements for Wyoming attorneys to be admitted in that other state, generally speaking, those same requirements will be imposed upon the out-of-state attorney seeking admission in Wyoming. See *Wyoming Lawyer*, August 1995.

By contrast, Alaska is very liberal about where the site of the previous practice occurred. See *In re Brewer*, 506 P. 2d 676 (Alaska 1973). (Moreover, no state can require that someone be a permanent resident before being admitted to the bar. See *Virginia Supreme Court v. Friedman*, 487 US 59 (1988)). Given the fact that all states require a showing of proper character and fitness before bar admittance (whether they are recent graduates or practicing attorneys from other jurisdictions) and have a vested interest in monitoring CLE compliance, and given the fact that technology allows attorneys to literally advise clients by modem, fax or telephone halfway across the country, it is surprising that some states still hold onto these insular policies.

Even putting aside technology, however, lawyers are as mobile as the rest of society. They have spouses who get transferred just like everybody else and, assuming they meet character and fitness requirements as well as being properly



the approach taken by other states which recognize not only technological advances but also the personal needs of lawyers to be mobile. More importantly, these states have recognized and accommodated the needs of modern-day lawyers while simultaneously safeguarding their citizens from the unsupervised practice of law.

Finally, even states with protectionist views would presumably opt for the continued regulation of attorneys within their borders instead of running the risk that, at some point, the pressure might become overwhelming for a national bar admission with little or no regulation by the individual states. Indeed, we are not very far from such a scenario with the Multi-state Bar Examination and the National Conference of Bar Examiners reviewing applicants for more and more state bar admitting committees.

Conclusion

Sister states like Alaska take a responsible approach in regulating the practice of law by requiring that applicants become members of the Alaska State Bar and meet the character, fitness and CLE requirements associated with such membership. At the same time, they do not discourage admission by requiring attorneys who have practiced for a number of years in another jurisdiction to actually sit and take yet another bar examination as a means of discouraging out-of-state applicants.

In a technological age where interstate attorney-client consultations will increasingly become the norm, it is important that legitimate state interests be protected, and that out-of-state attorneys be encouraged to become members of the bar in those states where they practice — and not be discouraged from such membership through the unnecessary and painful exercise of having to take another bar exam. Indeed, those states that persist in mandating such a requirement may be indirectly encouraging the unauthorized practice of law or, alternatively, a national bar admission process whereby legitimate states' rights will be subsumed by an overriding federal interest.



Robert W. Martin, Jr. is assistant risk manager for the Attorneys Liability Protection Society.

seasoned, they should be able to practice in that new jurisdiction with relative ease. The obvious mobility of attorneys in the modern age has even led to the publication of treatises on the subject. (See, e.g., *Hillman on Lawyer Mobility*, Little, Brown and Co. 1994).

The notion of requiring all attorneys, no matter how long they have been practicing, to sit for the bar examination before being admitted to practice in that jurisdiction cannot be justified as anything more than a protectionist ploy. It certainly cannot be justified on the basis that a person needs to be tested on each state's laws because, if that were so, states like Alaska, Vermont and Texas could be accused of dereliction of their responsibilities for not so testing. No such allegation has been made or is warranted. If some states persist in their more protectionist view, it is likely that other states will continue — or adopt — the standards of North Carolina, Wyoming, and other states. As previously noted, those states have basically said, "We will treat you the same way you treat us."

In a technological age where clients "visit" their attorneys by telephone or modem, there seems little justification for the barriers erected by some states to the admission of out-of-state attorneys. Hopefully, these jurisdictions will adopt

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The Advantages of Barrier-free Design

by Michael J. Swanson

In 1957, Hugh Deffener, a proponent of barrier-free design, had to submit to being bodily carried up a flight of stairs, in his wheelchair, to receive the Handicapped American of the Year Award.¹ Ten years later, a report by the National Commission on Architectural Barriers to Rehabilitation of the Handicapped found:²

that the greatest obstacle to employment of handicapped persons is the physical design of buildings and facilities they must use; and . . . [v]irtually all of the buildings and facilities most commonly used by the public have features that bar use by disabled individuals.

The report found:

The most common causes of inaccessibility are due entirely to failure to think of the needs of the handicapped at the design and planning stage.³

This report eventually led to several laws which partially addressed the problem of access for disabled Americans.⁴

The Americans With Disabilities Act of 1990

In spite of these initial efforts, however, early federal accessibility laws had limited applicability. For the most part, private businesses were still free to discriminate against persons with disabilities. One fairly typical example of such discrimination was related by Representative Houghton, when he spoke in support of the Americans with Disabilities Act of 1990⁵ (henceforth ADA).⁶

A young woman from Elmira, NY, along with a group of her friends, had dinner reservations at a good restaurant. It happened to be raining that evening and my constituent was not permitted to enter the restaurant because the wheels on her wheelchair were wet. She offered to wipe the wheels dry. No deal. She could go elsewhere.

For persons with disabilities, the ADA offered the hope of inclusion in society. There are five major sections to the ADA.⁷ Title III deals with access to public accommodations, including law offices.⁸ It provides that public accommodations shall not discriminate against any individual on the basis of disability in the enjoyment of goods, services, facilities, privileges, advantages, or accommodations in a public accommodation by anyone who owns, leases, leases to, or operates such establishments.⁹ Title III also contains specific prohibitions. One proscription is to fail to remove architectural barriers which are structural in nature, "where such removal is readily achievable."¹⁰ "Readily achievable" was defined by the Department of Justice in the implementation regulations for the ADA, as¹¹ "... easily accomplishable and able to be carried out without much difficulty or expense," as determined on a case-by-case basis. Readily achievable is a new term, developed for the ADA.¹² In the implementation regulations, the Department of Justice gives examples of readily achievable barrier removal. These include:¹³

- installing ramps;
- making curb cuts in sidewalks & entrances;
- repositioning shelves & telephones
- installing flashing alarm lights [for the deaf];
- widening doors or installing offset hinges to widen doorways;
- eliminating a turnstile or providing an alternative path;
- installing grab bars in toilet stalls;
- rearranging toilet partitions to increase maneuvering space;
- insulating lavatory pipes under sinks to prevent burns;
- installing a full-length bathroom mirror;
- repositioning the paper towel dispenser in a bathroom;
- installing an accessible paper cup dispenser at an inaccessible water fountain; or
- removing high-pile, low-density carpeting.



This list is not exhaustive, but illustrative.¹⁴ Moreover, barrier removal is a continuing obligation. Barrier removal that once was not readily achievable may later become achievable due to changed circumstances¹⁵ Indeed, the Dept. of Justice has a suggested priority order for barrier removal.¹⁶

One of the few ADA cases that discusses the term "readily achievable" is *Pinnock v. International House of Pancakes*, 844 F.Supp. 574 (S.D. Cal. 1993). In *Pinnock*, an attorney, who used a wheelchair, dined at an IHOP and then attempted to use the restroom. Unfortunately, the entrance to the restroom was not wide enough to allow Pinnock's wheelchair to enter the restroom. Pinnock therefore removed himself from the wheelchair and crawled into the restroom. As a result of this incident, Pinnock filed multiple causes of action against the owner of the IHOP, including a cause of action asserting that the owner had violated the ADA by not removing barriers when such removal was readily achievable. The owner of the IHOP answered and presented 25 affirmative defenses, including allegations that the ADA was unconstitutional. The United States intervened to defend the constitutionality of the ADA. In *Pinnock*, the court actually ruled only upon the constitutional issues, and found that none of IHOP's constitutional challenges could prevail. The court therefore granted summary judgment to the United States. However, the case is worthy of review for the court's apparent lack of support for the defendant's claim that barrier removal was not readily achievable.

Regarding new construction of public accommodations, Title III mandates that new construction be designed and

**“ Sooner
or later,
everyone
benefits
from user-
friendly
design. ”**

constructed so that facilities are readily accessible to and usable by individuals with disabilities unless it would be structurally impracticable to do so.¹⁷ This encompasses “commercial facilities,” which includes all facilities intended for nonresidential use which affect commerce.¹⁸ Virtually all private entities fall within either the definition of public accommodation or commercial facility.

Regarding the alteration of pre-existing construction, both public accommodations and commercial facilities are subject to the same requirement that, to the maximum extent feasible, the facility being altered be readily accessible to individuals with disabilities.¹⁹ However, this standard is lower than the standard imposed upon new construction.²⁰

The accessibility requirements of Title III are generally applicable to both tenants and landlords.^{21,22} The law also imposes accessibility requirements on entities engaged in providing professional certification courses, e.g., CLE providers.²³ However, Title III has limited applicability to historic buildings,²⁴ and no applicability to religious facilities²⁵ or to “private clubs” as the term is defined under Title II of the Civil Rights Act of 1964.

State Law

When determining which barriers need to be removed from a public accommodation, an attorney must consider state as well as federal law. Washington has had a barrier-free law since 1975 (RCW 70.92). This law provides that buildings, structures, or portions thereof, which are constructed, “substantially remodeled” or “substantially rehabilitated” after 1976, shall conform to the standards and specifications adopted under that chapter.

The terms substantially remodeled or substantially rehabilitated mean an alteration or restoration of a building or structure within any 12-month period, the cost of which exceeds 60 percent of the currently appraised value of the structure.

Consequently, the state law does not apply to most remodels; moreover, even if an extensive remodel is planned, an individual might be able to avoid accessibility requirements if he or she could convince the local permit-issuing authority that full compliance is “impracticable.” Unfortunately, there has been a too-frequent willingness on the part of many local authorities to deem full compliance impracticable if a building owner merely alleges such difficulty.²⁶

Washington also has a nondiscrimination law (RCW 49.60) which prohibits discrimination in places of public accommodation. However, this prohibition does not require a public accommodation to remove barriers absent some other statutory requirement for barrier removal.

The federal barrier-removal laws, particularly the ADA, are generally broader than the laws of this state. However, what actually must be done to obtain accessibility is likely to be very similar. In fact, this state’s building code was recently certified by the Department of Justice as in compliance with the provisions of Title III. The benefit of this certification is that a demonstration of compliance with the Washington State Building Code is now rebuttable evidence of compliance with the ADA accessibility guidelines.

Costs & Advantages

One of the biggest issues in connection with accessibility is the cost of barrier removal. With the passage of the ADA, there were some claims that the act would bankrupt businesses. These Draconian cost predictions were not new to the ADA. These same dire forecasts accompanied the issuance of the regulations implementing section 504 of the Rehabilitation Act.²⁷ In speaking against the fallacy of the ADA imposing an unreasonable burden on

small business, former Representative Jolene Unsoeld noted that the State of Washington had its barrier-free law on the books for over ten years, yet she had “found no evidence of even one business being forced out of operation by having to accommodate or hire the handicapped.”²⁸

The cost of adding accessibility features to new construction should not be an issue. The cost is less than one percent of the total construction cost.²⁹ With pre-existing construction, however, the cost of making a building accessible will depend upon the extent of the retrofit and the nature of the existing construction.³⁰ Estimates for barrier removal can vary widely.³¹

Some dispute the need for altering pre-existing buildings because they have no disabled clients. However, persons with disabilities “tend to not even try to use a public accommodation that is inaccessible; therefore, the manager doesn’t know what the demand for services would be among persons with disabilities if the facility was accessible.”³²

Indeed, there are approximately fifty million Americans with disabilities, and as our population ages, this population is growing.³³ These individuals are not impoverished. Roughly 70 percent of all disposable income is in the hands of persons with disabilities and the elderly (persons over 50).³⁴ These people appreciate accessibility and patronize businesses that are accessible.³⁵ Not surprisingly, making restaurants and retail

facilities barrier-free, over the long-term, increases their value by five percent.³⁶

Barrier removal also brings unanticipated benefits. Representative Houghton made this point when he shared a story with the House of Representatives:³⁷

Another restaurant in my district, because of New York law, was forced to install an elevator to take disabled patrons to one of the three floors of

the restaurant. The proprietor resisted the mandate but finally complied. To his surprise, he found that his business increased because of his initiative. The move helped attract the disabled to his restaurant. In addition, word got out about the elevator and as a result it attracted seniors and nondisabled people who did not want to walk those stairs. Still another plus — the waiters, since the kitchen

is on the lower level, also use the elevator to take food to the upper level.

Almost everyone appreciates ramps rather than stairs, as well as the extra space that accessible bathrooms offer. Wider doors are exceptionally convenient when moving furniture. Curb-cuts are helpful when using dollies or baby strollers. User-friendly doorknobs are advantageous when opening a door while carrying packages. And easy-open window handles are a godsend for those with arthritis. Sooner or later, everyone benefits from user-friendly design.

Even the IRS, in an effort to mitigate the costs of barrier removal, allows eligible small businesses an annual credit of up to \$5,000 for expenditures made "to comply with . . . the Americans with Disabilities Act of 1990."³⁸ Additionally, businesses may take a deduction of up to \$15,000 for qualified architectural and transportation barrier removal expenses.³⁹

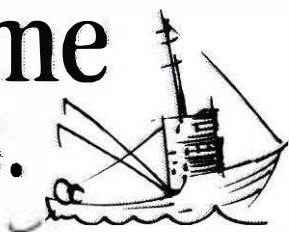
On the flip side, however, noncompliance with the ADA can be costly. For enforcement actions brought by the Department of Justice, the first violation is punishable by a civil penalty of up to \$50,000 plus actual damages.⁴⁰ For an action brought by a private party, the prevailing litigant is entitled to an award of reasonable attorney fees, litigation expenses and costs.⁴¹ Injunctive relief is also available. The average cost of defending an ADA action has been estimated at \$250,000.⁴² Consequently, it makes much more sense to utilize tax write-offs and remove barriers, than to try to explain why a public accommodation, including a law office, cannot afford to widen a door.

Conclusion

At some point we need to ask why buildings are designed that have barriers for such a significant percentage of the population. In part the answer to this question is that this is the way buildings have always been designed.⁴³ Some of our very first buildings were designed to limit access, e.g., moats around castles. Another way to limit building access was to use steps. (Steps were easy to defend.) As civilization evolved, imposing flights of steps leading up to a building (as we see in many older courthouses across this state) demonstrated the importance of the building (with steps limiting access to a select few).⁴⁴ Even today, a single step at

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the entry to a house serves as a territorial boundary limiting access to the uninvited.⁴⁵

A second reason why buildings are designed with barriers for such a significant percentage of our population is that the model for architectural design in this century has been a male, about six feet tall, with strong arms and legs.⁴⁶ To the vast majority of us who do not fall within this design model, buildings do not "fit" us. To the extent that anyone does not fall within this design model, that person may be considered "disabled" for purposes of building access.

It is time for us to move beyond designing buildings so that they are easy to defend by six-foot males carrying swords, to designing buildings which allow efficient access to anyone who might choose to enter the building. Everyone benefits when everyone has access.

Endnotes

¹ Wm. Wilkoff & L. Abed; *Practicing Universal Design: An Interpretation of the ADA*; at page 13 (1994).

² *National Commission On Architectural Barriers to Rehabilitation of the Handicapped, Design for all Americans* (Washington, DC: U.S. Department of Health, Education, and Welfare, 1967).

³ *Id.*, at page 3.

⁴ 45 U.S.C. 4151-4157; 29 U.S.C. 701-796(i); 29 U.S.C. 794; 42 U.S.C. 4151-4157; 49 U.S.C. 41701-41742.

⁵ 42 U.S.C. 12101-12213. For information, technical assistance and/or training on the Americans with Disability Act, please call the Northwest Disability Business Technical Assistance Center at 1-800-HELP-ADA, voice/TDD.

⁶ 136 Cong. Rec. H2,445 (daily ed. May 17, 1990) (remarks of Rep. Houghton).

⁷ Title I addresses employment. Title II addresses public services. Title IV addresses telecommunications. Title V addresses miscellaneous provisions.

⁸ Title III is located at 42 U.S.C. 12181-12189. The twelve categories of public accommodation are: (1) places of lodging; (2) establishments serving food or drink; (3) places of exhibition or entertainment; (4) places of public gathering; (5) establishments selling or renting items; (6) establishments providing services; (7) stations used for public transportation; (8) places of public display or collection;

(9) places of recreation; (10) places of education; (11) establishments providing social services; and (12) places of exercise or recreation.

⁹ 42 U.S.C. 12182(a); 28 CFR Ch. 1, sec. 36.201 (7-1-95 Edition)

¹⁰ 42 U.S.C. 12182(b)(2)(A)(iv); 28 CFR Ch. 1, sec. 36.304 (7-1-95 Edition).

¹¹ 28 CFR Ch. 1, sec. 36.104 (7-1-95 Edition).

¹² Burgdorf, "Equal Members Of The

Community: The Public Accommodations Provisions Of The Americans With Disabilities Act," 64 *Temple Law Review* 551, 562-563 (1991).

¹³ 28 CFR Ch. 1, sec. 36.304 (7-1-95 Edition).

¹⁴ 28 CFR Ch. 1, App B, page 620, section analysis of, sec. 36.304 (7-1-95 Edition).

¹⁵ *Id.* at 620-21.

¹⁶ *See*, 28 CFR Ch. 1, sec. 36.304(c) (7-



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1-95 Edition); and 28 CFR Ch. 1, App B, page 621-22, section analysis of sec. 36.304 (7-1-95 Edition).

¹⁷ 42 U.S.C. 12183(a)(1); 28 CFR Ch. 1, sec. 36.401 (7-1-95 Edition).

¹⁸ 42 U.S.C. 12181(2); 28 CFR Ch. 1, sec. 36.104 (7-1-95 Edition).

¹⁹ 42 U.S.C. 12183(a)(2); 28 CFR Ch. 1, sec. 36.402 (7-1-95 Edition).

²⁰ "Alteration" is defined at 28 CFR Ch. 1, sec. 36.402(b) (7-1-95 Edition).

²¹ 42 U.S.C. 12182(a); 28 CFR Ch. 1, sec. 36.201(b) (7-1-95 Edition).

²² 28 CFR Ch. 1, sec. 36.201(b) (7-1-95 Edition); See, Field, "The Americans With Disabilities Act 'Readily Achievable' Requirement For Barrier Removal: A Proposal For The Allocation Of Responsibility Between Landlord And Tenant," 15 *Cardozo Law Review*, 569 (1993); and Whelan, "The 'Public Access' Provisions Of Title III Of The Americans With Disabilities Act: A Guide For Commercial Landlords And Tenants," 34 *Santa Clara Law Review*, 215 (1993).

²³ 42 U.S.C. 12189; 28 CFR Ch. 1, sec. 36.309 (7-1-95 Edition).

²⁴ See, 42 U.S.C. 12204(c); 28 CFR Ch. 1, sec. 36.405 (7-1-95 Edition).

²⁵ 42 U.S.C. 12187.

²⁶ White, "Washington State's Barrier-Free Code: Still Misunderstood After All These Years," 20 *Gonzaga Law Review* 229, 236, n. 28 (1984-85).

²⁷ See, 136 Cong. Rec. S.9,686 (daily ed. July 13, 1990)(remarks of Senator Harkin)

²⁸ 136 Cong. Rec. H.2,434, (daily ed. May 17, 1990)(remarks of Rep. Unsoeld)

²⁹ See, e.g., Architectural and Transportation Barriers Compliance Board, 56 Fed. Reg. 2320 (1990); and Martin Dorf and other architects commenting on the ADA, "Designers on the ADA," *Interior Design*, 73, August 1992.

³⁰ D. Kearney, *The New ADA: Compliance and Costs*, Appendix N (1992) provides cost estimates for some specific barrier removal jobs.

³¹ See, e.g., Field, "The Americans With Disabilities Act 'Readily Achievable' Requirement For Barrier Removal: A Proposal for the Allocation of Responsibility Between Landlord and Tenant," 15 *Cardozo L. Rev.* 569, 571, n. 7 (1993) quoting from Steve Kerch, "Disabilities Act Enters 2nd Scene," *Chi. Trib.*, July 12, 1992, section 16, at 1, 2N (reporting that a building management company found the cost to make readily achievable modifications to a 220,000-square-foot building to be \$32,000, where an initial estimate, by a professional design firm, had been \$750,000.).

³² 136 Cong. Rec. H.2,625, (daily ed. May 22, 1990)(remarks of Rep. Morrison)

³³ By 2030, more than 66 million Americans will be over age 65. Alice H. Wade, "Social Security Area Population Projections: 1987," *Social Security Bulletin*, February 1988, at 3, 25-27.

³⁴ Martin Dorf, and other architects commenting on the ADA, "Designers on

the ADA," *Interior Design*, 73, August 1992.

³⁵ *Id.*; See also, note 37, *infra*.

³⁶ Martin Dorf, and other architects commenting on the ADA, "Designers on the ADA," *Interior Design*, 73, August 1992.

³⁷ 136 Cong. Rec. H.2,445 (daily ed. May 17, 1990) (remarks of Rep. Houghton).

³⁸ I.R.C. sec. 44.

³⁹ I.R.C. sec. 190; note also that an eligible small business may be able to stack the section 44 tax credit and the section 190 tax deduction in a year in which sufficiently large qualified expenditures are made.

⁴⁰ 42 U.S.C. 12188(b)(2)(B); 28 CFR Ch. 1, sec. 36.502-504 (7-1-95 Edition).

⁴¹ 42 U.S.C. 12205; 28 CFR Ch. 1, sec. 36.505 (7-1-95 Edition).

⁴² C. Leibrock, *Beautiful Barrier-Free, a Visual Guide to Accessibility*, preface (xiii) (1993) referencing D. Bartholomew, "Opening Your Door to the Disabled," *Your Company*, 46, Spring, 1991.

⁴³ See, John Peyton, *Architects' Journal*, Accessibility for all, 43, January 12, 1995, noting at page 43: "[O]ur buildings have been, and continue to be, designed within a 'culture of exclusion'." See also, Dianne Pilgrim, "Interior Design," *Accessibility*, 72, August, 1992; and n. 3, *supra*, and associated text.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ Christine Benglia Bevington, *Interior Design*, One Size Doesn't Fit All, 81, August 1992; at page 82 the author notes: "One great flaw (among many) of architectural theory and practice in our century has been our relentless focus on designing for an erect human body about six feet long, with strong arms and legs (Le Corbusier's Modular Man had particularly impressive biceps), about 33 years old, with car keys in his pocket. For all those who do not fit this mold the built environment is never quite right." See also, Peyton, *supra* at note 43, who notes that buildings have been designed for fit, right-handed males, between the ages of 18 and 45, who are not overly tall, short or fat.



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Enforcing U.S. Judgments in British Columbia

by Cleveland Stockmeyer

If you obtain a judgment against a person with no Washington assets, you may need to seek recognition and enforcement of that judgment in a jurisdiction where the debtor maintains property. If the defendant holds property in Canada, you will need to enforce the judgment in the appropriate province.¹ This article discusses the recognition and enforcement of judgments in Canada and British Columbia.²

Sovereignty and Comity

Preliminarily, one might ask why foreign courts would not respect a Washington judgment in the first place. The answer lies in the principle of territorial sovereignty. A nation state is sovereign within its own territory. Accordingly, the laws, orders or judgments of a foreign state or court cannot operate directly within the territory of another state. *Federal Deposit Insurance Corp. v. Vanstone*, [1991] 2 W.W.R. 407, 412 (BCSC) ("FDIC").

However, applying the sovereignty principle too strictly would lead to absurd results. It would prevent British Columbian authorities from recognizing a marriage solemnized before a Washington judge as soon as the couple crossed the border on a weekend jaunt to Whistler. Similarly, an overly rigorous application of sovereignty would hold that in British Columbia a Washington corporation could not be liable for the hotel bill of its employee traveling on business to Victoria, because the corporation is only a creature of Washington law.

Fortunately the principle of comity comes to the rescue. Comity rests on reciprocity and the fact that all sovereign states have a common interest in mutual exchange. Accordingly, under comity, one nation and its courts will give effect to the laws, acts or judgments of another state.

Comity also means that courts in British Columbia generally respect the rights of a judgment creditor who seeks enforcement of a Washington judgment north of the border.

Recognition and Enforcement: Grounds, Method and Effect

In general, in Canadian common law, a foreign judgment will be recognized and enforced where:

- the foreign court had an appropriate basis for exercising personal jurisdiction over the defendant,
- the foreign judgment is final under the law of the foreign jurisdiction, and
- the judgment is conclusive, for purposes of recognition, under the law of the Canadian province. Conclusiveness includes various matters such as fraud and public policy.³

The usual method of seeking recognition and enforcement in Canada is to bring an action at common law on the judgment (see box, page 27), alleging the facts of the underlying claim(s) and the foreign judgment. The judgment creditor would usually move for summary judgment, at which time the court would determine whether to recognize and enforce the foreign judgment.

The effect of recognition is that the judgment debtor cannot re-litigate the cause. It is no defense to claim that the original court made an erroneous finding of fact, or an error of law or procedure. Such claims would destroy the point of recognition.⁴ If the foreign court has jurisdiction, it has the jurisdiction to reach a wrong result as well as a right one. Thus, *res judicata* applies to recognized foreign judgments.⁵

In British Columbia, as in other provinces, there is also a process for the "registration" of a foreign judgment of a "reciprocating state." Court Order Enforce-

ment Act (Act).⁶ Upon registration of such a judgment in the British Columbia Supreme Court, it is enforceable as a domestic judgment. British Columbia has named Washington, Alaska, California, Colorado, Idaho and Oregon as reciprocating states under the Act.⁷ However, aside from speed, the advantages of registration are not clear. It is not possible to enforce a registered judgment without giving the judgment debtor notice and the chance to raise any defense that could be raised in a common law action,⁸ as well as the additional defense, not available in a common law action on the foreign judgment, that the defendant did not reside or carry on business in the original forum.⁹ Thus, this avenue may be less productive than enforcing a judgment via a common law action.

Real and Substantial Connection Test for Courts of Other Provinces

The first requirement for recognition at common law is that the British Columbia court must be satisfied that the foreign court properly asserted jurisdiction over the defendant pursuant to the rules of Canadian jurisdiction.¹⁰ The foreign judgment will not be conclusive as to facts pertaining to jurisdiction; the enforcing court must always inquire whether the foreign court properly exercised jurisdiction over the defendant.

Until 1990, a foreign court could exercise jurisdiction only if the defendant consented to such jurisdiction; appeared and defended on the merits; or resided in the foreign jurisdiction when the action commenced.

The Supreme Court of Canada abandoned this rigid approach in *Morguard Investments Ltd. v. De Savoye*, 76 D.L.R.4th 256 (S.C.C. 1990), [1991] 2 W.W.R. 217. *Morguard* dealt with the

enforcement in British Columbia of an Alberta judgment for a deficiency against a defendant who had previously resided and mortgaged property in Alberta. The Court stated that rules of jurisdiction suitable for the international context in the last century did not make sense applied to judgments rendered within Canada today. Instead, the court stated, jurisdictional rules for recognition of foreign judgments should "facilitate the flow of wealth, skills and people across state lines," and ensure fairness, order and "security of transactions with justice." *Morguard*, at 269. Accordingly, the Court held that jurisdiction is properly asserted by a foreign court where the defendant appears, consents to jurisdiction, resides in the forum, or where the defendant and transaction merely had a "real and substantial connection" to the forum. *Id.* at 275. The Court had no trouble finding that mortgaging property while residing in a province was a sufficient connection.

Real & Substantial Connection Test Applied to U.S. Judgments

The rationale of *Morguard* applied in

an international as well as an inter-provincial context. Accordingly, courts in British Columbia relied on the "real and substantial connection" test to enforce default judgments rendered by courts in Alaska, Arizona, California, Colorado, Connecticut, Oklahoma and Washington.¹¹

The extension of *Morguard* to U.S. judgments is significant not only because recognition and enforcement are now more likely in British Columbia, but also because a nonresident defendant with a real and substantial connection to Washington may no longer default in a Washington action and defend on the merits in the enforcement action in British Columbia. As a result, such defendants are more likely to fight the merits in Washington courts.

What Contacts Are Sufficient to Demonstrate a Real and Substantial Connection?

The *Morguard* real and substantial connection test brings to mind the "minimum contacts" test used to measure the proper limits of long-arm jurisdiction over nonresident defendants in the United States.

(*International Shoe Co. v. Washington*, 326 U.S. 310 (1945)). Surprisingly, however, given their much narrower pre-*Morguard* approach, Canadian courts now appear to take a more expansive view to personal jurisdiction than United States courts.

Morguard and most cases extending it to the international context involved easy fact patterns, where the defendant originally resided in the foreign jurisdiction and engaged in conduct giving rise to the claim. *FDIC, supra* (notes signed and money loaned in Oklahoma); *Clark v. Lo Bianco*, 84 D.L.R. 4th 244, 59 B.C.L.R. 2d 334 (BCSC 1991) (negligent medical services in California); *Minkler & Kirschbaum v. Sheppard*, [1991] 60 B.C.L.R. (2d) 360 (legal services provided in Arizona).

Other Canadian cases involved a more attenuated connection to the original American jurisdiction. One British Columbia court opined that foreseeable damage in the forum alone may constitute a sufficient connection. *Moses v. Shore Boat Builders* [1993] 83 B.C.L.R. 2d 177, 188 (B.C.C.A.). There, the court enforced an Alaskan judgment for costs of repairing a



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How to Enforce a Foreign Judgment in British Columbia

1. Hire Canadian counsel.
2. Decide whether to use Provincial Small Claims or the Supreme Court (requiring a claim over \$10,000).
3. In Provincial Court: File a Notice of Claim, and pay a fee of \$150.
4. Serve the defendant personally or by registered mail. The defendant serves a reply within two weeks.
5. The court determines the merits by Small Claims Trial. (Go to step 10.)
6. In Supreme Court: Serve a summons and statement of claim and pay a filing fee of \$200.
7. Serve the defendant personally, or, by court order, if necessary, use a form of substituted service. The Defendant appears and enters a statement of defense within two weeks.
8. The judgment creditor usually should request a summary trial on affidavit (similar to a motion for summary judgment). This requires two weeks notice; the court ordinarily will decide the issue promptly.
9. The court may order a full trial. Generally this will involve a delay of approximately one year to obtain a trial date. The court ordinarily will decide the merits immediately following the trial.
10. Enforce the resulting judgment like any other judgment.

Yan Gertsoy, of the personal injury firm Sisett & Co., Vancouver, British Columbia, assisted in the preparation of this list.

boat in Alaska, where the British Columbian defendant had specially built the boat for the Alaskan plaintiff. Similarly, in *Stoddard v. Accurpress Manufacturing, Ltd.*, 1 W.W.R. 677 (B.C.S.C. 1994) the British Columbia court allowed enforcement of a Connecticut judgment where a British Columbia manufacturer had sent a machine to an employer in Connecticut, where the machine injured a worker. In *McMickle v. Van Straaten*, 93 D.L.R. 4th 74 (B.C.S.C. 1992) the court enforced a California judgment, where the British Columbian defendant had marketed a facial cream nationally in the United States and had advertised in television commercials in California. The Court reasoned that the defendant "was firing long-range artillery from Vancouver which landed in California." *Id.* at 82.

It appears that in Canada the defendant's contacts must merely suffice to make it reasonable to contemplate being sued in the forum, while analogous U.S. tests of jurisdiction require some purposeful activity directed toward the forum. *Ivankovich*, at 515. In *Moran v. Pyle Nat. (Can.) Ltd.*, [1975] 1 S.C.R. 393, [1974] 2 W.W.R. 586, 43 D.L.R. 3d 239, 1 N.R.

122, the Canadian Supreme Court upheld Saskatchewan jurisdiction over an Ontario manufacturer on the basis that it sent its products to Saskatchewan through normal distribution channels. In effect, the Canadian Supreme Court adopted the "stream of commerce" theory in a products liability case. In contrast, U.S. standards require more; the fact that a defendant placed a product in the stream of commerce, with awareness it would reach the forum, may not suffice. *E.g., Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102 (1987).

Given the more expansive standard for personal jurisdiction in Canada, it appears that whenever jurisdiction is proper under U.S. standards, it would be viewed as proper by the Canadian court in a subsequent action to enforce a U.S. judgment.¹²

Final Judgment for a Sum Certain of Money

The second requirement to enforce a foreign judgment at common law is that the foreign judgment must be a final judgment for a sum certain.

Finality means the judgment must be

enforceable, and not interlocutory, in the foreign jurisdiction. It must be *res judicata* and not open to rescission, rehearing, or modification by the rendering court.¹³ The possibility of an appeal in the foreign jurisdiction is generally no bar to enforcement, unless under the foreign law the effect of an appeal is to render the judgment conditional.¹⁴

That the foreign judgment is a default judgment, or that there are procedures to set it aside, will not prevent recognition and enforcement. "[I]f we were to say merely because a default judgment may be set aside by the Court in which it is taken that therefore it is of not final legal validity for the purpose of international suit, we would, in effect, be saying that the clearer the plaintiff's case the more useless his judgment would be." *Boyle v. Victoria Yukon Trading Co.* (1902) 9 B.C.R. 213, 223 (B.C.S.C.).

The requirement that the judgment be *res judicata* makes it impossible at common law to enforce orders for payment of maintenance or alimony, unless the order is for a fixed amount of arrears. However, there is legislation in British Columbia and in other provinces, and a large body

of case law, concerning reciprocal enforcement of foreign support orders.¹⁵ An arbitration award rendered in a foreign state may also be enforced in an action at common law, if it has been made enforceable in the same manner as a court judgment in the place where it was rendered.¹⁶

Historically the rationale for enforcement of a foreign judgment at common law was that the judgment created a transitory debt. Accordingly, the foreign judgment must be for a sum certain (or for a readily calculable amount) of money. It is not possible to enforce a foreign judgment for specific performance, an injunction, or an order of custody.¹⁷

Interest may be awarded if included in the foreign judgment, or if claimed as damages for failure to pay the judgment.¹⁸ The Canadian judgment enforcing the foreign judgment will be expressed in Canadian currency. A court in British Columbia may remove the risk of exchange rate fluctuations by ordering a judgment for a claim originally payable in foreign money to be satisfied by payment of the Canadian equivalent, determined by the exchange rate in effect as of the payment date.¹⁹

"Conclusiveness" of the Judgment

The third requirement for recognition and enforcement in a common law action

"[I]t appears that whenever jurisdiction is proper under U.S. standards, it would be viewed as proper by the Canadian court . . ."

is that the foreign judgment be deemed "conclusive" under the law of the relevant Canadian province. Conclusiveness is a conclusion that the judgment is free of a variety of "odious taints," including fraud, violation of public policy or "natural justice," and (in British Columbia), free of manifest error.²⁰ These defenses to recognition are construed narrowly; otherwise they would tend to allow a re-examination of the merits and defeat the purpose of recognition.

Fraud Upon the Court. Anyone might claim that a winning party's witnesses lied and defrauded the foreign court. If this sort of fraud were a defense to recognition and enforcement, the enforcing court would nearly always have to re-try the merits to determine the claim of fraud. This is not allowed. Fraud may not be proven by the evidence presented in the original trial, but requires evidence extraneous or collateral to that evidence.²¹ Fraud to impeach the judgment must be extrinsic fraud, which prevented the de-

fendant from having an adequate opportunity to present his case, or intrinsic fraud, based on fresh evidence not reasonably discoverable at the time of trial.²² Thus, the defense of fraud might be proven by testimony of witnesses from the original action that the plaintiff caused them to perjure themselves for his benefit.²³

Public Policy. The enforcing court may also decline recognition and enforcement on the ground that giving effect to the foreign judgment is contrary to the public policy of the forum.²⁴ There are few reported cases denying recognition or enforcement on this ground.²⁵ What is required is some violation of the "essential public or moral interests" of the enforcing state.²⁶ There is no violation of public policy just because the law applied by the foreign state is different from the law of the enforcing court's state.²⁷

Thus, despite the absence of a community property regime in British Columbia, the court had no trouble enforcing a community debt against a spouse arising out of the other spouse's activities in Arizona, while both spouses resided there.²⁸ Courts in Ontario and Quebec have enforced New Jersey judgments for gambling debts.²⁹ British Columbia does not permit an award of arrears for maintenance in excess of one year, but a court there enforced an Idaho judgment for 20 years of such arrears awarded in one fixed, final sum.³⁰ On the other hand, courts in British Columbia have stated that they would not enforce a promise to pay someone "\$150 a month if you will divorce your husband in order that I may marry him."³¹

Taxes, Antitrust & Asbestos. Related to the public policy defense is the rule against recognition or enforcement of a foreign judgment connected with a public penalty or tax. In *U.S. v. Harden*, [1963] S.C.R. 366, 44 W.W.R. 630, 635, the Canadian Supreme Court held that a foreign state may not directly enforce its tax laws in Canada, or do so indirectly by taking a judgment in its own courts and then suing on the judgment in Canada. Apparently comity will lead courts of one state to enforce foreign judgments arising out of private obligations, but sovereignty precludes the enforcement of a foreign judgment arising out of obligations owed directly to a foreign sovereign under its public laws.³²

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Canadian courts may also decline to enforce foreign judgments based upon foreign laws of a political nature, especially if such laws were applied by the foreign court or government to property or conduct inside Canada. Such laws might include antitrust laws, price or exchange controls, import and export regulations, or expropriation decrees.³³

For example, certain Canadian and provincial statutes target U.S. judgments in asbestos and antitrust claims. Canadians perceive that U.S. laws in these areas have been wrongfully applied to conduct occurring lawfully in Canada. British Columbia has enacted a prohibition on registration or enforcement of a foreign judgment arising from loss caused by asbestos that was mined in British Columbia.³⁴ However, in such a case the injured person may sue under British Columbian law notwithstanding a prior foreign judgment for the same injury.³⁵

"Natural Justice," i.e., *Notice of Proceedings*. Another branch of the public policy defense, also rarely invoked successfully, is a claim that the foreign proceedings were contrary to "natural justice." Mere irregularities or differences in procedure do not amount to a denial of natural justice. The procedural flaw must be one that deprives the defendant of his or her "day in court," by denying any notice of the proceedings or the right to be heard.³⁶ For example, in *Romano v. Maggiora*, [1935] 2 W.W.R. 524, the British Columbia court ruled that it would not recognize a Washington judgment in an action initiated by alleged personal service, where it accepted the defendant's testimony that he had not been served and had not known of the action.

Manifest Error. In British Columbia (and only B.C.), the defendant may defend on the ground that a foreign default judgment carries a manifest error on its face.³⁷ In one case, a British Columbia court relied on this doctrine to refuse registration of an Ontario judgment that included interest not allowable in law.³⁸ However, this doctrine has not restricted enforcement of foreign judgments in British Columbia. Moreover, this doctrine is heavily criticized: even Canadian courts have said it is "dubious," and will not be allowed where the alleged error is perceived in any of the documents filed in support of the judgment.³⁹



Other defenses, such as statutes of limitation, may also be available.⁴⁰

Conclusion

The extension of *Morguard* to international judgments bodes well for foreign creditors. Prospects for the recognition and enforcement of judgments in Canada have never been more favorable.

Endnotes:

¹"Recognition" means the court will give the foreign judgment *res judicata* effect and will not re-try the underlying claim. "Enforcement" encompasses recognition plus orders for discovery of assets, garnishment of wages, attachment and sale of the judgment debtor's property or other steps to compel satisfaction. A judgment creditor will seek recognition and enforcement. One who obtains a defense verdict of no liability might seek recognition only, to assert the defense of *res judicata*. Enforcement usually would be sought in a provincial court, which have exclusive jurisdiction in Canada over most civil matters. The federal courts in Canada are restricted to matters such as bankruptcy, patents and trademarks. Canadian provincial courts consider judgments from other Canadian provinces to be "foreign" judgments and sometimes refer to United States judgments as "truly foreign" judgments.

² See Ivan F. Ivankovich, "Enforcing U.S. Judgments in Canada: 'Things Are Looking Up!'", 15 *Northwestern Journal of International Law & Business* 491 (University of Alberta) (1995); Hon. G. Peter Fraser (Justice, Supreme Court of British Columbia), and John W. Horn (Master, Supreme Court of British Columbia), *The Conduct of Civil Litigation in British Columbia*, Vol. 2, Chap. 52, "Foreign Judgments," at 1955-1996 (updated February 1994); James G. McLeod, *The Conflict of Laws* (1983) at 579-653; J.G. Castel, *Canadian Conflict of Laws* (1974) at 59-99, 403-598; J. Brian Casey and Janet E. Kirby, *U.S. Court Awards*

Must Clear Canadian Customs, *National Law Journal*, Monday August 21, 1995.

³ E.g., *FDIC*; Fraser and Horn at 1956; Casey and Carboy.

⁴ Castel at 464-471; Fraser and Horn at 1958.2; *FDIC*, at 413.

⁵ *First National Bank of Oregon v. Harris*, 63 D.L.R. 3d 628 (Ont.).

⁶ Revised Statutes of British Columbia (R.S.B.C.) 1979 chapter 75, part 2, § 31(1), 35, 39; Fraser and Horn at 1956.

⁷ Ivankovich at 498; Fraser and Horn at 1987. Under similar acts, Alberta, Manitoba and Prince Edward Island have named Washington as a reciprocating state. *Id.*

⁸ The process of applying for registration usually entails a solicitor's affidavit that there are no grounds for refusing recognition. Fraser and Horn at 1964. In certain cases the order of registration may be granted without notice. Act, § 31(2). However, in any event, prior to enforcement, the judgment creditor must serve notice of registration on the judgment debtor and the judgment debtor has one month in which to move to set aside the registration. § 36.

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⁹ See Act § 30(1) and § 31(6)(a)-(g); Fraser and Horn at 1965; Ivankovich at 499. Under the Act the foreign court must have jurisdiction over the defendant based upon consent, an appearance on the merits, residence or "carrying on business." Act § 31(6) (a)-(g); Fraser and Horn at 1957. Thus, a foreign judgment over a nonresident, based upon "long-arm" jurisdiction or the defendants' contacts with the forum, may not be registered under the Act, although it could be recognized in a common law action on the foreign judgment if there was a real and substantial connection between the defendant and the forum. *Morguard, infra*; *Acme Video Inc. v. Hedges*, (1993) 12 O.R.3d 160 (Ont.C.A.) (refusing registration where there was a real and substantial connection).

¹⁰ Other rules apply to jurisdiction in actions *in rem*. Castel at 446; McLeod at 632.

¹¹ Ivankovich at 500-501; *Moses v. Shore Boat Builders* [1993] 83 B.C.L.R.2d 177, 5 W.W.R. 282, 106 D.L.R.4th 654 (B.C.C.A.) (B.C. defendant sold boat to Alaskan); *Minkler & Kirschbaum v. Sheppard*, 60 B.C.L.R.2d 360 (B.C.S.C. 1991) (Arizona judgment enforcing community debt against wife; B.C. couple moved to Arizona, husband's companies hired law firm, couple separated and wife

returned to B.C.); *Clark v. Lo Bianco*, 84 D.L.R.4th 244, 59 B.C.L.R.2d 334 (BCSC 1991) (California judgment for medical malpractice); *McMickle v. Van Straaten*, 93 D.L.R.4th 74 (B.C.S.C. 1992) (California judgment in product liability case; B.C. defendant advertised product in California); *Clancey v. Beach*, 92 B.C.L.R. 2d 82 (B.C.S.C. 1994) (Colorado judgment against B.C. defendants who solicited and met with plaintiff in Colorado); *Stoddard v. Accurpress Manufacturing, Ltd.*, 1 W.W.R. 677 (B.C.S.C. 1994) (Connecticut judgment: B.C. manufacturer sent machine to Connecticut, where it injured worker); *FDIC*, 88 D.L.R.4th 448 (Oklahoma judgment in loan case); *Kirschv. Kucera*, [1994] B.C.J. No. 432 (B.C.S.C.); (Washington judgment for debt; British Columbian defendant met with plaintiff in Washington and checks were dishonored by Washington bank).

¹² To complete the showing of proper jurisdiction, the judgment creditor also must show the defendant was duly served or given notice, or that the defendant appeared on the merits or submitted to the jurisdiction of the original court. Fraser and Horn at 1959; McLeod at 618-19. This is closely related to the question of natural justice discussed below.

¹³ Kirbey and Casey; McLeod at 623; Ivan R. Feltham, "Reciprocal Enforcement of Judgments Act," 1 U.B.C. L. Rev. 229, 232-34; *Four Embarcadero Centerv. Mr. Greenjeans* (1988), 65 O.R. (2d) 746.

¹⁴ McLeod at 624. The pendency of an appeal would, however, likely provide a grounds for the judgment debtor to request the Canadian court to stay enforcement pending appeal. Kirbey and Casey; *Arrowmaster Inc. v. Unique Forming Ltd.* (1993) 17 O.R. (3d) 407. Similarly, a judgment debtor seeking to set aside a default judgment in the foreign court may request a stay in the Canadian court.

¹⁵ *Patton v. Reed*, (1972) 30 D.L.R. (3d) 494, [1972] 6 W.W.R. 208 (B.C.S.C.) (enforcing 20 years of arrears awarded in Idaho in a lump sum); McLeod at 623-24. Similarly, orders for alimony, maintenance or child support may not be registered under the Act. Act, § 30(1). See McLeod at 670-727; Family Relations Act, R.S.B.C. 1979 c. 121, Part 4.

¹⁶ Castel at 568. Such an award also may be registered. Act § 30(1).

¹⁷ McLeod at 622. Only a judgment providing for payment of money may be registered under the Act. Act §. 30(1). If the judgment includes other provisions,

only the provisions for the payment of money will be given effect. Act, § 31(8).

¹⁸ McLeod at 631.

¹⁹ British Columbia Foreign Money Claims Act, Statutes of British Columbia 1990, ch. 18.

²⁰ E.g., *FDIC*, 88 D.L.R.4th 448; Fraser and Horn at 1956; Casey and Carbooy.

²¹ *Feltham, supra*, at 246; *Friesen v. Braun*, [1926] 2 D.L.R. 1032.

²² *Jacobs v. Beaver* (1908), 17 O.L.R. 496, 506 (C.A.); McLeod at 612-14.

²³ *Friesen v. Braun*, [1926] 2 D.L.R. 1032.

²⁴ *Patton v. Reed*, [1972] 6 W.W.R. 208 (B.C.S.C.).

²⁵ McLeod at 620.

²⁶ *National Surety Co. v. Larsen*, 4 D.L.R. 918, 920, 941 (B.C.C.A. 1929).

²⁷ *Minkler*, 60 B.C.L.R. at 365.

²⁸ *Minkler*, 60 B.C.L.R. at 365.

²⁹ *Boardwalk Regency Corp. v. Maalouf*, 88 D.L.R.4th 612, 613 (Ont. C.A. 1992) and *Resorts International*, 89 D.L.R. 4th 688.

³⁰ Castel at 97, discussing *Patton v. Reed*.

³¹ *Pope v. Pope*, 2 W.W.R. 509, 512 (B.C.C.A. 1940).

³² Under the Act, only a judgment or order of a court in a civil proceeding may be registered. Act, § 30(1).

³³ Castel at 93-95; *Lane and Baltser v. The Estonian State Cargo & Steamship Line*, [1949] S.C.R. 530; the Foreign Extraterritorial Measures Act, RSC 1985 c F-29.

³⁴ Miscellaneous Statutes Amendment (No. 2), 1984, chap. 26, § 41.1(2).

³⁵ *Id.* at 41.1(3).

³⁶ Substituted service usually will be considered adequate to give notice to an absent defendant. McLeod at 616-19.

³⁷ *Boyle v. Victoria Yukon Trading Co.* (1902) 9 B.C.R. 213, 217.

³⁸ *Re Gacs and Maierovitz*, (1968), 68 D.L.R.2d 345.

³⁹ *FDIC*, [1991] W.W.R. at 423; Castel at 469; McLeod at 601.

⁴⁰ Generally, in Canada, the limitation period for simple debts applies, starting from the time of the foreign judgment. McLeod at 629. In British Columbia, under the Act, an applicant may register a foreign judgment within six years after it was given. § 31(1).



Cleveland Stockmeyer practiced international law with the NY firm of Baker & McKenzie, and currently serves as law clerk to Justice Phil Talmadge.

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by Hal White, Bar News Editor

Disciplinary Changes. Governor Peter Ehrlichman opened the June 7-8 Board of Governors meeting in Pasco by briefly discussing the proposed revisions to RLD 11.1. A detailed discussion of these changes can be found in the "Ethics & the Law" department in this issue.

Ehrlichman was then joined by WSBA Chief Disciplinary Counsel Barrie Althoff and Disciplinary Counsel Randy Beitel. Together they submitted several RLD modifications which would implement the lawyer discipline changes previously approved by the Board (see "Governors Restructure Attorney Discipline" in the April *Bar News*). A copy of these changes may be obtained through the WSBA offices.

Voting & Elections. The Board then modified the WSBA bylaws to allow out-of-state members to vote in Board of Governor elections. Such members will now be allowed to vote within the gubernatorial district of their primary Washington practice, or in the district of their designated agent, at their option.

In a separate matter the Board declined to shrink the size of its two "King County at Large" positions to represent only

Seattle's seventh district.

Finally, the Board tabled until next June a consideration of whether the entire WSBA membership should vote on its decision to limit the Board to its present size, as opposed to expanding the Board to include diversity, young lawyer and citizen members.

Licensing Fee Increase. The Governors then discussed the report of the Budget and Audit Committee. The committee recommended four options for implementing a licensing fee increase. The Board unanimously adopted "scenario 1," which would increase fees \$45 in 1997, \$32 in 1998, \$9 in 1999, and \$9 in 2000. (See story, page 49.)

The President's Report. President Ed Shea led off Saturday morning with a brief report of his hectic schedule. He attended the Washington State Bar Leaders' Conference in May, quickly followed by a speaking engagement at the Clark County Bar Association. He then traveled to Washington, D.C., and lobbied our congressional representatives for increased legal-service funding.

The President-elect's Report. President-elect Tom Chambers also gave a report on the Bar Leaders' Conference, and appointed Governor-elect Marijean

Moschetto to head up a task force to investigate what bar leaders would like in next year's meeting. Chambers also stated that he had sent out a questionnaire to various bar members to solicit their views regarding funded vs. unfunded committee memberships.

The Exec.'s Report. Executive Director Dennis Harwick informed the Board that Tom Russell had been hired to fill the CLE Director vacancy. Russell is a WSBA member and has worked with CLE programs at the National and Oregon judicial colleges. Harwick also announced the resignation of WSBA Communications Director Mary Elizabeth Stritmatter. A search is underway to fill that position.

1996-97 Board Meeting Schedule. The Board of Governors approved the following 1996-97 meeting schedule:

October 4-5, Chelan
November 22-23, Bellingham
January 10-11, Olympia
February 14-15, Tacoma
March 28-29, LaConner
May 2-3, Spokane
June 20-21, Yakima
August 8-9, Vancouver
September 11-12, Seattle


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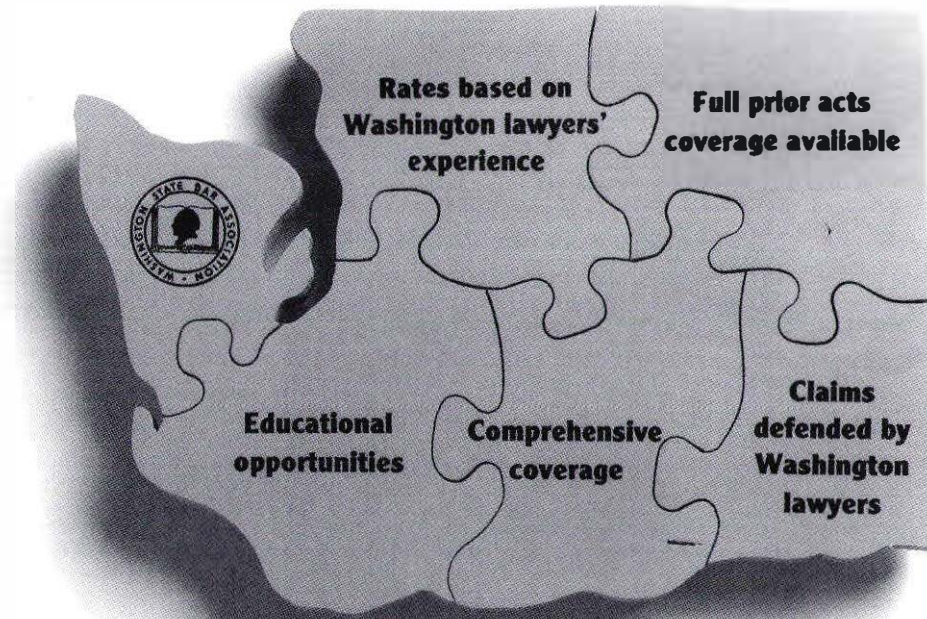
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WSBA Mission Statement. Governor Mary Fairhurst, chair of the Long-range Planning Committee of the Board, then offered a draft of the proposed new WSBA mission, goal and activity statement. If adopted, this statement would replace GR 12. Copies of the Mission Statement have been circulated among WSBA committees, and comment from individual members is encouraged. Copies of this document can be obtained through the WSBA offices. The Board will vote on a final version of this statement at its July 19-20 meeting in Port Ludlow.

Supreme Court Size Reduction. The committee studying a possible reduction in the size of the Washington Supreme Court, commonly known as the "Pearson Committee" (after its chair, retired Justice Vernon Pearson), offered its preliminary findings to the Board and requested the Governors' views on this issue. In a unanimous vote, the Governors opposed any reduction in the size of the Supreme Court. The Board felt that any benefits a reduction may have in terms of efficiency or cost savings would be offset by reductions in gender, racial and geographic diversity among the justices.

Committee Selection Policy. After extensive discussion, the Board formally confirmed its policy of allowing the president-elect to appoint unfunded positions to WSBA committees. The Governors will continue to appoint funded committee positions and make recommendations for unfunded appointments.

Gonzaga University Racism. Governor Steve Toole then apprised the Governors of the work of a task force formed in response to racist incidents which occurred at Gonzaga University Law School (see last month's "Board's Work"). Toole proposed two actions in response to these events. One: Forwarding a letter from President Shea to students in all three law schools condemning racist activities; and two: Inserting an interview with Gonzaga Law School Dean John Clute in the September *Bar News* also denouncing such acts. The Board endorsed these recommendations.

In a separate matter, Toole also informed the Board that he had asked the Committee on Opportunities for Minorities in the Legal Profession to review Article 1(A)(3)(b) of the WSBA Bylaws, and render an opinion regarding whether this Article limited the Board's ability to endorse the report of the King County Bar Association Task Force on Gay and Les-

bian Issues (see the January "Board's Work" for details on this report). Article 1 prohibits, in part, "Taking positions on political or social issues which do not relate to or affect the practice of law or the administration of justice."

Court Rule Changes. Walt Krueger, chair of the Court Rules & Procedures Committee, proposed five rule changes for Board endorsement and submission to the Supreme Court. ER 804(b) would be modified to amend the Deadman's Statute; ER 904 altered regarding the admissibility/authentication of documents; CR 30(b)(6) changed concerning the desig-

nation of a "speaking agent;" CR 34(b) amended regarding the production of documents; and CR 41(b) altered concerning a clerk's dismissal of actions. The Board endorsed these proposals and forwarded them to the Supreme Court.

Krueger also asked the Board to approve the creation of a task force to study the feasibility of statewide uniform discovery limitation rules. Discussion of this request was deferred until the July meeting in order to obtain information regarding the cost of such a study. Copies of the proposed rule changes, and details regarding the proposed task force can be obtained through the WSBA offices.

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Censured

Vancouver lawyer Randall L. Stewart (WSBA No. 4620, admitted 1972) has been ordered censured by the Disciplinary Board following review of the hearing officer's recommendation of a 30-day suspension.

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

The hearing officer based a 30-day suspension recommendation on the ABA Standards for Imposing Lawyer Sanctions which provide:

Suspension is generally appropriate when a lawyer engages in communication with an individual in the legal

system when the lawyer knows that such communication is improper, and causes injury or potential injury to a party or causes interference or potential interference with the outcome of the legal proceeding.

The hearing officer considered as aggravating factors Stewart's dishonest or selfish motive, his substantial experience in the practice of law, and his record of prior discipline (a reprimand in 1985 for failure to appear for a deposition and to file an answer in a disciplinary proceeding, and a public admonition in 1991 for failure to correctly account for a client's trust account funds).

Neither party appealed from the hearing officer's recommendation of a 30-day suspension. Because the Disciplinary Board automatically reviews all suspension and disbarment recommendations, it reviewed the transcript and record without oral argument or briefing. The Disciplinary Board on its own amended the hearing officer's findings to add that Stewart had made the communication openly, sending a contemporaneous copy to the plaintiff's lawyer. The Disciplinary Board also added a finding that Stewart was not aware of the case *Wright v. Group Health Hosp.*, 103 Wn.2d 192, 691 P.2d 564 (1984), or its holding that under the predecessor to RPC 4.2 [former Code of Professional Responsibility, DR 7-104(A)(1)], a lawyer is prohibited from communicating with a current employee of an adverse corporate party without the adverse corporate counsel's permission if the employee has the authority to speak for and bind the corporation. The Disciplinary Board on its own amended the hearing officer's conclusions to reflect that "[t]his violation was done negligently," apparently in reference to Stewart's lack of knowledge of his ethical obligations. Citing that Stewart had made free disclosure, that his motive was selfish but not dishonest, and that the disciplinary proceedings had been delayed by the backlog of disciplinary matters, the Disciplinary Board by a vote of 8 to 3 reduced the sanction from a 30-day suspension to a letter of censure. The three dissenters believed a reprimand to be appropriate.

The Hearing Officer was Ernest L. Meyer of Olympia. Disciplinary counsel Lisa E. Crawford represented the WSBA. Stewart represented himself. For a com-

plete copy of any disciplinary decision, call the WSBA Disciplinary Board at (206) 727-8280, and leave the case name and your address.

In Memoriam

Donald Blair: Lifelong Vancouver resident and former Clark County deputy prosecutor Donald Blair died in April at age 74. He was cofounder of Blair, Schaefer, Hutchison and Wolfe. He retired as a colonel and chief of staff of the Army Reserve Vancouver Barracks in 1976.

Robert M. Brown: Robert M. Brown, 80, died in Spokane last fall. He practiced law in Spokane for 55 years until he retired in 1994. He was a B-25 pilot in the Army during World War II and was shot down over Africa; he was a prisoner of war in Germany for 27 months.

William Gerraughty: Long-time Spokane attorney William Gerraughty recently passed away following an extended illness. He practiced in Spokane until 1994.

Ed Kelly: Vancouver attorney and Democratic party activist Ed Kelly died March 30 after suffering a stroke at age 53. He chaired the board of trustees for The Evergreen State College and was on the board of the Community Drug and Alcohol Center and a member of the Urban Forestry Board. He served as a Marine Corps captain in Vietnam.

Celeste N. Mitchel: Celeste N. Mitchel, a shareholder in the Seattle firm of Gores & Blais, died March 5 after suffering an aneurysm the previous week.

George Van Tuyl Powell: Seattle native George Van Tuyl Powell died at age 85 of cancer April 6. A partner in what is now Lane Powell Spears Lubersky, he practiced law for six decades. He served in the state House of Representatives from 1947-1953, as commissioner of Uniform State Laws from 1952-1964, as a UW regent for over a decade, and as a WSBA Governor.

Patrick H. Winston: Patrick H. Winston died March 1 at 91. He served in the Navy, returning in 1945 to Spokane with his wife and family. He and his partner, Lyle Keith, established the firm which became Winston and Cashatt.



THE WASHINGTON STATE BAR NEWS

FAX POLL



What is your opinion regarding mandatory pro bono? As mentioned in "The President's Corner" in the February issue of the *Bar News*, such a proposal would require Washington attorneys to perform a certain number of hours of pro bono work each year, or, in the alternative, perhaps allow attorneys the option of a "buy-out" for those lawyers who would prefer to pay rather than contribute time away from their practice.

Please check the statement which most reflects your opinion, along with any comments or qualifications which you may have, and fax (or mail) this entire page to the number/address below. No cover sheet is necessary.

1. ___ I strongly support mandatory pro bono.
2. ___ I somewhat support mandatory pro bono.
3. ___ I am undecided, but I believe the concept should be studied.
4. ___ I strongly oppose mandatory pro bono.
5. ___ I somewhat oppose mandatory pro bono.

Comments/Other: _____

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

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

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

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

RESULTS

of

THE WASHINGTON STATE BAR NEWS

FAX POLL



In last month's *Bar News*, we asked your opinions regarding jury reform. We asked you to vote on six categories. The results:

Should the number of peremptory challenges be eliminated, reduced or remain the same?

Eliminate 8% Reduce 7% Remain the same 85%

Should jurors be allowed to ask questions through the judge?

Yes 79% No 21%

Should jurors be allowed to take notes during trials?

Yes 94% No 6%

Should voir dire be abolished, restricted or remain the same?

Abolish 5% Restrict 13% Remain the same 82%

Should judges more strictly enforce the scope of questions during voir dire?

Yes 30% No 70%

Should occupational exemptions from jury service (doctors, lawyers, firefighters, etc.) be eliminated?

Yes 66% No 34%

Overall, 70 valid faxes were received, which is within the average range of responses. As a point of clarification, the drafter of the final question did not intend to imply that there are statutory occupational exemptions in Washington; rather that, as a practical matter, members of certain occupations are frequently excused from service. The editor apologizes for the inartful wording.

Your Comments:

"Compensation for jurors *must* be raised.
We get what we pay for!"

Gordon Tobin, Bellevue

"I know I would be guilty of malpractice if I tried to handle a trial without taking notes. It seems ridiculous to expect jurors with far less knowledge about each case to make crucial decisions based on memory (and exhibits). There is less chance of incorrect note taking than of faulty recollection."

Lisa Taplin, Everett

"Reduce jury duty to one week
and we'll get more people reporting for duty."

Kimberly Rendish, Tacoma

"Our Canadian brethren (sisteren?), in most instances, have no voir dire. No one accuses them of lacking in due process."

John D. Morgan, Silverdale

"If it isn't broke why fix it? If there is a problem it isn't in the system, it is with the players. Good judges and good lawyers make the system work."

Richard Vroman, Aberdeen

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



July

- 8 **Pat. & Intellect. Property Law**
Seattle
By University of Washington
(206) 543-0059/(800) CLE UNIV
CLE credit pending
- 9 & 21 **Effective Direct & Cross Examination**
Seattle
By National Assn. of Cert. Valuat.
(206) 448-7755
7.5 CLE credits
- 11 **Growth Management & Regulatory Compliance**
Seattle
By LSI (206) 621-1938
15.75 CLE credits
- 11 **Guardianship Law in WA**
Seattle
By NBI (715) 835-8525
6.5 CLE credits (incl. 1 ethics)
- 11 **Internet for Attorneys**
Seattle
By Halfmoon LLC
(715) 835-5900
4.25 CLE credits

- 11&19 **Fiduciary Income Tax Wkshop**
Seattle - 11th
Spokane - 19th
By PSI (800) 843-7763
7.25 CLE credits
- 12&19 **Developing and Using Evidence to Your Advantage**
Spokane - 12th
Seattle - 19th
By WSBA CLE and YLD
(206) 727-8202
7.25 CLE credits (incl. 1 ethics)
- 12 **Workers' Compensation**
Seattle
By WSBA CLE (206) 727-8202
5.5 CLE credits
- 16 **Demo of L.A.W. BBS**
Seattle
By Puget Sound Assn of Legal Administrators (206) 789-2111
1 CLE credit
- 17 **Advanced Evidence**
Spokane
By Superior Court Judges Assn.
(360) 705-5231
18 CLE credits
- 17 **4th Annual Fibromyalgia**

- Conference**
Spokane
By WSTLA (206) 464-1011
2 CLE credits
- 18 **Workers' Comp for Self-Insureds**
Seattle
By Lorman (715) 833-3940
5.25 CLE credits
- 18 **Communication in the Courtm**
Seattle
By Carl Grant (206) 364-5289
2 CLE credits
- 18-21 **WSTLA 1996 Annual Meeting & Convention**
Oregon
By WSTLA (206) 464-1011
- 19 **Trial Tactics for Success**
Tacoma
By Tacoma-Pierce County Bar
(206) 272-8871
2.5 CLE credits
- 19 **706 Estate Tax Returns**
Seattle
By WSBA CLE and Real Property, Probate & Trust Section
(206) 727-8202

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- 19 **Firearms Legislation Update**
Selah/Yakima
By WA St. Crim. Justice Training
(509) 459-6319
3 CLE credits
- 19 **Accounting & Finance for
Lawyers**
Seattle
By Themis (206) 783-4014
6.5 CLE credits
- 19-20 **WSBA Board of Governors**
Port Ludlow
- 22 **Interest-Based Mediation**
Spokane
By Fulcrum Inst. (509) 838-2799
CLE credit pending
- 25 **Choice of Business Entity in
WA**
Seattle
By NBI (715) 835-8525
7.25 CLE credits
- 26 **Public Entitlements**
Seattle
By KCBA (206) 624-9365
1.25 CLE credits
- 26 **Employment Law Snapshots**
Seattle
By Themis (206) 783-4014
6.75 CLE credits
- 26 **Selecting & Drafting Trusts for
Estate Planning**
Seattle
By WSBA CLE (206) 727-8202
6.5 CLE credits (incl. .75 ethics)
- 30 **Searching Legal Ethics**
Seattle
By West Pub. (206) 628-6435
2.25 CLE credits
- 30&31 **OSHA/WISHA Compliance in
Washington**
Seattle - 30th
Spokane - 31st
By NBI (715) 835-8525
6.5 CLE credits (incl. 1 ethics)
- 31 **Hazardous Waste in WA**
Seattle
By NBI (715) 835-8525
6.5 CLE credits (incl. 1 ethics)

August

**Bankruptcy 101: What You
Should Know About Bank-
ruptcy Law**

	Seattle By WSBA CLE (206) 727-8202 6 CLE credits		CLE (replay of 3/29/96 seminar) Seattle By WSTLA (206) 464-1011 6 CLE credits		Environmental Law Seattle By WSBA CLE /Environmental and Land Use Law Section (206) 727-8202 6.5 CLE credits
2	Sexual Harassment Seattle By WSBA CLE (206) 727-8202 7 CLE credits (est.) pending		14 Winning Strategies for Jury Selection Seattle By NBI (715) 835-8525 6.5 CLE credits (incl. 1 ethics)	21	Current WA State Taxation Issues Bellevue By Lorman (715) 833-3940 6 CLE credits
9	Business Succession: Strategies for Planning Seattle By WSBA CLE (206) 727-8202 6 CLE credits (est.) pending		15 Trial as Theater: Moderated Video CLE Seattle By WSTLA (206) 464-1011 5.25 CLE credits	23	Elder Law: Beyond the Basics Seattle By WSBA CLE (206) 727-8202 6.75 CLE credits (est.)
12	Preparing Attorneys to Thrive Seattle By Millennium Assn. (303) 368-5111 30.25 CLE credits (incl. 2.5 ethics)		15 Brownfields Redevelopment in WA Seattle By LSI (206) 621-1938 11 CLE credits	23	Third-Party Custody Seattle By KCBA (206) 624-9365 1.25 CLE credits
14	Civil Practice & Litigation Technology Seattle By Amer. Law Inst./ABA (206) 621-1503 20.50 CLE credits		16 Auto Cases/De Novo Challenges: Moderated Video CLE Seattle By WSTLA (206) 464-1011 6.25 CLE credits (incl. .5 ethics)	27	Complying with Fair Debt Collection Seattle By NBI (715) 835-8525 6.5 CLE credits
14	Subrogation: Moderated Video		16 Recent Changes in Land Use &	28	Deposition Skills Seattle

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**-Clarence Darrow
(Quoted by the New York Times,
April 19th, 1936)**

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41.25 CLE credits

September

5-6 WSBA Board of Governors
Seattle

6 WSBA ANNUAL MEETING

9

Federal Income Taxation of:
Individuals, Corporations &
Shareholders, Partners & Partner-
ships; Income Taxation Decision-
making, Tax Characterization
Seattle
By Golden Gate University

9

Internet Symposium '96
Seattle
By Seattle U. (206) 591-2274
10.5 CLE credits (incl. 1.5 ethics)

10

Residential/Comm. Eviction
Seattle
By NBI (715) 835-8525
6.5 CLE credits (incl. 1.5 ethics)

11/12

**Advanced Estate Planning
Techniques in WA**
Seattle - 11th
Spokane - 12th
By NBI (715) 835-8525
7.25 CLE credits (inc. 1 ethics)

13.

**Chambers & Taylors
Super Seminar** — A Comprehen-
sive Update for Every Lawyer
Seattle - 13th
Olympia - 13th
Bellingham - 13th
Port Angeles - 18th
Vancouver - 19th
Spokane - 19th
Yakima - 20th
By WSTLA (206) 464-1011

18, 20
& 25

Valuing Closely Held Businesses
Spokane - 18th
Bellevue - 20th
Seattle - 25th
By Business Advisory Service
(206) 223-5400
7.5 CLE credits

19

Surfing the Net
Seattle
By Puget Sound Assn. of Legal
Administrators
(206) 789-2111
1 CLE credit

19

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

26

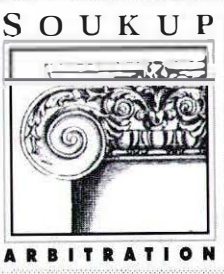
**Evaluating & Settling Cases:
Demo of a Mediation**
Seattle
By WSTLA (206) 464-1011
CLE credits pending

27

Communication in the Courts
Seattle
By Carl Grant (206) 364-5289
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30

**13th Annual Pacific Northwest
Institute on Special Education &
the Law**
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Average Coupon Equivalent Yields from the Auction of 26-week Treasury Bills: 1986 to Date

These are the average coupon equivalent yields from the auction of 26-week treasury bills December 1985 to date. The highest rate of interest permissible under RCW 19.52.020(1) is computed by the addition of four percentage points or is 12% per annum, whichever is higher.

The yields shown on the chart are those applied to the month shown, computed on the

coupon equivalent for the first market auction average in the month preceding, as specified in the statute.

These limits apply to loans which are made during the designated month. Note: Any loan made pursuant to a commitment to lend at an interest rate permitted when the commitment is made is lawful.

The average coupon equivalent yield from

the first May 1986 auction of 26-week treasury bill applicable to the computation of the maximum allowable interest rate for June 1986 is 6.72 percent. According to the state treasurer's office, the maximum allowable interest rate for June 1986 is 12%. Note that when the equivalent bond yield is below 8%, the maximum interest allowable remains at 12%.

MONTH	YIELD	RATE
1986		
January	7.64%	12.00%
February	7.48%	12.00%
March	7.42%	12.00%
April	7.22%	12.00%
May	6.46%	12.00%
June	6.37%	12.00%
July	6.72%	12.00%
August	6.11%	12.00%
September	5.98%	12.00%
October	5.38%	12.00%
November	5.34%	12.00%
December	5.52%	12.00%
1987		
January	5.69%	12.00%
February	5.79%	12.00%
March	5.83%	12.00%
April	5.76%	12.00%
May	6.07%	12.00%
June	6.46%	12.00%
July	6.40%	12.00%
August	5.95%	12.00%
September	6.45%	12.00%
October	6.66%	12.00%
November	7.33%	12.00%
December	6.55%	12.00%
1988		
January	6.42%	12.00%
February	6.67%	12.00%
March	6.41%	12.00%
April	6.20%	12.00%
May	6.21%	12.00%
June	6.41%	12.00%
July	7.05%	12.00%
August	7.04%	12.00%
September	7.52%	12.00%
October	7.79%	12.00%
November	7.86%	12.00%
December	8.13%	12.83%
1989		
January	8.73%	12.73%
February	8.86%	12.86%
March	9.04%	13.04%
April	9.18%	13.18%
May	9.38%	13.38%
June	9.16%	13.16%

MONTH	YIELD	RATE
1989, continued		
July	8.44%	12.44%
August	8.05%	12.05%
September	8.12%	12.12%
October	8.31%	12.31%
November	8.36%	12.36%
December	7.89%	12.00%
1990		
January	7.69%	12.00%
February	7.93%	12.00%
March	8.15%	12.15%
April	8.22%	12.22%
May	8.24%	12.24%
June	8.28%	12.28%
July	8.03%	12.03%
August	8.01%	12.01%
September	7.56%	12.00%
October	7.75%	12.00%
November	7.59%	12.00%
December	7.41%	12.00%
1991		
January	7.31%	12.00%
February	6.92%	12.82%
March	6.91%	12.00%
April	6.36%	12.00%
May	6.06%	12.00%
June	5.87%	12.00%
July	5.98%	12.00%
August	5.98%	12.00%
September	5.85%	12.00%
October	5.63%	12.00%
November	5.30%	12.00%
December	5.00%	12.00%
1992		
January	4.56%	12.00%
February	4.00%	12.00%
March	4.08%	12.00%
April	4.28%	12.00%
May	4.16%	12.00%
June	3.91%	12.00%
July	3.84%	12.00%
August	3.42%	12.00%
September	3.40%	12.00%
October	3.00%	12.00%
November	2.86%	12.00%
December	3.37%	12.00%

MONTH	YIELD	RATE
1993		
January	3.57%	12.00%
February	3.38%	12.00%
March	3.19%	12.00%
April	3.14%	12.00%
May	3.13%	12.00%
June	3.07%	12.00%
July	3.32%	12.00%
August	3.32%	12.00%
September	3.35%	12.00%
October	3.12%	12.00%
November	3.17%	12.00%
December	3.35%	12.00%
1994		
January	3.37%	12.00%
February	3.39%	12.00%
March	3.51%	12.00%
April	3.88%	12.00%
May	4.16%	12.00%
June	4.57%	12.00%
July	4.70%	12.00%
August	4.92%	12.00%
September	4.93%	12.00%
October	5.08%	12.00%
November	5.61%	12.00%
December	5.93%	12.00%
1995		
January	6.63%	12.00%
February	6.73%	12.00%
March	6.38%	12.00%
April	6.29%	12.00%
May	6.18%	12.00%
June	6.12%	12.00%
July	5.59%	12.00%
August	5.71%	12.00%
September	5.64%	12.00%
October	5.54%	12.00%
November	5.62%	12.00%
December	5.53%	12.00%
1996		
January	5.42%	12.00%
February	5.25%	12.00%
March	4.99%	12.00%
April	5.00%	12.00%
May	5.26%	12.00%
June	5.35%	12.00%
July	5.43%	12.00%



Governors Modify Proposal For Making Discipline Investigations Public

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

Proposals to open all investigations of disciplinary grievances to public inspection once a lawyer has been given a chance to respond have been debated by the WSBA Board of Governors for two years.* Many people believe a more open system is needed to increase public confidence in the lawyer discipline system and to give legal consumers greater information. Others are concerned that this opening could seriously and undeservedly harm a lawyer's reputation as a result of baseless grievances, even though such grievances are ultimately dismissed.

Consequently, the Board of Governors, responding to the debate, has approved for circulation and comment a revised proposal to amend Rule 11.1 of the Rules for Lawyer Discipline. This revised proposal tries to reconcile both concerns by making more information available to the public at an earlier point in the process, but only after first determining that there are substantial concerns about a lawyer's conduct. This revised proposal was developed by the Board's Discipline Committee and by the Office of Disciplinary Counsel with comments from members of the Disciplinary Board and others.

The Board of Governors encourages further comment, and intends to act on this proposal at its September 5-6 meeting in Seattle. If the Board approves the proposal, it would then be sent to the Supreme Court for review and approval as a proposed rule change. If adopted as proposed, it would apply only to grievances received after the effective date. The significant features of the revised proposal are as follows:

Investigations Remain Confidential. Investigations of disciplinary grievances would remain confidential until a threshold determination has been made that there are legitimate concerns about the lawyer's conduct. This threshold would be met when matters are submitted for Review Committee or Disciplinary Board review (see below). Grievances dismissed by disciplinary counsel as frivolous, unsupported by sufficient evidence or beyond disciplinary jurisdiction would remain confidential.

Advisory Letters Remain Confiden-

tial. Advisory letters, which are not based on a finding of misconduct and are not disciplinary action, would remain confidential. It is believed that confidential advisory letters serve an important purpose to warn a lawyer before the lawyer's conduct results in rule violations, and that this can be done most effectively by keeping advisory letters confidential.

Admonitions Become Public. Although admonitions are now generally confidential, they are only issued after a Review Committee of the Disciplinary Board has found a rule violation. Thus, under the proposal they would become public. Because admonitions are the least serious form of public discipline, they would remain part of a lawyer's public disciplinary file only as long as the record of the admonition is maintained (usually three years), after which the records are ordinarily destroyed unless there are ongoing investigations or proceedings (RLD 5.5A(b); RLD 12.8(b)).

Recommendations For Disciplinary Action Become Public. Disciplinary counsel's recommendations to a Review Committee that a hearing be ordered or an admonition be issued, would (along with supporting documentation), become public when submitted to the Committee. At this stage matters have been fully investigated, and disciplinary counsel has determined that there is adequate evidence of misconduct to support finding a rule violation and imposing either: 1) an admonition, or; 2) a public hearing to determine if more severe discipline is warranted. Materials related to client confidences and secrets could remain confidential under a protective order. At present, matters only become public after a formal complaint has been filed and the time for the lawyer's answer has expired. This change would make serious disciplinary proceedings public several months sooner than is currently available.

Stipulations To Discipline Remain Confidential Until Approved. Stipulations to discipline are agreements between lawyers and disciplinary counsel that certain misconduct has resulted in rule violations. They become public when approved by the Disciplinary Board.

Stipulations which are not approved remain confidential and are of no force or effect and cannot be introduced into evidence (RLD 4.14(d)). Although knowledge of non-approved stipulations might be of use as consumer information, they would nevertheless remain confidential lest they prejudice hearing officers in the subsequent hearing. In addition, making non-approved stipulations public might chill the willingness of respondent lawyers to consider stipulated resolutions of disciplinary proceedings. Stipulations to dismissal, and stipulations to dismissal with an advisory letter, would remain confidential whether approved or not.

Statements of Concern. Currently, discipline grievances do not become public until several months after an investigation is undertaken. From time to time, disciplinary counsel will be aware of significant concerns about a lawyer, but the public records of the WSBA will only reflect "Member In Good Standing — No Public Discipline." To provide a warning to the public in appropriate cases, the Chief Disciplinary Counsel would also be authorized to issue a statement of concern — based on otherwise confidential disciplinary information — about serious ongoing misconduct 14 days after service on the respondent lawyer. Prior to issuance, the respondent lawyer would be able to appeal such a decision to the Chair of the Disciplinary Board.

Disclosure to Protect Public Interests. The proposal retains the current ability of the Bar to disclose in particular cases such confidential information as may be necessary to protect the interests of clients, other persons, the public or the integrity of the Bar. The proposal would place this discretion in the Executive Director or the Chief Disciplinary Counsel, whereas now it is in the discretion of the Board of Governors or the Executive Director acting under its direction.

Other Changes. The proposal would also:

- provide judges greater access to disciplinary information,
- authorize cooperation with criminal authorities,
- increase the ability to respond to false



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or misleading statements,

- authorize the release of information to admissions and lawyer discipline programs in other states, and
- authorize the release of information for judicial or appointive office evaluations.

Copies of Proposed Rule Available and Comments Encouraged. A copy of the proposed rule change may be obtained by calling the WSBA Communications Department at (206) 727-8203. Comments are encouraged and are due by August 1, 1996; comments may be made to your Governor, to Gov. Peter Ehrlichman (Chair of the Board of Governors' Discipline Committee), or to Barrie Althoff (Chief Disciplinary Counsel). Please forward a copy of all comments to Barrie Althoff at the WSBA offices.

* See, for example: "The Board's Work," *Washington State Bar News*, September 1994, pp. 36-7; "Washington Needs a More Open Discipline System," Leland G. Ripley, *Washington State Bar News*, November, 1994, pp. 47-8; "The Oregon Experience With an Open Disciplinary System," George Riemer, *Washington State Bar News*, November, 1994, p.49; "Board of Governors Recommends to Court Expansion of Disclosure of Lawyer Discipline Records," *Washington State Bar News*, September, 1995, p. 55; "Governors Restructure Attorney Discipline," *Washington State Bar News*, April 1996, p. 37; and, "The Board's Work," *Washington State Bar News*, May 1996, p. 39.

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Correction: The University of Washington School of Law advertisement on page 44 of the June 1996 *Bar News* was run in error. There are currently no openings for Trial Advocacy Program instructors.

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WSBA Annual Fees Increase for First Time in 10 Years

WSBA mandatory annual fees will increase for the first time in 10 years, effective in fiscal year 1997. The license fee forms mailed to members in early December will reflect the change. The Board of Governors voted unanimously for the increase at its June meeting.

The \$95 increase for active members will be spread out over four years — \$45 in 1997, an additional \$32 in 1998, and another \$9 each in 1999 and 2000. (See chart below for increases for inactive members and new admittees.)

"The reason why we're increasing it is due to discipline and inflation," explained Mary Fairhurst, chair of the BOG's Budget and Audit Committee. "We're doing it over four years so that the money is collected when it is needed and to have the least financial impact upon our members."

In 1994, the budget for lawyer discipline was \$980,197. In fiscal year 1997 it is \$2,271,685 — an increase of \$1,291,488 (131% increase). Assuming that \$1,291,488 increase was spread evenly over the WSBA's membership of approximately 20,000, the increase attributable to lawyer discipline alone would be almost \$65 of the proposed \$95 increase.

WSBA President Ed Shea explained it this way: "First, our association faced the imminent prospect that it would be unable to adequately fund necessary changes to the disciplinary system. Several members of the Supreme Court had publicly stated that if the Bar did not do so, the Court would assume control of the disciplinary system and its funding. Second, the cost of administering a bar association of 20,000 members has risen in the last 10 years during which license fees remained at \$195, not only the second lowest in the west but also far lower than license fees for comparable Washington professional associations. In terms of 1987 dollars, it now takes \$267 to equal the purchasing power of \$195. Third, our auditors recommended that the Bar maintain a reserve of no less than 10% of its annual revenues; the projections demonstrated we could not responsibly deliver services to members and meet this minimum reserve in the next four years without this increase in license fees. The Board had no alternative but to take these steps to preserve the independence of our association."

Tom Chambers, president-elect of WSBA, echoed Shea's support. "I commend the board for taking an unpopular but absolutely necessary action. We have made a mistake by letting our disciplinary backlog build until we are in jeopardy of the Supreme Court stepping in and making mandatory assessments. We have not had a fees increase for 10 years and the natural effects of inflation are about to drive the association into insolvency. The board has taken a bare bones approach to the amount of the increase. The membership must support this increase as the alternatives are less desirable." ♦

WSBA Fee Increase Schedule

approved by the Board of Governors
June 7, 1996

	Active Years 6 and over	Active - Years 4 and 5	Active - Years 2 and 3	Active -- Year of Admission*	Inactive
Current License Fee	195	195	115	60 30	37
1997 increase	45	16	11	0	6
1997 License Fee	240	211	126	60 30	43
1998 Increase	32	16	11	0	5
1998 License Fee	272	227	137	60 30	48
1999 Increase	9	6	5	5	2
1999 License Fee	281	233	142	65 35	50
2000 Increase	9	5	3	3	1
2000 License Fee	290	238	145	68 38	51

*\$50 if admitted pursuant to winter bar exam; \$30 if admitted pursuant to summer bar exam

WSBA Introduces New CLE Director Tom Russell

Tom Russell, former chair of the WSBA CLE Committee, became WSBA's new CLE Director in June. Tom brings a wealth of experience to the position of providing adult legal education. After serving as a District Court Judge from 1967-1971, he created and administered the first training programs for Washington State's Magistrates Association (now the District and Municipal Court Judges Association). In 1972 he joined the National Judicial College in Reno, Nevada, to design and administer residential training, seminars, and publications for courts of limited jurisdiction throughout the U.S. He then served as Director of the Oregon Judicial College and later returned to the National Judicial College in 1986 as Associate Dean for Educational Programs.

As a practicing lawyer Tom has been a trial lawyer and partner in two small and one mid-sized firm, and was a trial lawyer with the King County Prosecutor's Office and the U.S. Attorney's Office for the Western District.

He has served as faculty on several WSBA CLE programs, Oregon State Bar programs, private CLE providers in Oregon, and on national programs for the ABA, U.S. Dept. of Justice and the National Institute for Trial Advocacy. Tom also taught law at Willamette

University, is author for the Oregon State Bar Book on Evidence, and has contributed several articles to the *Bar News*.

As a member and then chair of the WSBA CLE Committee, he helped formulate the VIA*CLE (participate by phone) program and the award winning Faculty Training Program. Most recently he practiced law in Lynnwood. ♦

Runoff in Board of Governors Election for Third District

Terrance (Terry) Lee and Marla Ludolph-Heikkala, both of Vancouver, were the top two vote getters for the Board of Governors election for the Third District. Ballots were counted June 10 by a Board of Elections, comprised of WSBA members Kathleen O'Brien, Dave Wieck, and Carla Wigen, all of Seattle.

Lee received 46% of the votes, Ludolph-Heikkala received 29% and Melissa Denton won 25%. Since no one received a majority, a runoff between the top two is necessary. Runoff ballots were already mailed to Third District constituents and results will be announced approximately July 10, as well as printed in the August issue of *FYI*. ♦

1996 Pre-Law Conference Introduces Students Across State to Legal Careers

The Equality in Practice Committee of the WSBA's Young Lawyers Division co-sponsored the 1996 Pre-Law Conference on April 26 in Seattle, and on May 11 in Yakima. The theme was "Opening the Door to a Legal

Career." The primary purpose of the annual conference is to introduce high school students of color to the profession, hoping to spark their interest in the

practice of law or other options that a legal education can provide. The conference is open to all students. Ethnic backgrounds represented included African American, Asian

American, Cambodian, Chinese, Ethiopian, Korean, Latina American/Hispanic, Native American, Vietnamese, White/Caucasian.

The students received information about college, the Law School Admission Test, law school, the bar exam, law practice, and other career options. They also had the opportunity to meet and interact with law students, law professors, lawyers and judges.

"The mock trial was fabulous and the students' comments were very interesting — particularly the student who insisted on re-writing the story in accordance with her take on the witnesses," said Bernardean Broadous, chair of the Equality in Practice Committee, in a press release on the Seattle event. "One of my most rewarding moments came at the end of the day when a student abruptly stood up and expressed heartfelt appreciation for this activity; all the students spontaneously broke into loud applause and screams of 'yeah!'" ♦

Washington State Lawyers' Campaign for Hunger Relief is looking for enthusiastic, talented people to volunteer their time to help end childhood hunger. Please call Kathy Casey at 622-3000.



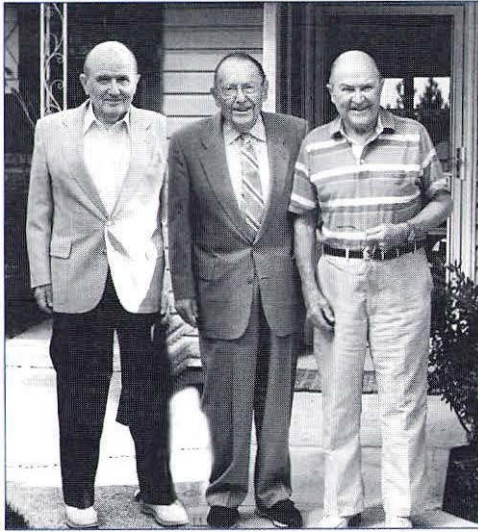
3 Kelley Brothers Still Active in Law After More Than 5 Decades

The three Kelley brothers in Washington have been actively practicing law longer than many of our members have been alive. Thomas D. Kelley, former partner of the Seattle firm of Kelley & O'Sullivan and now practicing on Bainbridge Island, has 58 years of practice under his belt. His older brother, William V. Kelley, of counsel at the Spokane firm of Wither- spoon, Kelley, Davenport & Toole, has 64 years of practice. Their younger brother, John F. Kelley, also practices in Spokane, and has 56 years of law behind him.

"I think my dad talked us all into it," explains Thomas. "My dad was an engineer from Cornell, but for some reason talked us all into (the law)." William was admitted in 1932, Thomas in 1938, and John in 1940. Although they studied the same field, they never thought of working together. "We figured that wouldn't work very well," Thomas said with a laugh. However, they did occasionally send referrals each other's way.

Thomas is still an active attorney, doing all his business in King County, and is still a member of the King County Bar Association. "I'm not quite as fast as I used to be. I'm not working as hard as I used to." In his of counsel position, William comes into the office only once a week now. He has been with the firm "since sometime in the '30s," according to his secretary. (He and John both were unavailable for an interview.)

Thomas, who also studied journalism at the UW for three years, said he never thought about law school as a kid, instead starting newspaper work during the Depression. "I got five dollars a week and thought 'geez I gotta do something better than this!'" His granddaughter just finished her first year of law school at Columbia. "She writes to me and tells me the difficulty she has with some courses. The courses I find easy she finds difficult, and vice versa."



From left: John, 83; Thomas, 87; William, 92

"I was thinking the other day how different (the practice of law) was then than it is now," Thomas said. "It seemed then we were more concerned with our clients and not the dollar. We didn't have billable hours. We knew every lawyer in town and the judges."

He'll be 88 years old in July and says he may retire next year. "I think I'd miss most having something to do. I like to keep going and doing things." All three Kelley

brothers have wheat ranches south of Spokane, "so we keep busy that way." ♦

WSBA Annual Business Meeting & More Friday, September 6 - Seattle Hilton

The day begins at 8 a.m. with a CLE seminar produced by the WSBA Public Relations Committee. **Discovery — A Tool, Not a Club** is about the abuse of discovery and is designed to enhance the image of lawyers, improve professionalism and assist attorneys in avoiding malpractice. Credit is pending in the range of 3.75 CLE credits. The seminar runs from 8 a.m.-noon and costs just \$25. Seating is limited. Watch your mailbox for the brochure and registration form or call Jerrie Bennett at (206) 727-8211 for registration information.

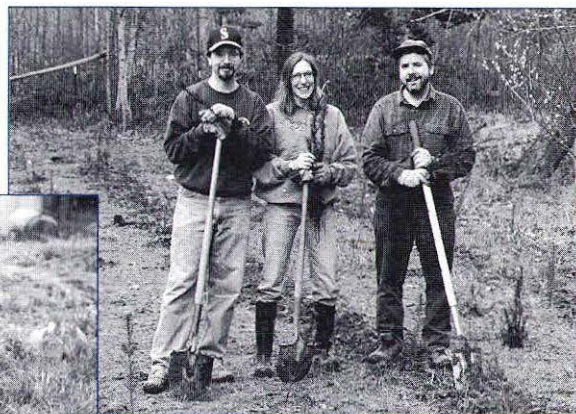
The **1996 WSBA Awards Luncheon** begins at 12:15 p.m. at the Top of the Hilton. The Board of Governors' awards include: The President's Award; Board of Governor's Award for Professionalism; Angelo Petrus Award for Lawyers in Public Service; Outstanding Judge Award; WSBA Pro Bono Award; WSBA Courageous Award; and the Affirmative Action Award. The cost of the luncheon is \$20. For reservations, watch your mailbox for the brochure mentioned above or call Sharlene Steele at (206) 727-8262.

Continued on page 52

Correction:

A story on page 60 in the June issue of *FYI* incorrectly identified award-winner Kimberly Cox as a non-lawyer. Ms. Cox is in fact a lawyer from Belfair and has been a member of WSBA since 1990. The *Bar News* apologizes for the error.

The Bellevue office of Davis Wright Tremaine recently planted trees and helped revitalize the gardens and flower beds at Eastside Mental Health's Avondale House in Redmond. The trees will be part of an income-producing tree farm for the adult residential center for 16 mentally ill adults, all of whom were either homeless or previously resided at the State Hospital. Some of the firm's clients also helped out: Port Blakely Tree Farms donated 640 tree seedlings. Smith Brothers Farms donated organic fertilizer. Super Rent Inc. loaned tractor equipment. Waste Management Sno-King Inc. provided dumpsters, and Barbee Mill Co. Inc. served as horticultural



consultant by designing the gardens and donating plants and seeds. Photo above left, Crissa Cugini, attorney at DWT, plants trees. Photo above right, Warren Koons, partner at DWT, plants trees with Elisabeth Buchman, director of Avondale House, and Mike Mosman, Forestry Office Manager for Port Blakely Tree Farms.

A Family Affair

Anna M. Laurie of Bremerton provided the Kitsap County Bar newsletter with a funny yet touching "career moment" that we're sure others will identify with. (Thanks to Anna for permission to reprint.):

"My grandmother was attempting to sell her home in Bremerton in 1993. Unfortunately, she had broken her hip and was living with one of my aunts in Renton. It seemed only logical that I would step up to the plate and help her sell it as both granddaughter and lawyer. We finally got the sale through and it was not an easy task. The purchasers were VA, which required numerous improvements and repairs be done to the house. The real estate agent and I both busted our chops getting the thing closed before the VA lock expired. I probably had 50 billable hours worth of time into it.

My grandmother, as befit a German immigrant, wanted to pay her debt to me. In a long phone call she promised she was going to send me something to thank me for helping her. I, of course, politely protested, thinking all the while that I needed a new transmission in my car. The sale price on the house had been \$84,000, so my grandmother put a little more

than \$75,000 in her pocket. The real estate agent had received a 7% commission and I was busy calculating zeros and decimal points.

The magical day arrived and I received an envelope in the mail from my grandmother in Renton. Thoughts of sugar plums danced in my head until I opened the envelope and out dropped a crisp new five dollar bill newly minted and fresh as a daisy. My grandmother's thanks were heartfelt and my multitude of cousins never felt like I profited unnecessarily from our poor old granny. She who represents herself or family members has fools for clients and mush for brains." ♦

WSBA Business Meeting — Continued from page 51

The grand finale of the day is the 1996 WSBA Annual Business Meeting which begins at 2 p.m. in the Ballroom. Since no resolutions were filed this year, the meeting will focus on the passing of the gavel from President Edward Shea of Pasco to President-elect Tom Chambers of Seattle.

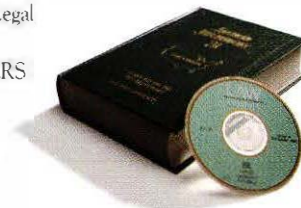
The Seattle Hilton is at Sixth and University in downtown Seattle. ♦

Drop Us A Line
 If you have timely Bar-related news, activities or business, or a funny story that would be of interest to your co-members, call, mail or fax it to us and we will help spread the word in upcoming FYI editions. Call us at (206) 727-8203 or fax us at (206) 727-8320.



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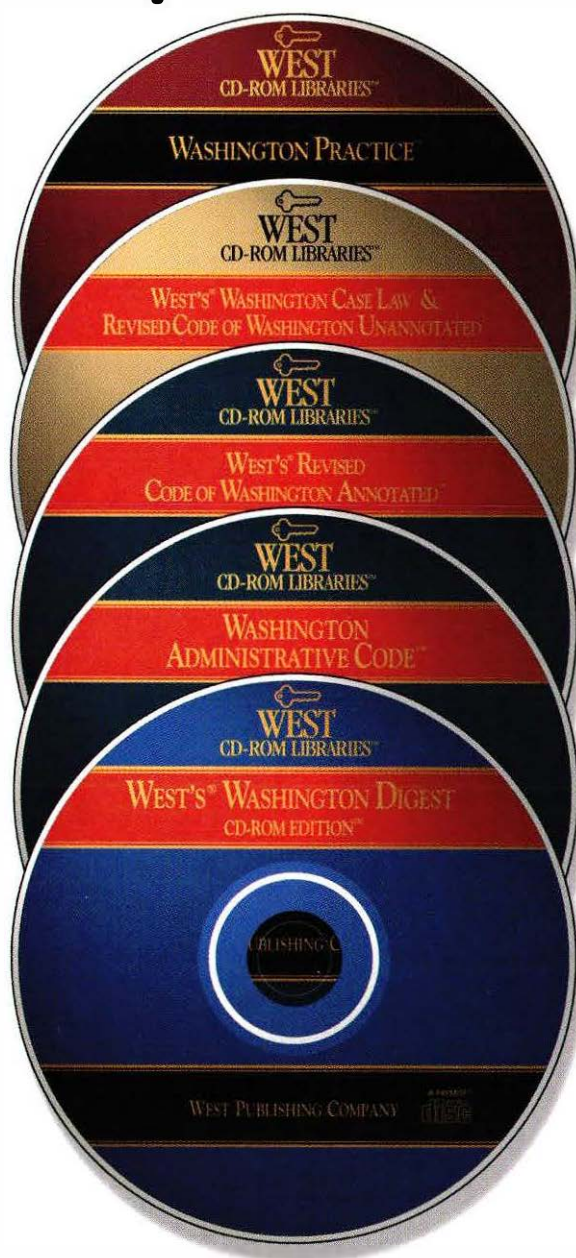


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