State of the Judiciary
Chief Justice Keith M. Callow, Washington Supreme Court
Message to the Washington State Bar Association
September 15, 1989, in Whistler, B.C.

I. The Judicial Conduct Commission and the Survival of the Independence of the Judiciary

The beginning of this year found the Judiciary under siege and its existence as an independent branch of state government threatened. The very real possibility existed that the Legislature, in over-reaction to the outcry that arose from the Gary Little transgressions, would impose restrictions and controls that would place the selection and discipline of judges under legislative dominance. The Legislature considered constitutional and statutory amendments which could have subjected a judge to legislative retribution for an unpopular decision.

We surmise that lawyers believe, as do judges, that we should be answerable to the law and to the electorate, not to legislative bodies. We believe that state judges should be free to decide issues without the apprehension that a legislative committee could seek to punish a judge through a legislatively controlled disciplinary process.

Upon this bleak January 1989 scene strode lawyers of good heart who understood and cared about the separation of powers and the judiciary. The Commission on Washington Courts, composed of lawyers, judges and citizens, with former Washington State Bar Association president Bill Gates as its chairman, after numerous meetings and hearings, concluded, in part, that:

1. Judicial Conduct Commission members should not be subject to Senate confirmation.
2. The Judicial Conduct Commission should remain an independent part of the judiciary and not a state agency.
3. The standard of probable cause should be satisfied before a hearing would be required.

These and other conclusions of the Gates Commission were invaluable tools in persuading the Legislature to accept those positions in the constitutional amendment that will be before the voters in November. The positions set forth in the report of the Commission on Washington Courts not only assisted those of us struggling for level-headed, moderate changes in the Judicial Conduct procedures, but were very beneficial to the Legislature and to Senate Majority Leader Jeannette Hayner and to House Judiciary Chairman Marlin Appelwick. Both of these lawyer-legislators were instrumental in seeing that the changes proposed in the constitutional amendment and the statutory changes made preserve procedural and substantive safeguards for judges. We owe Chairman Gates and each member of the Commission on Washington Courts a real debt of gratitude. We owe many thanks to Senator Hayner and Representative Appelwick for their very effective efforts.

Neither the Board of Judicial Administration nor any level of Washington courts will oppose the adoption of the constitutional amendment. As Jim Danielson, the co-author of the Danielson-Cody Report, that figured prominently in this affair, said to me yesterday, the matter seems long

ago and forgotten.

This is the way it ought to be - except for what we learned.

II. The Novack Commission

The Novack Commission did not just happen; it came about as a result of perceptions in the minds of some members of the public and of the Legislature that, in some instances, lawyers fees were unfair. Then Chief Justice Vernon Pearson appointed the Novack Commission, ably led by Edward Novack, a past president of the Washington State Bar Association, to examine RPC 1.5 dealing with fees and to make recommendations for improvements. The Commission had among its membership Judges Carolyn Dimmick and William Dwyer of the U.S. District Court and retired Washington State Supreme Court Justice William Williams. Serving as advisors were Paul Stritmatter, representing Washington State Trial Lawyers Association, and Ross Burgess, representing the Washington Defense Trial Lawyers Association. Jim Vander Stoep represented the Washington State Bar Association. The Commission's report certainly got the attention of the membership of the Bar. The report recommended (1) written fee agreements accompanied by a "Statement of Lawyer-Client Relationship and Information as to Fees and Cost," (2) that contingent fees should be based upon net recovery, (3) mandatory guidelines for structured settlements, and (4) requiring written agreements in all flat-fee agreements exceeding $1,000. The required "Statement of Relationship" spelled out in detail a number of guidelines for the setting of fees and indicated that, if after the conclusion of the work, the client was not satisfied with the fee, that the client could submit the matter to arbitration.

When the suggested amendments to RPC 1.5 were made known to the Bar, the reaction was vigorous to say the least. Hundreds of letters were written to all concerned and the Board of Governors spent many hours reviewing the Commission Report. President Bracelin wrote to me in April of this year setting forth the Bar's concerns and proposing alternatives. Let me read to you from the last page of that letter:

> Mindful of the need to be constructive in our criticism, we do have some alternative suggestions to be considered by the court. These alternatives include (1) a broad program of education to instruct the public about fee arrangements with attorneys, consistent with Washington State Bar Association budgetary constraints; (2) an emphasis on educating attorneys regarding billing practices; (3) a modification for calculating contingent fees when clients advance the costs of litigation; (4) a modification for calculating contingent fees in structured settlements; and (5) modification of RPC 1.5 to clarify questionable areas.

After much discussion and deliberation the members of the Supreme Court instructed me to respond, which I did in July of this year as follows:

[Quoting, first, from the Novack Commission report itself] "The State Bar General Counsel testified that about ten percent of the complaints brought to the Association each year involve fee disputes ... these complaints tend for the most part to reflect confusion, misunderstanding, or poor communications as to costs, methods of computation, or other details of the transaction."

In the final paragraph I wrote:

We commend both the membership of the Novack Commission and the membership of the Washington State Bar Association for the hard work and effort they have put into studying RPC 1.5. That effort has not been wasted as it has educated all concerned about the need for communication between lawyer and client at all times as to fee arrangements. It is commendable that the Bar Association has noted the need for continuing communication so that misunderstandings will be avoided and that it intends to embark on an educational program so that lawyer fees and arrangements will be clearly understood by all participants.

We took note of Board Member Ron Gould's maxim "If it ain't broke, don't fix it." It wasn't; we didn't.

The time and effort put into this problem must not be passed off lightly. This is not a victory, but hopefully an enlightenment. The problem remains, the threat of outside intervention remains if we do not change perceptions and if we do not amend the rule where changes should be made. I urge the Bar to carry out its proposals to: (1) educate lawyers and clients as to fees and billing practices and (2) submit to the Supreme Court from its appropriate committees proposed amendments to RPC 1.5 to improve the calculating of fees in structured settlements and clarifying questionable areas of RPC 1.5.

We call upon the Washington State Bar Association to shoulder its responsibility. This basic area of possible misunderstanding and conflict between lawyer and client will not go away. It must be addressed by the Bar or others will step in. We know that we can count on the incoming administration to follow through.

III. Judicial Functions - Overload - Backlog

The judge in Wahkiakum County faces a day different from that of the judge in King County. It is the judges in the populated counties of King, Pierce, Snohomish, Spokane and Clark who need help in the performance of their judicial duties. This past year has seen the result of great effort and persistence by Judge Gerry Shellan, as Presiding Judge in King County. By continually keeping the need for more judges in the King County Superior Court before the public through the news media and by exerting pressure on county officials, an accommodation was reached which provides for a phased-in increase in Superior Court judges up to that authorized by the Legislature - and within a reasonable time. The momentum gained by Judge Shellan's efforts is being continued by a committee led by Judge Anne Ellington.

Further, in December, a seminar will be held to which King County legislators, King County officials, and Superior Court judges have been invited. This will give the key players from these three groups the opportunity to hear of the manner in which their counterparts from Maricopa County, Arizona (Phoenix) solved a very similar standoff, and it will also give everyone present a chance to meet one another. We hope this will assist in dissolving any suspicions that the others were horned devils out for headlines and glory with no thought for the public good. We hope this conference helps.

IV. Proposed Statutory Changes

It is said that "Lawyers are 100 percent for reform and 1,000 percent against change." However that may be, you as concerned lawyers must face up to the fact that if the judicial system is to meet the demands upon it, we must be innovative enough to meet the needs of the litigating public. It is not an excuse to the client who cannot get to trial for two to three years to say that a 1950s system cannot serve a 1990s caseload.

This year, subject to the approval of the Board of Judicial Administration and its constituent levels of the courts, we will propose through the Judicial Council legislation, as follows.

1. A statute authorizing the presiding judge in a multi-judge county to appoint pro tern judges without a stipulation of the parties. This would be subject to certain standards for qualification to serve from a list of local-bar- approved lawyers and retired judges. To be placed on such a list the prospective pro tern would need to possess a number of years of experience and not have reached mandatory retirement age. The usual one affidavit to disqualify would apply. Granting flexibility along these lines would go a long way toward assisting the administrative judges in the large population counties to meet the challenge.
2. For the larger population counties, seek a constitutional change which will remove the constitutional limit of three commissioners per county.
3. Seek removal of the 90-day retirement benefit restriction for retired judges who otherwise would serve as pro terns.
4. Propose that the state assume the payment of 100 percent of the salary for both superior and district court judges.
5. Seek to establish an appropriate automatic methodology for establishing and allocating judicial positions for both the superior and district courts. To accomplish such a goal it will be necessary to solve the question of whether the state can, under existing law, mandate the creation of new positions without the approval of the counties. We will also need to face the problem of whether such requests should be presented on a statewide basis or county by county.

We would be astounded to achieve all of those proposals in the coming legislative session. It is a beginning. If one enters the legislative arena, it is well to be girded with the buckler and shield of patience and armed with the sword of perseverance. For decades, we have had fewer trial judges in this state than reasonable judicial standards would prescribe. Were we to have the right number of superior court judges in the state of Washington, we would have 191 rather than 140-plus. It is time that we get on with achieving the best state judiciary that the people want and are willing to support. We hope you, as members of the Bar, will inform yourselves, will embrace the proposed reforms and will support our attempts to improve the administration of justice.

V. The Changing Face of Bench-Bar Relations

A silent revolution is taking place in the composition of the Bench. Because of the capping of the Judicial Pension Plan and the placement of incoming judges into the Public-Employees Retirement System (PERS), new judges will need to serve much longer to receive much less upon retirement. It will be very difficult to attract successful trial lawyers in mid-career to the

judiciary in the future. This can be expected.

Facing up to this fact of life is essential. You can expect that in the future, the judge on the bench will be a governmental-career person. To compensate for the void in experience and the possible lack of empathy with the practicing lawyer, we intend to provide educational programs for trial judges on the realities of law office operation, overhead, costs and time demands. We need the input of the Bar as educators; we need you to be aware of the background of the judges who will be considering your civil cases and your requests for fees. From now on, we hope we can participate in a mutual education society involving bench and bar - both ways.

The business of education works both ways. If judges are to educate themselves on the problems of lawyers, lawyers must be sympathetic to the problems of judges. Two matters have come to my attention in the past months that have disturbed me regarding the relationship of lawyers to judges. If business lawyering is a contact occupation, then the trial of a law suit is a collision occupation. Lawyers waste their time and expectations hoping to be loved; the same holds true for judges. We cannot hope to be loved when the grist of our mill is controversy. However, we can hope and strive for respect.

I mentioned two matters that had disturbed me in recent months. One was the trial of a high-visibility case where defense counsel, in open court, called the trial judge "an incompetent" and said that he was too old to preside. In another situation, a trial judge was accused of misdoing and two lawyers proceeded to investigate the matter, found that there was no misdoing and then failed to inform the trial judge that he had been cleared. As a result, this fine, conscientious judge was permitted to wonder for months if he would be held up to scorn and ridicule in the public press. Finally, when he inquired as to the disposition of the matter, the lawyers told him that they had found nothing and so they took no further action. An insensitive act, to say the least.

If lawyers and judges are to receive respect, they must give respect to one another. If you as lawyers want effective referees in the trial courts, you must treat them with courtesy and respect. If those who administer justice want the public to believe that they are being treated fairly, then they must go before a forum where dignity, respect and courtesy are the medium of exchange between bench and bar. These attributes must be our stock in trade. If you want effective trial court judges, you as members of the Bar, must back them up.

VI. Conclusion

I want to conclude this report on the State of the Judiciary by naming my 1989 Lawyer-Judge-Legal Hall of Fame.

(1) Bill Gates and the Commission on Washington Courts for their hard work and wonderful preservation of constitutional principals.
(2) Jeannette Hayner and Marlin Appelwick for outstanding efforts as lawyer-legislators who stood up for the independence of the judiciary.
(3) Gerry Shellan for patience and perseverance in achieving more trial judges for King County.
(4) Ed Novack and the members of his commission for reminding us that we do not live in a

vacuum, but in a glass house. For reminding us that misunderstandings over fees hurt the entire profession and can be avoided.

(5) Betty Bracelin for leadership of the Washington State Bar Association through a myriad of crises and problems with grace, humor and charm.

BLESS 'EM ALL!