Your Home, Your Castle — You Rule

By Christina Schuck

Your home, no matter how grand or modest, has long been considered a “castle” into which the rain may enter, but not the King of England (or other governmental officials). This maxim became part of Fourth Amendment jurisprudence and, as a result, the right to privacy is greatest in one’s home. Excluding others from your castle has long been considered one of the sticks within the property rights bundle. The list of those to exclude from your castle may contain law enforcement, local inspectors, burglars and trespassers, and, of course, solicitors.

Privacy in your home is most strongly protected against government action within the criminal context. The Fourth Amendment declares, “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause...” Its purpose is “to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials.”

Washington’s constitution protects an individual’s castle in Article 1, section 7. Interpreted as more protective than the Fourth Amendment, it provides: “No person shall be disturbed in his private affairs, or his home invaded, without authority of law.”

In 1921, Washington’s Legislature implemented Article 1, section 7 by making a police officer’s entry into a private dwelling without a search warrant a gross misdemeanor. This law does not apply where an exception to the warrant requirement is recognized (e.g., consentual search, exigent circumstances). Prosecution under this law is rare, with the first documented case in 1993.

The government may also seek entry to your castle to implement its civil authority with an administrative search. Many city codes contain “right of entry” provisions declaring the right to enter your property at any reasonable time for various public welfare-based reasons.

In the past, individuals faced criminal conviction for refusing entry to governmental officials. That changed in 1967 when the Supreme Court ruled that an individual has a “constitutional right to insist that the inspectors obtain a warrant” and may not be convicted for refusing consent.

Those seeking administrative warrants beware: Even if a judge issues an administrative warrant, it does not make it legal or protect the official from a trespass charge or constitutional claim. Furthermore, “right to entry” statutes do not necessarily give officials the right to enter.

In the 1990s, the Washington Supreme Court issued the McCready decisions, arising from warrants issued under a Seattle residential housing inspection program. In McCready I, the court quashed warrants issued by the Superior Court authorizing city inspectors’ entrance into apartment complexes to search for building and housing code violations.

In absence of a statute or court rule, a Superior Court judge is not authorized to issue search warrants on less than probable cause. Statutes simply authorizing a “right of entry” do not suffice.

Recent Case Law Helps Clarify Foreclosure Process

By Melissa Huelsman

Home is most certainly where the heart is, and in America in particular homeownership is an aspiration for most people and something to be preserved, if at all possible. While there isn’t space in this article to go into all of the historical reasons for the emphasis on homeownership in America (it has a lot to do with immigrants who could not own land and a home in their native lands) or the shifts in perspective and lifestyle that are causing millennials to close in Washington (it has more to do with immigrants who could not own land and a home in their native lands) or the shifts in perspective and lifestyle that are causing millennials to close in Washington.

The program is funded by fees paid by those who utilize the nonjudicial foreclosure process and is administered by the Washington Department of Commerce. The latest statistics indicate that the program is largely a success for the people who participate in an FFA mediation, but the number of participants is still lower than the legislation’s drafters had hoped.

The consensus seems to be that many people receiving the notices regarding FFA mediation do not really understand the options available under the program or that it offers a meaningful way to get through the morass of judicial foreclosures — the most common way that real property is foreclosed in Washington. Statistics indicate that approximately 95 percent of all foreclosures are done non- judicially.

In an effort at giving homeowners an opportunity to preserve homeownership in the face of the most recent financial crisis, the Legislature passed the Foreclosure Fairness Act (FFA) in 2011. The statute went into effect on July 22, 2011, and it permits owners of residential real property (owner-occupied) to request participation in a mediation program designed to allow the homeowner an opportunity to avoid foreclosure.

This may come in the form of loan modification, in most instances, which allows the homeowner to retain the home. It may also involve a homeowner entering into a short-sale agreement whereby the property is sold for less than the amount owed on the debt or entry into a deed in lieu of foreclosure. The mediation referral must be made by a HUD-certified housing counselor or an attorney, and while the mediation is open the foreclosure auction may not occur.

Under RCW §§ 61.24.030–031, the referral to mediation cannot be initiated until the issuance of the notice of default. The right to mediation is available to the homeowner until 20 days after the next document issued in the process — the notice of trustee’s sale has been recorded.
Forty years ago my family escaped Vietnam, leaving just three days before the fall of Saigon. Like many families, our dramatic departure depended on luck just as much as it did on planning. Once in the United States, a network of organizations and individuals opened their homes, shared their resources and probably saved our lives.

Some are known to us: the Army officer at the airport gates who chose my family as hundreds pressed for entry and a Lutheran Church who sponsored my Buddhist family out of the refugee camps. Many people helped us whose names I will never know and who will never know the impact of their help.

Of course, my parents’ instinct for survival and creative thinking didn’t hurt either. We lived for a short while in Cedar Rapids, Iowa, when my dad worked for Rockwell Engineering. One winter he drove alone to Texas in our wood-paneled station wagon for a job interview. My dad swerved off an icy road, into a ditch.

He made his way to a phone booth and for a moment did not know whom to call. He simply opened the phone book, found someone (a stranger) with the last name Tran and called. My dad guessed that the person answering the phone would speak Vietnamese and would be willing to help. He was right.

In similar fashion, the attorneys who volunteer for the King County Bar Association’s pro bono programs frequently answer the calls for help. Last year, the KCBA pro bono programs provided more than $7 million in free legal services. Our Neighborhood Legal Clinics serve more than 35 communities and offer subject-specific clinics.

Earlier this year, the Pro Bono Services Committee put out an “all hands on deck” call for attorney volunteers to assist unaccompanied minors and help with other immigration-related programs. More than 250 members from our legal community responded to the call. I served as a volunteer naturalization teacher for 10 years and am especially inspired by the way the KCBA provides training for attorney volunteers, coordinates scheduling and provides interpreters for clients. I often saw my own family reflected in the clients being served at the clinic: teenagers explaining that their parents needed help understanding a form or letter and that the teen’s capacity to help had been maximized.

These experiences drew me into the work of KCBA. Recently a Neighborhood Legal Clinic client (not mine), describing the clinic experience, noted: “Very helpful, there is no way I could afford to seek legal advice otherwise. I got clear information that will help me to avoid further conflict and debt.”

In addition to providing free legal services to individuals, KCBA has been a trailblazer on a number of public policy issues. KCBA voted to support same-sex marriage long before Washington voters passed Referendum 74 in 2012, eliminating Washington’s ban on same-sex marriage.

I recall then-KCBA President Gary Maehara asking me in 2005 whether the Asian Bar Association of Washington would join KCBA in endorsing a resolution to support same-sex marriage. At the time, I was serving as president of the Asian Bar Association of Washington, and a number of organizations debated whether and how LGBT rights would intersect with the discourse on racial and ethnic discrimination.

Likewise, KCBA’s leadership on comprehensive drug policy reform began in 2001, more than a decade before I-502, legalizing personal use of marijuana, was implemented in 2013. Our Public Policy Committee continues to systematically identify public policy issues relevant to our members and the broader society.

KCBA rises to the needs of individuals and our society as a collective. We must continue to lead, to be disruptive risk takers, and to be solution oriented as we respond to inequities. The work of KCBA, the lives that we change, the policies that we influence — all of that work is driven by individuals, and sometimes by one individual. Leaders — even unintentional leaders — see what our world should look like despite what it may currently look like.

I think back to the moment that my family fled Vietnam. The Army officer who could have looked the other way and pretended not to recognize my family. He did not ignore our plight. During the same month that I left Saigon, Bill Gates saw a picture of a computer in a magazine that inspired him to design a new computer program. He did not wait for someone else to do it and Microsoft was born. I now have the privilege to work in-house for Microsoft.

These actions and circumstances clearly influenced where I am and who I am. The KCBA Neighborhood Legal Clinics were founded just a year before I left Saigon. The program’s founders were rightly focused on helping clients. In the process, they also created many opportunities for volunteer attorneys to be fulfilled in the practice of law.

Not only do the clinics assist families like the one I was raised in, but with the legal clinics introduced me to the great work of KCBA. I look forward to working with you as we do right by those members whose vision makes our work possible.

Kim Tran is the president of the King County Bar Association. She is in-house counsel with Microsoft’s Global Employment Law Group. She can be reached at 425-705-7609 or kimtran@microsoft.com.
Homework for KCBA:

New Workplan Begins for 2015–2016

At the start of each membership year (July 1 through June 30), KCBA takes time to plan for the coming period by developing an annual workplan. This month I would like to preview that plan for you.

First, in the member services area, we expect to develop additional social events and new/prospective member orientations after a successful pilot event this past May. We will also be reviewing the results of a recently available installment dues payment plan to assess if that option is helping retain members versus adding too much administrative work for the bar to justify the benefit.

Next, with recent dramatic changes made by the Supreme Court to continuing legal education requirements, KCBA’s CLE committee and staff will likely be expanding the scope of our offerings to include non-traditional programming such as practice management.

In the pro bono services area, we plan to survey our volunteers to learn areas of our training and support that might need improvements. We will also be carefully analyzing a recently released update to the State’s Civil Legal Needs Study to identify gaps in our program coverage. And I’m pleased to announce that with new funding from the Legal Foundation of Washington, KCBA will be expanding its third-party custody, family law program to assist with unaccompanied minor immigrant children who are eligible for special immigrant status in the United States.

Another important focus this year will be in publications and communications. As previously reported in the Bar Bulletin, KCBA has the results of a communications audit recommending that we redesign our website and allocate additional resources to social media such as LinkedIn. KCBA will begin work on both fronts this summer. In addition, we will be soliciting additional advertisers for the Bar Bulletin and will be exploring ways to improve the production process for our Washington Lawyers Practice Manual.

Complementing the communications work, over the next 12 months KCBA will begin efforts to improve our membership database, which has not seen an update in more than 10 years (a lifetime in terms of rapidly improving technology!). We will evaluate new automated, web-based, lawyer referral technology as well. In both areas we will benefit from similar efforts already undertaken by sister metropolitan bar associations across the country.

The public affairs work by the bar is often the most visible of our activities. This coming year we will be conducting the quadrennial judicial officer survey (bar poll) about Superior Court judges, for release by early 2016 (ahead of the election season). Our Public Policy Committee will be actively investigating three new areas of interest, including administrative law judge independence, voting rights challenges, and the impact of legal financial obligations on indigent residents of our community. Further study and policy recommendations on our state’s referendum and initiative process also are continuing. (Please contact me to get involved in any of these four efforts; we’re always looking for volunteers!)

Our diversity programs also will be strongly promoted, including the annual MLK Luncheon. We will look carefully at the bar’s diversity “pipeline” efforts to ensure we remain vigilant in promoting diversity early in attorneys’ careers.

Through our Leadership Development & Nominations Committee, we will expand KCBA’s work to evaluate and improve our governance systems, with special attention to the support we provide to our committees and their relationship with the Board of Trustees. In particular, KCBA will seek to find the best balance in the work of its Board so it becomes neither a rubber-stamp approval entity for committees nor a place where every decision taken by a committee is reargued.

Our sister organization, the King County Bar Foundation, will begin to launch efforts identified in a newly adopted fundraising strategic plan, including messaging work and reformatting our planned giving initiatives. We’ll also be looking at building on the success of the March 2015 Breakfast With Champions event to inspire even more members of the bar to make financial contributions to our pro bono and diversity projects.

Finally, an analysis of our Giving Circles program will be undertaken to ensure it is meeting its purpose (i.e., to secure multi-year pledge commitments from supporters for general operating funds for pro bono and diversity).

Lastly, but critically important, will be a renewed focus on the human resources of the bar: our dedicated staff members. The Board of Trustees has approved a modest amount of our new fiscal year budget to be set aside for salary increases, which I hope will allow me to better recognize this important asset of the bar. Beyond raises, and in the face of a very favorable job market in King County (under 4% unemployment), KCBA must maintain a pleasant work environment where our employees are valued, inspired and appreciated in all that they do on the membership’s behalf.

In that last area, I’d appreciate the help of KCBA members. If you come across a KCBA staff person providing good member service, being noticeably helpful or assisting you to resolve a challenge, would you be sure to express your thanks to them — and shoot me a quick note so I can thank them, too.

As you may sense from the work-plan I’ve just reviewed, we have a lot of homework ahead of us this year. I’m confident we’ll get it all done and still have time to have some relaxation and recreation time before dinner each night.

Andrew Prazuch is KCBA’s executive director. He can be reached by email (andrewp@kcba.org) or phone (206-267-7061).

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SLAPP motion was "frivolous" or "solely for the purpose of harassing or intimidating a person acting in the interest of public communication to a governmental entity regarding "any matter reasonably connected to that agency or organization." It contains no method for early dismissal.

In 2010, the Legislature enacted RCW § 4.24.525, which significantly expanded the reach of an anti-SLAPP motion, imposing a mandatory stay of discovery, and defined a procedure for early dismissal of a claim.

Under the new statute, the party filing a special motion to strike bears the initial burden of establishing by a preponderance of the evidence that the lawsuit constitutes an "action involving public participation and petition." This can be done by meeting one of several standards, including a "catch-all" provision relating to "any other lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public concern, or in furtherance of the exercise of the constitutional right of petition." If the moving party meets its burden, "the burden shifts to the responding party to establish by clear and convincing evidence a probability of prevailing on the claim." If the responding party does so, the trial court must deny the anti-SLAPP motion.

A moving party who prevails on an anti-SLAPP motion is entitled to an award of reasonable attorneys' fees and a $10,000 penalty. Whether this means an award of $10,000 to each moving party or to the moving party collectively was a question left unanswered by the Supreme Court in Davis v. Co-op.

The Anti-SLAPP Act requires that special motions to strike be filed within 60 days of service of the complaint, and that the Anti-SLAPP Act by establishing that the Board's decision to enact the boycott of Israel was a "lawful action involving public participation and petition." Under RCW § 4.24.525(4)(b), those provisions do not define a dismissal mechanism. At the same time, if they are found to be irreconcilable with the rules governing frivolous claims — such as whether the plaintiffs' "probability of prevailing on the claim." Summary judgment, by comparison, "does not concern degrees of likelihood or probability." CR 56 and § (4)(b) of the Anti-SLAPP Act therefore "involve fundamentally different inquiries.

Although the right to a jury trial does not preclude a court from disposing of claims summarily — e.g., under CR 56 and the various rules governing frivolous claims — §§ 4.24.525(4)(b) "requires the trial judge to make a factual determination of plaintiffs' probability of prevailing on the claim." This, the Court said, "is no frivolousness standard."

The immediate impact of Davis is that parties may no longer move to strike claims under RCW § 4.24.525 and thus cannot recover attorneys' fees, costs and penalties under the statute. Additionally, Davis raises a host of questions that Washington courts are likely to confront in the coming months. These include:

How will the decision impact other anti-SLAPP cases currently before the Supreme Court?

Three anti-SLAPP cases remain pending before the Supreme Court: Dillon v. Seattle Deposition Reporters; Atrie v. Grant; and Alaska Structures v. Haldan. The Court's resolution of those cases will of course comport with the decision in Davis. In Dillon, the Court can nonetheless reinstate the trial court's granting of summary judgment, though not dismissal or an award of fees and penalties under the Anti-SLAPP Act.

In Atrie, the plaintiff failed to appeal the dismissal of his complaint under CR 12(b)(6). Thus, the Court will likely affirm the trial court's decision to award the defendants under the Act. In Haldan, the Court of Appeals reversed the trial court's dismissal of the case under the Act. Thus the Supreme Court will likely affirm.

Whether the Court's decision in Davis applies retroactively is an important question that Washington courts are likely to confront in short order. Since the Supreme Court applied its holding to the parties before it, Davis likely applies retroactively to pending litigation. On the other hand, the Supreme Court has in certain instances denied retroactive enforcement of decisions invalidating other statutes.

What effect does Davis have on claims dismissed under the Anti-SLAPP Act that are no longer pending? Under one theory, the Court of last resort declares a statute unconstitutional for deprivation of a constitutional right, then any judgment based on the statute must likewise be unconstitutional.

Courts most commonly reject such an absolute approach, however, and instead favor the principle that final decisions are not subject to retroactive correction. Washington courts will likely follow this major rule and decline to reopen final judgments previously entered under RCW § 4.24.525. Are RCW §§ 4.24.500–520 affected by the decision?

As noted, Washington's original anti-SLAPP statutes, RCW §§ 4.24.500–520, were not at issue in Davis. Unlike RCW § 4.24.525(4)(b), those provisions do not define a dismissal mechanism. At the same time, if they are found to be irreconcilable with the rules governing frivolous claims, they may be subject to constitutional scrutiny under Davis.

Moreover, questions left unanswered by Davis — such as whether the $10,000 penalty offends a non-moving party's right to petition — may be raised in downstream challenges to RCW §§ 4.24.500–520.

How will the Legislature respond to Davis?

The process to introduce new anti-SLAPP legislation is already under way. As of this writing, the Code Reviser's Office already has generated a draft bill — in this instance, a "redline" of RCW § 4.24.525 — aimed at accounting for the Supreme Court's holding in Davis. On June 17, the Senate Law and Justice Committee held a hearing on the draft bill, where, among others, two of the plaintiffs in Davis were present to testify. A Senate Bill Report summarizes the background of the Washington Anti-SLAPP Act and the decision in Davis v. Co-op.
Generate Business with a Homepage That Wows

By Dustin Reichard

Your homepage is undoubtedly the mother of all pages on your firm’s website. It makes the first impression upon visitors. It represents your firm’s virtual front office. Put simply, it has the power to transform website visitors into potential clients that will generate more business for your practice.

Despite this importance, many legal website homepages fail to generate leads. Don’t let a critical component of your virtual office scare away business. Organize it with great copy to capture attention. The following examines six critical steps to help boost your firm’s business with a homepage that wows.

Tell Visitors What You Do

People visiting your website are probably not doing so because they’re bored on their lunch breaks. They are doing so because they are looking for an attorney to help solve a problem or answer a question, or to gain legal advice. Make their mission easier by clearly stating what your firm does. This includes your areas of practice, specialties and geographic reach.

In communicating what you do, ensure that your most important web copy is in the top 30 percent of your homepage. In the web world, this zone is typically referred to as “the top of the fold.” This is where at least 80 percent of what visitors read first is located; so, make certain this zone tells visitors 100 percent of what you do.

One method is to use effective headlines. Clearly state what your areas of service are, what a client will achieve from working with your firm and what your firm can do for a client. If your homepage cannot quickly supply and communicate this information, then odds are that a visitor will get confused and leave your site … maybe forever.

Tell Visitors Why They Should Choose You

Let’s face it, you’re not the only attorney in Washington. Thus, outstanding web copy not only states what you do, but it effectively communicates why people should choose your firm.

What makes you better than the other attorneys in your practice area? Have you won awards? Have you successfully represented more than “X” clients at trial? These are great questions to ask yourself when thinking about why people should choose you for their legal needs.

This message is so important to convey that potential clients do not want a poor lawyer. They want a good lawyer, and they rightfully want evidence of what makes you good. They want to see factors that make you credible and trustworthy.

An effective way of communicating this is via past clients. If possible, include one or two quotes from former clients that help you stand out. Including a name or photo of the client will also make the testimonials more genuine.

Simplicity Is Key

Many attorneys believe the more information they convey on a homepage the better. This is far from the truth. Keep matters simple. Visitors typically skim rather than read web copy. Get to the point and do it quickly without sacrificing page view.

While on the topic of simplicity, help matters out by keeping copy clear and concise. A homepage is not a research paper. It’s far from an in-depth briefing read by a judge or opposing counsel.

Avoid legalese. Use simple words, clear language and easy-to-understand sentence structure. The key is to welcome and excite your virtual office guests, not confuse them. You can’t offer content to those visiting your homepage, so keep your visitors awake with clear and concise language.

Maintain a Consistent Voice

Take into account all of the components that comprise your firm. This may include other attorneys, staff members, Facebook pages, LinkedIn profiles, etc. Try to ensure that the voice and tone used in your homepage matches these other components.

The voice you use in your homepage will also make the testimonials sound genuine. The testimonials must spring forth as one united and consistent voice.

Edit, Edit and, Yes, Edit Some More

Building a phenomenal homepage is quite similar to drafting an outstanding legal document. Both require superior editing. Much like the vast range of legal documents, every word within a homepage needs to be read for accuracy and clarity. Every word needs to clearly guide your visitors. The words must not confuse. Rather, the copy must spring forth as one united and consistent voice to action for a visitor to become a client.

To aid in the editing process, please do not overlook Google Analytics. This tool will inform you as to the “Average Time On Site,” i.e., the average time a visitor is actually viewing your homepage/website. If the time is drastically low, odds are you need to spend some quality editing and design time to help fuel added attention.

In this day and age, your website homepage is a powerful tool for generating more business for your firm. However, the power lies within how well it is used and how well its copy is written. If you try to use it to do everything, it will likely do nothing.

Again, your homepage is your firm’s virtual front office. As such, it should welcome visitors. It should help calm visitors, and it should help gain the visitor’s trust and confidence. Simply follow the six steps above to help your firm get a website homepage that wows and generates more business for your practice.

Guide Your Visitors

Think back for a moment to your legal writing days in law school. The majority of us were probably instructed that a key to legal writing is to provide our audience with a roadmap — something telling your audience where you want to take them and what you want to tell them. Sound familiar?

Well, believe it or not, this particular motif helps brilliantly in designing a homepage. This is not necessarily because you want to tell a visitor where your site will take them, but because you want to show a visitor where your site will take them. Put more simply, a great homepage will include an understandable and easy-to-use navigation system that will guide visitors to other pages within your website.

If you need a quick practical tip in this area, keep navigational menus in the upper left to middle of your homepage. This is because visitors read web pages in an “F” pattern, starting with the upper left-hand corner of a page. Make sure to place important (and noticeable) menus where they are easy for visitors to find within the upper or middle portion of the “F” pattern.

AVTI LIPTAN, a partner at McNaul Ebel Nawrot & Helgren, and Curtis Isacke, an associate at McNaul Ebel, represent the plaintiffs/defendants in Davis v. Cox with lead attorney Bob Sulkin.

ANTI-SLAPP LAW

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the draft bill in part as follows: The moving party bringing a special motion to strike has the initial burden of showing by a preponderance of the evidence that the claim is based on an action involving public participation and petition. If the moving party meets this burden, the court must render judgment for the moving party if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.

This initial effort appears to reflect the Court’s observation in Davis v. that “if our legislature desires to create a summary judgment standard for an anti-SLAPP motion, the relevant language in CR 56(c) describes that standard.”

Indeed, the drafters have apparently concluded that substituting a summary judgment procedure is the “step” that RCW § 4.24.525 sufficiently accommodates Davis.

This proposed fix avoids, however, the Court’s holding that “the only instance” in which “petitioning activity may be constitutionally punished is when a person initiates a claim based on information, whether defined as lacking a ‘reasonable basis’ … or as sham litigation.”

It also does not address other challenges raised, but not resolved, in Davis, including: (1) whether the $10,000 penalty is constitutional and, if so, whether such a penalty should be awarded to each prevailing party or instead to the prevailing parties collectively (an issue also presented in Akrue, which the Supreme Court has not yet decided); and (2) whether the discovery stay, which the new draft proposal leaves intact, is constitutional. If the Legislature does not adequately account for these issues, any new anti-SLAPP statute it enacts may confront challenges like those asserted in Davis.

Avi Lipman, a partner at McNaul Ebel Nawrot & Helgren, and Curtis Isacke, an associate at McNaul Ebel, represent the plaintiffs/defendants in Davis v. Cox with lead attorney Bob Sulkin.

1 RCW § 4.24.525(2)(b).
2 RCW § 4.24.525(4)(a).
3 See RCW § 4.24.525(4)(b).
4 RCW § 4.24.525(5)(c).
5 RCW § 4.24.525(3).
6 RCW § 4.24.525(4).
Profile / Kim Tran

Committed to Diversity, Dedicated to Diligence

By Mike Bolasina

Although she does not recall the incident, Kim has been told that as a 10-month-old, she almost altered the fate of her entire family.

Kim was born in Vietnam toward the end of America’s involvement in the war. Kim’s father fought for the South Vietnamese; after he was wounded in battle, he worked in Saigon for the U.S. military, placing him and his family in harm’s way if the North Vietnamese were to prevail.

As Saigon fell to the North Vietnamese, Kim’s mother took Kim and her older brother to the airport to find her father and board a military transport airplane to safety. Kim’s mother was sent home because Kim was crying. When they returned to the airport with a pacified Kim, they were stranded behind a locked gate with throngs of South Vietnamese seeking to be let through.

At the very last minute, an Army officer at the gate recognized Kim’s mother and let her through, reuniting the family for an escape from Saigon and an eventual journey to the United States.

If it reminds you of the ending of “Argo,” it is probably because Ben Affleck heard Kim’s story and stole it (it is, after all, more exciting than the actual events at the end of the movie). If it were not for the officer recognizing Kim’s mother, it is likely that Kim still would have served on the board of a Vietnamese bar association, but not the one located in King County.

After living the American Dream at a refugee camp in Arkansas, and then small towns in Minnesota and Iowa, the Trans relocated to Salem, Oregon, arriving just in time for the eruption of Mount St. Helens. It was in Salem that Kim attended elementary and high school, and it was in high school where she developed an interest in law.

Kim participated in a mock trial competition and her team went to nationals two years in a row. Her mock trial coach, Paul J. De Muniz — the first lawyer she ever met and her inspiration to become a lawyer — is now retired after serving as chief justice on the Oregon Supreme Court (and the first Hispanic American to be elected to statewide office).

Participation in these high school programs can and does change lives.

Kim also developed an interest in juggling, not with balls, but with commitments to school government, athletics (as the shortest volleyball player to make the all-league team), academics and family. She had not yet developed an interest in diversity, as the Trans were essentially the only diverse family in the community at the time.

Kim attended Tufts as an undergraduate, in part because she was interested in a great liberal arts school, and in part because she wanted to experience life outside Salem. Curiously, she did not consider a return to Arkansas, Iowa or Minnesota.

It was in college that she first identified as an Asian American and developed an interest in diversity. She became president of the Asian Community at Tufts. She returned to Asia for the first time since infancy on a study abroad program to Thailand. With $21 in her pocket, she visited Vietnam and met her grandparents and other relatives who had not seen anyone in her immediate family since they had fled.

I met Kim in 1997, recruiting for the dearly departed Stafford Frey Cooper at the Northwest Minority Job Fair. Every hiring attorney has successes and failures, and I sensed a huge success as early as the screening interview. My instincts were correct.

At Stafford Frey, Kim developed an employment law practice representing both plaintiffs and defendants, and was made partner in 2007 — one of the first Vietnamese American women in Seattle to make partner. She also perfected the

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She became hiring attorney as a senior associate, and transformed Stafford to one of the most diverse firms in Seattle in terms of gender, race and national origin. One of her proudest accomplishments at Stafford Frey was representing a plaintiff in a successful race discrimination lawsuit. Another was representing Northwest Center, a Seattle nonprofit that is devoted to improving the lives of people with disabilities.

Kim met fellow KCBA board member Mike Heath in 2005 and together they organized the first Statewide Diversity Conference, the purpose of which was to spotlight what diversity in law means, raise cultural competency in the legal profession, and facilitate camaraderie among diverse attorneys. What started as an idea between two colleagues continues today; Kim has been involved in organizing six more diversity conferences.

While studying for the bar exam, Kim became involved in three important organizations: the Asian Bar Association of Washington, the Asian Counseling & Referral Service (ACRS) and KCBA. She has devoted many years of simultaneous service to each, rising to the level of board president in each organization. While she served as president of ACRS, the agency completed a $19.1-million capital campaign to build its new home in Rainier Valley. Kim also served as a pro tem judge in District Court in Seattle.

One of Kim’s most meaningful activities during this time was volunteering as a naturalization teacher to immigrants who were applying for U.S. citizenship and needed to pass a difficult civics exam. In her 10 years of service, she had a 100% success rate. Kim considers this experience to have been a privilege and one of the most rewarding experiences in her life.

In 2010 and joined Microsoft in 2012. She is one of Microsoft’s employment law attorneys in its Global Employment Law Group, advising Microsoft’s managers in its operations in Africa, the Middle East and India. Kim notes that her mother supported her family after they relocated to Oregon in the early 1980s by learning and using the BASIC programming language developed by Bill Gates.

Kim and her husband Angelo Locsin live in south Seattle. Angelo, born in the Philippines, came to the United States the same year that Kim’s family arrived. With three small and very active boys (all under the age of 6 and including twins), one might expect that Kim would reduce the number of balls she is keeping in the air, but she hasn’t. Kim has remained committed to her career, her profession and her volunteer/pro bono work while serving as a judge, mediator, nurse, teacher, entertainer and all the other roles a parent holds. I have often asked Kim, in the voice of Robin Leach (remember him?), “How do you do it?” I have never received a satisfactory answer, because the only answer I will accept is “no sleep.”

She is very much looking forward to her upcoming service to KCBA as its new president and the first woman of color to hold this title. To Kim, this is a unique opportunity to serve the profession she loves with a focus on pro bono work and a commitment to diversity in the profession that she has made her life’s work. Just do not ask her to spell.

Mike Bolasina is a partner with Summit Law Group in Seattle.
Effective Preparation for Family Law Mediations

By Kim Schnuelle

Mediation strategy should begin significantly prior to setting a mediation date. The prudent practitioner should evaluate a case at the beginning and continuously throughout the litigation to fully understand the strengths and weaknesses of their client’s positions. In the event a client has potentially embarrassing facts that might not play well in open court, or which are best to leave out of a public record, it may be advisable to attempt mediation for temporary orders rather than file a motion for the same in court.

For example, if a client has significant sex or drug addiction issues, it may deleteriously affect his or her job were such facts placed in a public court record. By mediating temporary orders, an attorney may be able to avoid declarations outlining your client’s issues from being placed within public access. If the opposing party depends upon your client for financial support, he or she may share the goal of preserving your client’s employment and may be agreeable to mediating these matters in service of their own financial security.

As a given case progresses, prudent counsel will know what is needed for trial and will obtain this documentation well in advance of mediation. If an appraisal is needed for the husband’s business, an expert will be called in to perform the same. If information about a third-party caregiver is strategically needed in developing a parenting plan, their deposition may be taken.

If the opposing party’s discovery responses contain three months of missing bank records, they will either have subsequently provided these records or they will have been subpoenaed. The wise attorney will have completed all of this work well prior to drafting the mediation materials themselves so that a full and accurate picture of the situation is present before determining your client’s mediation proposal.

Once discovery has been sufficiently completed and any parent evaluation or GAL report has been submitted, the case is likely ready for formal mediation. Due to trial schedule deadlines, it is often prudent to set the mediation date a month or two in advance so as to have a date to “work toward.”

In addition, the best local mediators are often booked well out and may not be available for mediation at all until several weeks in the future. If possible, it is helpful to set the mediation prior to the start of any trial-related case schedule deadlines so as not to have your client incur such preparation costs if the case settles at mediation.

The well-versed family law attorney knows the mediators in his or her area and knows the strengths and weaknesses of each one. A more aggressive mediator may be appropriate for a client who needs direction from several sources, while such a mediator may be a poor choice for a client who either will feel bullied or will refuse to budge in response to feeling such pressure.

It is important to take into consideration (to the extent you have knowledge) the personality type and psychology of the opposing party as well. This author had an experience several years ago where a more aggressive mediator reduced the opposing party into tears, causing her to flee the mediation and thus send the case to trial. If the opposing side suggests a mediator you have not worked with before, do your homework and ask colleagues about him or her before agreeing to use them in your case.

Once you have set your firm mediation date, it is time to both prepare your submitted materials and your client. King County Local Rule 16 lists the minimum required mediation documents:

1. proposed final orders;
2. a financial declaration;
3. a proposed final parenting plan if parenting is at issue;
4. an asset and debt spreadsheet or the equivalent if division of debts and property is at issue; and
5. any other materials requested by the mediator.

If child support or maintenance is at issue, it is wise to submit proposed orders and financial documentation to support your proposals. If you have hired an expert to perform stock or business valuations, his or her report should be provided as an exhibit to the mediation materials as well.

If there is an allegation that the other side is an alcoholic, submitting credit card statements showing and highlighting daily bar purchases may assist in underscoring your client’s position and concerns. While it is important not to bury your mediator with materials, it is also important to provide not only a clear and concise argument for your client’s position but also sufficient independent documentation supporting that position.

It is also important to prepare your client for the mediation process. In a case with children and contested parenting issues, the mediation will likely last all day. In such cases, advise your client to take the entire day off work.

FAMILY LAW MEDIATION

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YOUR CASTLE
continued from page 1

Rather, the statute must specifically authorize issuance of the warrant for the purpose identified in the warrant application.13

McCready II examined whether administrative search warrants issued by a municipal court based upon probable cause were issued under the “authority of law” required by Article I, section 7. The Supreme Court also invalidated these warrants, ruling the municipal court only has the authority to issue administrative search warrants if the application alleges a violation that constitutes a crime, not simply a civil infraction.16 Several years later, in Bostedt v. City of Renton, the Court held that a search conducted pursuant to a void warrant violates the Fourth Amendment.17

Christina Schuck currently practices municipal law. She has previously worked for a federal judge, the U.S. Attorney’s Office and in white-collar criminal defense.

1 William Pitt, Speech on the Excise Bill (1776) (quoted in Miller v. United States, 357 U.S. 301, 307 (1958)).


5 RCW 10.79.040.


7 7.


10 See Mielke v. Yellowstone Pipeline Co. 75 Wn. App. 621, 624, 870 P.2d 1005, rev. denied, 124 Wn.2d 1030, 895 P.2d 326 (1995) (citing Restatement (Second) of Torts §§ 158, 165, 166 (1965) (a governmental actor present at a search pursuant to a void warrant violates the Fourth Amendment)).


14 City of Seattle v. McCready, 123 Wn.2d 260 (McCready II).

15 Id. at 278-79.

16 McCready II at 510.

17 155 Wn.2d 163.

18 83 Wn.2d 160, 509 P.2d 525 (1973) (McCready v. County of King, 123 Wn.2d 260, 915 P.2d 156 (1997)).

19 See Restatement (Second) of Torts § 330, cmts. b, c, e, f.

By Katherine Hedland Hansen

The first statewide analysis of laws criminalizing homelessness finds those laws are expensive, ineffective and disproportionately impact already marginalized individuals. Those are among the key findings of a series of in-depth policy briefs released in May by the Homeless Rights Advocacy Project at Seattle University School of Law that examine the scope and extent of the problem of criminalization in Washington.

These briefs are the most extensive of their kind in the nation. Among the findings:

- Washington cities are increasingly criminalizing homelessness. Since 2000, communities have enacted laws that create more than 288 new ways to punish visibly poor people for surviving in public space.
- Millions of dollars could be saved if cities would redirect funds used for enforcement of these laws toward affordable housing.
- Homelessness and poverty disproportionately impact people of color, women, LGBTQ youth, individuals with mental illness, and veterans.
- The greater the income gap between the rich and the poor, the higher the rates of enforcement of these laws.
- Modern anti-homeless ordinances share the same form, phrasing and function as historical discrimination laws, such as Jim Crow.

“FAMILY LAW MEDIATION continued from page 8

and obtain childcare for the evening if needed.

Even if mediation is set from “9 to 5,” it is common for the process to “go late” and your client should be prepared for this possibility. This author also advises her client to dress very comfortably and in layers, and to bring snack food and a magazine or book for periods when the mediator is with the other party.

It is important to have a good sense as to your client’s priorities prior to mediation. Is Christmas Day of utmost importance to a client or barely celebrated? — SU Law Professor Sara Rankin

“Thanksgiving, but determined to have

For the first time, we have a complete picture of the most effective and least costly strategies to help people experiencing homelessness. These reports will leave an indelible mark on constitutional, civil and human rights discourse about how society and the law can either contribute to the problems of poverty and homelessness, or how society and the law can reverse course and contribute to more meaningful and just outcomes for all people, regardless of their housing or economic status,” said Michael Stoops, director of community organizing at the National Coalition for the Homeless.

“These carefully researched reports present the most complete picture of the criminalization of homelessness in any state in the country,” said Professor Jeff Selbin, a poverty law expert at U.C. Berkeley School of Law. “They demonstrate how municipal laws target the visibly poor in Washington are increasingly unjust, inhuman and costly. State lawmakers in Washington and elsewhere should take action to end these shameful practices.”

And Trista Bauman, senior attorney at the National Law Center on Homelessness and Poverty, said, “As more communities across the nation criminalize the life-sustaining activities of homeless people, comprehensive research on the impact of these ineffective, expensive and often illegal policies is critical to combating them,” she said.

“These reports represent a model that should be replicated across the country by advocates working to end the criminalization of homelessness.”

Learn more about the Homeless Rights Advocacy Project and review the briefs at www.law.seattleu.edu/hrap.

1. KCLFLR 16. Alternative dispute resolution is not required in cases involving domestic violence, child support only modifications and where waived by court order. KCLFLR 16(a).
2. RCW § 26.09.010.
3. RCW § 26.09.015(3).
4. KCLFLR 16(a).
5. KCLFLR 16(b).
6. RCW 26.09.015(3).
7. Taking a line from one of our very experienced local mediators, this author often refers to CR2A as “no buyer’s remorse” document.
8. KCLFLR 16(c).

‘As long as we pretend that homelessness is a problem that should be addressed through the criminal justice system, we are not really addressing the root problems of homelessness and poverty.”
—SU Law Professor Sara Rankin

The common thread is prejudice,” said Professor Sara Rankin, faculty director of the Homeless Rights Advocacy Project. “One of the underlying premises of our research is that visible poverty makes people uncomfortable. Regrettably, we often use the law to purge visibly poor people from public space. As long as we pretend that homelessness is a problem that should be addressed through the criminal justice system, we are not really addressing the root problems of homelessness and poverty.

Prof. Rankin’s students spent months collecting data, researching and writing their briefs. They presented their works-in-progress and incorporated feedback from experts, including prosecutors, defense attorneys, police, service providers and people currently experiencing homelessness.

Researchers analyzed data from 72 cities and completed in-depth case studies of seven cities: Seattle, Burien, Bellingham, Spokane, Auburn, Pasco and Vancouver. They also looked at other states that have adopted the “Housing First” movement that prioritizes providing shelter over enforcement. “At what cost are we criminalizing homelessness?” asked one student co-author, Joshua Howard. “Criminalization is expensive and ineffective, and non-punitive options are proven to save money.”

One brief estimates the City of Seattle will spend a minimum of $2.5 million in the next five years enforcing just 16 percent of the city’s criminalization ordinances. Spokane will spend a minimum of 1.3 million enforcing 75 percent of the city’s criminalization ordinances. Investing this same money over five years on affordable housing could house approximately 55 people experiencing homelessness per year, saving taxpayers over $2 million annually and more than $11 million total over the five years, according to the briefs.

“This research humanizes the problems and shows the ways in which the institutional response to homelessness has failed,” said Scott MacDonald, one of the student co-authors.

National experts praised the research. These reports will leave an indelible mark on constitutional, civil and human rights discourse about how society and the law can either contribute to the problems of poverty and homelessness, or how society and the law can reverse course and contribute to more meaningful and just outcomes for all people, regardless of their housing or economic status,” said Michael Stoops, director of community organizing at the National Coalition for the Homeless.

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of communicating with mortgage loan servicers.

In the last few years, we have seen a significant number of cases interpreting the parameters and requirements of the Washington Deed of Trust Act (DTA)—the nonjudicial foreclosure statute.1 This makes sense given the significant rise in nonjudicial foreclosures following the financial crisis in 2008, and many of the issues relating to the explosion in the sale of mortgage loans played out in the context of foreclosures.

One of the first significant cases decided recently by the Washington Supreme Court was Bain v. Metropolit an Mtge. Group., Inc.,2 which answered certified questions including the meaning of “beneficiary” contained in the DTA. The case also explained that a borrower may bring claims based upon violations of the requirements of the DTA, including the Consumer Protection Act.

Also in 2013, the Supreme Court decided Klem v. Washington Mut. Bank,3 which confirmed that the foreclosing institution that contended it was the borrower and the lender, and that the trustee must act independent of the direction of the lender to maintain that duty to both parties. The trustee in Klem deferred completely to the lender’s duty and refused to consider that the nonjudicial foreclosure sale for two weeks in order to allow the sale of the real property, which would have resulted in approximately $150,000 in equity.4

In Bain v. Premier Mtge. Servs. of Wash., Inc.,5 and Schroeder v. Encel sor Mtg. Group, LLC,6 which are the most recent cases dealing with the issues relating to waiver of the right to pursue claims following a nonjudicial foreclosure, clarified the standards that had been set out 10 years earlier in Plein v. Lackey,5 relating to waiver. In Albice v. Schroeder, the Supreme Court confirmed the concept that strict compliance with the foundational requirements of the DTA is required; otherwise, the nonjudicial foreclosure sale is invalid.

In Albice, the auction took place more than 120 days after the originally noted sale, which is the limitations period for continuances permitted under the DTA. Therefore, the foreclosure was invalid, irrespective of the fact that the property had been sold to a third-party buyer.

In Schroeder, the Court affirmed that if there is any question as to whether the property in question is agricultural, the trial court could not assume that the sale was valid. The case was sent back to the trial court to determine whether the property was agricultural, irrespective of an agreement between the lender and the borrower about which there were questions. The Supreme Court noted that if the land was agricultural, the sale was invalid.

Also in 2013, the Supreme Court decided Lyons v. Northwest Trustee Servs., Inc.,7 and shortly thereafter, Lyons v. Northwest Trustee Servs., Inc.8 Lyons answered the question regarding whether the Supreme Court would consider and refuse to clarify how exactly the nonjudicial foreclosure process is supposed to work in Washington.

Either way, Washington courts continue to grapple with the ramifications of the 2008 financial crisis and the need to clarify how exactly the nonjudicial foreclosure process is supposed to work in Washington. ■

MELISSA A. HUELSMAN IS A SOLO PRACTITIONER IN SEATTLE WHOSE LAW PRACTICE FOCUSES ON MORTGAGE LENDING Litigation, foreclosure defense litigation, bankruptcy and other credit-related issues. She was the attorney for the prevailing plaintiffs in Bain and Frias, and she served as co-counsel to the prevailing plaintiff in Lyons.

1 An earlier version first passed into law in 2009 added 30 days to the nonjudicial foreclosure timeline and required the sending of a notice of pre-foreclosure options to homeowners, which addressed them of their right to request an in-person or telephonic meeting with their loan owner.

2 Many of the provisions of the FPA are codified in RCW §§ 61.24.160, 163, 165, 166, 172, and 174 and 177.

3 See RCW § 61.24.163(3).

4 RCW ch. 61.24, et seq.

5 175 Wn.2d 83, 295 P.3d 34 (2012).

6 174 Wn.2d 560, 276 P.3d 1277 (2012).

7 177 Wn.2d 94, 207 P.3d 677 (2010).


10 Other decisions have come from the Court of Appeals, including Becker v. Northstar Mtge., Inc., 177 Wn.2d 463, 287 P.3d 476 (2012); Browand v. OneWest Bank, 138 Wn.2d 319, 78 P.3d 207 (2003); and Frezzoli v. Murray, 153 P.3d 1171 (2013).


12 See also, Cashmere Valley Bank v. State Dep’t of Revenue, 181 Wn.2d 622, 554 P.3d 1100 (2014).


14 554 P.3d 1114 (2014). Jackson also includes language in the last paragraphs that implies the Lyons decision held there is no requirement that a plaintiff specifically plead that the trustee has violated its duty of good faith in order to pursue a claim related to reliance upon an improper beneficiary declaration. There is the heightened pleading requirement either in the statute or in the Lyons decision.


16 See § 61.24.166. Smaller banks and credit unions (“federally insured depository institutions”) that issue less than 250 notices of default annually are exempt from participation in an FPA mediation.
Stand-Your-Ground Laws and Defense of One’s Home

By Conner Spani

Our legal system gives tremendous police power to the state, balanced by requirements for due process. If it works as intended, this system provides equitable criminal justice outcomes. Without police power, our states would be running rampant with mob justice. The acquiescence of police power includes prohibiting vigilantism and street justice. Stand your ground (SYG) laws may be undermining that balance.

Washington and Florida SYG Similarity

One hugely controversial and notorious SYG case is State of Florida v. George Zimmerman, which involved the fatal shooting of Trayvon Martin, an African American teenager, by George Zimmerman, a neighborhood watch coordinator who was not acting as a neighborhood watch coordinator at the time of the shooting. Zimmerman didn’t actually use the SYG defense, instead using the regular self-defense statute. However, the lines were blurred because SYG language was used in the jury instructions, which made the Florida SYG and self-defense laws effectively indistinguishable in Zimmerman.

Washington’s SYG laws are effectively the same as the Florida self-defense/SYG law that resulted in Zimmerman’s ultimate acquittal. The following is a key excerpt from the jury instructions used in Zimmerman’s trial (note the SYG language):

If George Zimmerman was not engaged in an unlawful activity and was attacked in any place where he had a right to be, he had no duty to retreat and had the right to stand his ground and meet force with force, including deadly force if he reasonably believed that it was necessary to do so to prevent death or great bodily harm to himself or to prevent the commission of a forcible felony. Let’s compare that instruction to Washington’s justifiable homicide/SYG law:

Homicide is justifiable when committed either:
1. In the lawful defense of the slayer, or his or her husband, wife, parent, child, brother, or sister, or of any other person in his or her presence or company, where there is reasonable ground to apprehend a design on the part of the person slain to commit a felony or to do some great personal injury to the slayer or to any such person, and there is imminent danger of such design being accomplished; or
2. In the actual resistance of an attempt to commit a felony upon the slayer, in his or her presence, or upon or in a dwelling, or other place of abode, in which he or she is.

Escape or retreat:
In order to assert justification of self-defense, it is not necessary that defendant have had no means of escape or retreat available to him prior to protecting himself with force, but rather he may stand his ground and repel force with force under appropriate conditions so long as he is in a place where he has right to be. The jury in Zimmerman found that he was “not guilty” on the grounds that he had been justified in his deadly use of force in self-defense under Florida law. Only when we acknowledge Zimmerman’s innocence and our dissatisfaction, not necessarily with the verdict, but the entire situation, can we take the corrective steps necessary to prevent similar situations from occurring in the future.

Stand Your Ground Laws’ Impact on Homicide Rates

In a 2013 study in the Journal of Human Resources, data were gathered and analyzed for homicide rates in states that passed SYG laws between 2000 and 2010. In those states, the homicide rate increased by an average of 8 percent more than in non-SYG states. The study also attempted to validate the relationship between the increased homicide rate and SYG laws by considering the time of the increase and history of homicide rates in those SYG states. Increases in homicide rates were found only after the SYG laws had passed, not before. Also, the SYG states had no history of relatively higher increase in homicide rates. Consequently, based on this study, there is at least a correlation between the passing of SYG laws and an increase in homicide rates.

Defense in One’s Home and the Castle Doctrine

A castle doctrine is a law that justifies self-defense in one’s home without the duty to retreat. All but five states have either a castle doctrine or an SYG law. SYG laws generally absolve any need for a castle doctrine because they encompass one’s home.

In light of the prevalence of these laws, it is widely accepted that the duty to retreat should not extend to one’s home. However, the idea of never having a duty to retreat is much less widely accepted, and we should consider it carefully because it is strongly correlated with increased violence.

As indicated above, Washington’s SYG law allows for a person — in their home or in public, and without the duty to retreat — to respond with reasonable, proportional force in the actual resistance of an attempt to commit a felony upon himself, in his or her presence. The law gives sweeping protection to anyone being attacked in public or private regardless of whether they have a reasonable and safe method of escape.

This law may be encouraging violence that would not otherwise occur if the protection was limited to one’s home and vehicle.

A homicide can be both legally justifiable and unnecessary. We should try to eliminate the unnecessary homicides in our state, even if they can be legally justified. An alternative to the broad SYG law in Washington could be to require the absence of a reasonable means of safe escape to forcefully defend one’s self, except in one’s home or vehicle. Such a change would preserve the widely accepted sanctity of the right to defending one’s home with little restriction, while discouraging violence and likely saving lives.

Conner Spani is a second-year JD/MBA student at Willamette University College of Law/Atkinson Graduate School of Management. The opinions set forth in this article are entirely his own, and this article should not be relied on as legal advice or as a substitute for legal research.

Sources:
2 Id.
3 Id.
5 BWC § 9A.16.050.
7 Id.

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Eubanks and Gray v. Brown, 110 Wn.2d 500, 397 P.3d 515 (2017) (addressing venue issues in gender discrimination action against deputy prosecutor)

In re the Marriage of Larson and Calhoun, 178 Wn. App. 133, 313 P.3d 1228 (2013), review denied, 325 P.3d 913 (2014) (successfully addressing property division issues in one of largest dissolution cases in Washington State history)

AUTO v. State, 175 Wn.2d 214, 786 P.3d 52 (2013) (issues and responsible parties to litigation)

Clemency v. State, 175 Wn.2d 549, 280 P.3d 911 (2012) (application of estate tax to qualified terminable interest trusts)


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Washington’s Amended Data Breach Notification Law

Is Your Business in Compliance?

By Olivia Gonzalez

Given the proliferation of high-profile data security breaches, 2014 was deemed the “year of the data breach” by various news and media sources.1

Mega-retailers such as eBay, Target and Home Depot were victims of sophisticated cyberattacks leading to the disclosure of millions of consumers’ personal information. But large retail chains and financial institutions are not the only entities at risk; small businesses are just as vulnerable to large-scale security breaches of their information technology (IT) systems.

Consider the following scenarios:

• A week after terminating the manager at your main office, you learn that before leaving, she saved hundreds of confidential files containing customer information to her personal laptop. Disgruntled at having been terminated, albeit for cause, the former manager threatens to disseminate the private information she misappropriated.

• A current employee borrows a company laptop for a business trip to California. The computer is loaded with confidential client files, including files belonging to Washington clients, and employee payroll records. After going through security and before boarding the plane, she misplaces the laptop. Two weeks later, the computer is mailed to your home office stripped of its contents. It was not password protected.

• Cyber attackers executed an attack on your company’s IT system. Although your in-house technology team is working on securing the network and “fixing” the problem, the situation has yet to be contained. An ongoing investigation confirms that customer information, and maybe even employee information, has been accessed or stolen.

Each of these scenarios may trigger a business’s duty to inform clients, consumers and employees of a data breach under RCW § 19.255.010, Washington’s data breach notification law. The law requires any person or business that conducts business in Washington to disclose unauthorized disclosure of “personal information” (PI). PI is an individual’s first name or first initial and last name in combination with their: (1) Social Security number, (2) driver’s license or Washington state identification card number, or (3) account, credit or debit card number along with the required security code or password.2

RCW § 19.255.010 was recently amended by House Bill 1078, effective July 24, and imposes more stringent notification requirements on businesses that disclose PI without authorization. Key elements of the new bill include:

• Broader coverage. The existing statute covered only “computerized” data. The new bill expands coverage to include hard-copy data as well.

• 45-day notification deadline. The old law required businesses to notify consumers “in the most expedient time possible and without unreasonable delay.” The new bill imposes a 45-day deadline from when the breach was discovered to notify affected individuals.

• Limit the collection and storage of client, consumer and employee PI to the least amount necessary for the accomplishment of your business’s objectives. PI should be disposed of securely when the need for it has expired.

• Develop a comprehensive incident response plan that defines the types of data breach incidents, identifies the individuals to be notified in the event of a breach and outlines each of their responsibilities, and provide a clear course of action in response to a breach.

• Establish requirements and policies for data security (in software installations, data outsourcing, cloud storage and vendor contracts. Provide staff awareness and training programs on those requirements and policies.

• Identify all mobile and portable devices that contain and transmit company data. Develop controls governing the use of those devices, encryption of data and access protocols to the firm network.

• Amend vendor contracts to require compliance with applicable data security regulations, especially if vendors are used by your business to process, store, transmit or destroy client, consumer and/or employee data.

• Consider purchasing cyber liability insurance.

You may not be able to prevent every breach — hackers grow more sophisticated by the day. But robust policies and security systems, coupled with a response plan for swift response and notice to affected parties should a breach occur, can protect a business from a good part of the damages caused by a data breach.

Olivia Gonzalez is an employment litigation attorney with Stokes Lawrence.

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2 RCW § 19.255.010(5) (as amended effective July 24, 2015)
4 The GLBA requires financial institutions to explain their information-sharing practices to their customers and to safeguard sensitive data.
EEOC v. Abercrombie & Fitch: What You Don’t Know Can Hurt You

By Patrick Pearce

On June 1, the Supreme Court issued its decision in Equal Employment Opportunity Commission v. Abercrombie & Fitch Stores, Inc. The opinion was authored by Justice Antonin Scalia, who was joined by six other justices. Attorneys for both employers and employees should note the Court’s guidance on establishing support for religious discrimination claims.

In Abercrombie, the dispute arose when Samantha Elauf, a practicing Muslim, applied for a position in an Oklahoma store. The assistant manager who interviewed Elauf found her to be qualified, but observed that she wore a headscarf. The headscarf was a concern for the assistant manager as the company had an existing “Look Policy” governing employee dress that prohibited wearing any “caps.” The term “caps” was not defined by the policy.

The assistant manager sought guidance from the store manager as to whether the headscarf violated the policy and the prohibition on wearing “caps.” The assistant manager advised the store manager that she believed Elauf wore the headscarf for religious reasons. The store manager assessed the issue and concluded the headscarf violated the Look Policy. As a result, the store manager directed that the applicant not be hired.

The EEOC brought suit on Elauf’s behalf, arguing that the store’s refusal to hire Elauf violated protections for religious practices provided under 42 U.S.C. § 2000e. The U.S. District Court granted the EEOC’s motion for summary judgment on liability and awarded $20,000 following trial on damages.

The Tenth Circuit reversed and ordered summary judgment for Abercrombie & Fitch. In reaching its conclusion, the Court focused on the meaning and application of the term “because of” as used in 42 U.S.C. § 2000e-2(a), the provision of Title VII prohibiting discrimination against individuals, employers and job applicants “because of” religion.

The company argued that a claimant cannot show disparate treatment without first showing that an employer has “actual knowledge” of the need for an accommodation. The Court rejected the argument, and instead ruled that the applicant need only show that the need for accommodation was a motivating factor in the employer’s decision.

The Court noted that 42 U.S.C. § 2000e-2(a)(1) does not impose a knowledge requirement on the employer like those found in other statutes such as the Americans with Disabilities Act of 1990. Instead of reading an actual knowledge requirement into Title VII, Justice Scalia observed that the Court would “construe Title VII’s silence as exactly that: silence.”

In writing for the seven-justice majority, Justice Scalia summarized an employer’s obligations to avoid disparate treatment based on religion as follows:

Thus, the rule for disparate-treatment claims based on a failure to accommodate a religious practice is straightforward: An employer may not make an applicant’s religious practice, confirmed or otherwise, a factor in employment decisions.

The Abercrombie decision almost certainly applies to both employment applicants and existing employees, and has the potential to be expanded and applied to other protections under 42 U.S.C. § 2000e-2(a). In terms of immediate use, several practical points can be taken from Abercrombie.

First, the current Court will give religious beliefs and practices careful scrutiny in assessing treatment of an employee or applicant by an employer. As noted by Justice Scalia, “Title VII does not demand mere neutrality with regards to religious practices.... Rather, it gives them favored treatment.”

Per the Court, employers are affirmatively obligated to avoid refusing or failing to hire or promote an individual based on that individual's religious observance and practices. Employers will be well served to carefully assess potential religious accommodation issues in order to determine whether there is a potential issue and, if so, how best to handle particular employees or applicants.

Next, facially neutral policies may not constitute a defense for an employer’s decision. Justice Scalia’s opinion specifically states that Title VII requires otherwise-neutral policies to give way to the need for an accommodation. When an accommodation is required relating to an aspect of religious practice, “it is no response” that the subsequent action or inaction by the employer was due to an otherwise neutral policy.

Third, the decision establishes that an employer does not have to have actual knowledge of the possible need for religious accommodation in order to be under an obligation to provide it. As reasoned by the Court, an employer’s “knowledge” may not be determinative. An employer with actual knowledge of the need for an accommodation, yet does not provide it, will not violate Title VII if the employer was not motivated by a desire to avoid the accommodation requirement.

Conversely, an employer motivated by a desire to avoid providing an accommodation may be liable even if the employer has no more than “an unsubstantiated suspicion” that accommodation may be necessary. The inclusion of religious beliefs or practices as a factor in the employer's decision is the critical factor.

Finally, footnote 2 of the opinion references an employer’s required accommodation efforts, stating that the term “means nothing more than allowing the plaintiff to engage in her religious practice despite the employer’s rules to the contrary.” This language provides potential guidance regarding what at least seven members of the Court may consider adequate efforts by an employer to accommodate religious beliefs or practices.

Specifically, an employer may be found to have acted properly if sufficient efforts are made to allow an employee or applicant to observe sincerely held religious practices or beliefs regardless of company rules and practices.

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2 at 2.
3 Id. at 1–2.
4 Id.
5 Id. at 2.
6 Id.
7 Id. at 3.
8 Id. at 4–5 (citing 42 U.S.C. § 12112(b)(5)(A)).
9 Id. at 5.
10 Id.
11 Id. at 6–7.
12 Id.
13 Id. at 7.
14 Id. at 5.
15 Id.
16 Id. at 3–4.
The KCBA wishes to thank the outgoing members of the Board of Trustees who completed their terms at the end of June. From left: President Steve Rovig, Trustee Mary Anne Vance, Treasurer Jennifer Payseno and Trustee K.M. Das.

KCBA recognized the Young Lawyers Division Board of Trustee members completed their terms at the end of June. From left: Trustee Arthur Shwab, Chair Lori Hurl and Trustee Joshua Haubenstock.

KCBA wishes to thank this year’s committee chairs. Front row: President Steve Rovig and First Vice President Kim Tran. Middle row: Judge Patrick Oishi, Jeffrey Cohen, Peter Talevich, Reagan Rasnic, Kinnon Williams. Back row: Brett Hill, Lafcadio Darling, Lori Hurl, Gene Barton.

Leaders from KCBA and the WSBA join together at their annual liaison meeting. Front row: Mario Cava, Elijah Forde, Alan Funk, Paula Littlewood. Second row: Andrew Prazuch, Ken Masters, Steven Rovig, Anthony Gipe, Patrick Palace, and Bill Hyslop.

Outgoing King County Bar Foundation President Derek Crick, with Kathleen Petrich (pictured right), and outgoing Trustee Mark Honeywell were honored at the KCBF board meeting May 15 at the bar offices. Also recognized for distinguished service was Hon. Charles Burdell, Jr. (Ret.).
Emerald City for Five Minutes

By Kiyoko Kami

It’s 7:05 a.m. at Tokyo’s Yurakucho Station. Every morning I brace a sea of dark suits. I find myself surrounded by legions of Tokyo “corporate warriors.” I myself have been transformed into one of them. White-gloved platform attendants push us onto an already overflowing train. It transports us to the same destination called “Japan Inc.”

I am a Japan-born, U.S.-qualified lawyer. As a young adult, I left Japan and carved out a new life in the Pacific Northwest. I attended law school, took the bar exam, gave birth to two children and practiced law in Seattle. Three summers ago, my family and I embarked on a new chapter in our lives, settling in the heart of Tokyo.

I jumped at the opportunity to revisit the landscape of my childhood. This homecoming, however, proved a mixed blessing. I suffered through reverse culture shock. The open office filled with rows of desks. Obligatory drinks are expected. And the expectation of conformity. I was an alien grappling with the realities of her own country.

At 8:20 p.m., I squeeze myself onto another packed train. Dazzling skyscrapers soar into the sky. Luxurious boutiques punctuate the streets. The world’s most populated city never sleeps.

Yes, life in corporate Japan is stimulating. But perhaps too stimulating at times. Navigating the urban landscape, still somewhat awkwardly, I set my eyes on the distinctive green logo and walk into a Starbucks, or suita b, as they call it in Japan.

A Seattleite at heart, I am a product of espresso culture. I relax with a cup of Seattle Starbucks. The store lay-out and design are virtually identical. Tokyo Starbucks transports us to the same destination as if to stay meekly within carefully defined boundaries: “Do you have a point card?” (“I’m so sorry to bother you.”) “Please do so quietly. At least, please refrain from talking.” “May I take your order?” (Their speech is scripted; even the baristas bow and use honorific expressions, but no small talk. They diligently [or painstakingly] follow predictable patterns.)

Likewise, every time we make a purchase at grocery stores, clerks consistently follow the predictable pattern as if to stay meekly within carefully defined boundaries: “Do you have a point card?” (“I’m so sorry to bother you.”) “Please do so quietly. At least, please refrain from talking.” “May I take your order?” (Their speech is scripted; even the wording remains virtually identical. This focus on the predictability and stability reminds me of what my adolescent son endlessly complains about his Japanese public school education: memorization of facts through drill, drill, drill. Thinking outside the box remains out of the question.)

Typical Japanese corporate training reflects a lack of dynamic communication skills. Not surprisingly, you tend to be monotonous, filled with platitudes. At the outset of a recent company training seminar we had taken the time out of our busy schedules to attend, one presenter remarked matter-of-factly to us, “This training might put you to sleep.” “If you fall asleep,” he continued, “please do so quietly. At least, please try not to snore.” No one in the audience even laughed. Indeed, I may have slept through the seminar and then, by the end, actually managed not to snore. (Or so I thought.)

My areas of expertise as a lawyer and compliance professional include global policy formulation. Having launched various global policies, ranging from a code of conduct to an anti-corruption policy, I keenly recognize this: Any company’s written policies and procedures are brought to life only when they actually move the audience to action.

Of course, dull presentations are far from a culturally unique problem. How often do we American lawyers feel an urge to put ourselves on the shoulder at the end of the day for staying awake the whole time while enduring boringCLE courses? Being a dynamic communicator, after all, remains a universal challenge across geographical lines.

But my cross-cultural observations confirm that Americans are far better at communicating dynamically and creatively. Many lawyers I know back in Seattle, for instance, draw on the power of storytelling as they deliver speeches. They skillfully weave their personal experiences and anecdotes into their presentations and convey powerful messages, taking the audience on a journey.

I view storytelling as a natural outgrowth of small talk culture. Just like small talk paves the way toward smoother interaction and ultimately an emotional connection, stories, too, can work wonders — engaging, captivating and inspiring the audience. Vivid details of stories also help bring big ideas to life, making the content more relevant and memorable.

Sipping my beloved beverage, I realize: What I so achingly miss is not only a tranquil afternoon on Bainbridge Island or summer picnics in the parks. It is a bond instantly formed with a perfect stranger sitting next to me on the bus as she brags about her boyfriend, a joke shared with a customer behind me in the checkout line at the grocery store, or a smile of an apron-clad barista who compliments me on my “good taste” as he prepares a white chocolate mocha.

These vivid moments signify what America means to me. Living and working in Japan has given me a deeper appreciation for America’s small talk culture. Can Japan draw lessons from that? During a business trip to Seattle two years ago, I had the privilege of meeting with a compliance professional at the Starbucks headquarters. “Can you think of something like this,” he said, after listening intently to my description of the gulf between Japanese Starbucks and its U.S. counterpart. “A 50-something corporate executive in Japan might be taken aback if a barista suddenly makes small talk, asking about his weekend plans. But a 20-something regular may be more willing to strike up a conversation. You can start somewhere.”

He suggested: If the sudden transformation is unrealistic, why not aim for incremental changes? I nodded. Who knows, maybe those seemingly little gains would eventually add up and turn into a force that even impacts Japan. I am hoping to make a difference in that process.

The art of public speaking has always fascinated me. Now I am eager to help Japanese professionals craft and articulate messages that engage human emotions and make a behavioral impact on the audience. I am determined to keep sharpening my own communication skills.

That explains why I wear two hats. Monday through Friday, I take the commuter train to Japan, Inc. Come Saturday, I turn into a student. I am enrolled in a “Performance Studies” program, learning how to convey powerful messages that create impact and inspire action. Revisiting the landscape of my childhood, I have found a new passion.

The five minutes in the Emerald City are up. I drain the last drop of my caramel macchiato and head out into the neon-drenched city. The night is young in Tokyo.
Attorney Rating Systems: Should You Play?

By Stacey L. Romberg

First of Three Parts

Opinions run high and confusion abounds regarding attorney rating systems. Many solo and small-firm practitioners believe that rating systems such as Super Lawyers are rigged and inherently biased in favor of large law firms. Some attorneys rave favorably about Avvo, believing it provides a valuable tool to market their practices, whereas other attorneys rant just as strongly against it, contending that Avvo’s rating system lacks legitimacy and merit.

Although these opinions are specific to their respective rating systems. Although these opinions are specific to their respective rating systems, they are becoming increasingly well known and more frequently used by both the legal community and the general public. Attorneys use a “good rating” to market themselves to clients; clients then rely on these ratings, at least in part, to select a lawyer. Even if an attorney chooses not to participate, it is impossible to avoid being impacted by this trend because clients still inquire about attorney ratings, review attorney profiles and post reviews.

Second, thankfully, more state bars are issuing advisory opinions on this topic. Two recent opinions set forth by the Utah State Bar (summarized in this article) and the Washington State Bar Association (to be described in my next article) may help lawyers to make informed choices and avoid the myriad of ethical pitfalls involved in rating systems. Although these opinions are specific to their respective states, they also provide useful guidance to lawyers in any state who have

Concerns about participating in these rating systems.

Ethical Limits: Utah State Bar Ethics Advisory Opinion 14-04

In this ethics opinion, issued on November 12, Utah tackled the issue: “What are the ethical limits to participating in attorney rating systems, especially those that identify the ‘Best Lawyer’ or ‘Super Lawyer’?”

Quoting Bates v. State of Arizona,

Utah articulated its primary concern as follows:

Deceptive advertising in the legal profession poses a particular risk because “the public lacks sophistication concerning legal services, and therefore] misstatements that might be overlooked or deemed unimportant in other advertising may be found quite inappropriate in legal advertising.”

Relying on both Rule 7.1 of the Utah Rules of Professional Conduct (prohibiting a lawyer from making false or misleading communications about the lawyer or the lawyer’s services) and a New Jersey Supreme Court opinion concerning the use of lawyer ratings in advertising, the Utah State Bar stated:

We conclude that a lawyer’s participation in any rating system and use of that rating in the lawyer’s advertising is permissible when: (1) the comparing organization has made appropriate inquiry into the lawyer’s fitness; (2) a favorable rating from the comparing organization is not for sale and may not be purchased by the lawyer; (3) the lawyer ensures that the methodology or process used to determine the rating is fully disclosed and explained using plain language and is conveniently available to the public; and (4) the communication disclaims the approval of the Utah Supreme Court and/or the Utah State Bar. Statements that explain in laymen’s terms, and do not exaggerate the meaning or significance of professional credentials, are permissible.

As such, Utah is issuing advisory opinions on this topic, including Ethics Advisory Opinion 14-04, § 1.

The website does not disclose how to view other point values, such as the value of in-firm nominations as opposed to out-of-firm nominations that are used to determine the rating.

With these notable omissions, is the Super Lawyers selection process sufficiently described so as to meet Utah’s “fully disclosed” standard?

Best Lawyers in America

Similarly, Best Lawyers in America discusses the methodology behind its selection process at https://www.bestlawyers.com/Downloads/bl-expanded-methodology-int.pdf. Voters rate the nominated attorneys on a scale of 1 to 5 and are also able to provide comments. The website states, “The Best Lawyers editorial staff reviews [emphasis added] the votes and comments... Listed lawyers are notified of inclusion.”

The website does not state that the lawyer with the most votes “wins,” so some element of subjectivity is clearly involved. Does this amount of disclosure meet Utah’s “fully disclosed” standard?

Avvo

Avvo describes the basis for its 1 to 10 rating system at http://www.avvo.com/support/avvo_rating. Avvo discloses much less information about the basis for its lawyer ratings than does Super Lawyers or Best Lawyers in America, stating: “The Avvo Rating is based on all of the background information in a lawyer’s profile. However, we do not disclose how we weight this information, primarily because we don’t want anyone gaming the Avvo Rating System.”

In comparing this statement to Utah’s requirement that “the lawyer ensures that the methodology or process used to determine the rating is fully disclosed and explained using plain language and is conveniently available to the public,” it is difficult to imagine how Avvo’s rating system stands up to this ethical rule.

Until more guidance is given through future advisory opinions and disciplinary actions, it is up to debate whether a particular rating system meets the “fully disclosed” standard. Lawyers need to carefully review all aspects of any rating system, including its methodology, before participating in it, and determine their own comfort level with regard to how that rating system stands up to the ethical rules.

By Stacey L. Romberg

A Seattle attorney focusing on business law, estate planning and probate. For further information, please see Romberg’s website at www.staceyromberg.com.

This article is the first of three installments designed to provide insight into recent ethical opinions governing attorney rating systems as well as specific factors attorneys should consider in deciding whether to participate, and if and how to respond to online criticism on rating websites. Originally printed in GPSOLO eReport, American Bar Association, May 2015 – Vol. 4, No. 10 (reprinted with permission).

1. Avvo creates profiles for attorneys that may contain information about their educational backgrounds, bar memberships, practice areas, contact information, etc. Avvo will not delete a profile upon request, unless the lawyer is no longer in practice. Lawyers can only add to or correct the information on their profile by “claiming” it. Once an Avvo profile has been claimed, a lawyer can never unclaim it.


4. Id at § 5


7. These indicators are: verdicts/settlements; transactions; representative clients; experience; honors/awards; special licenses/certifications; position within law firm; bar and/or professional activity; pro bono and community service; scholarly lectures/papers; education/employment background; and other outstanding achievements. http://www.superlawyers.com/about/selection_process.html. Any website language quoted in this article is accurate as of the date this article was written, but may have been subsequently revised.

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Changes Coming to the Federal Rules of Civil Procedure

By Todd Nunn

On December 1, unless Congress takes contrary action, certain amendments to the Federal Rules of Civil Procedure will go into effect. There are a number of amendments that will be made, but this article will focus on the four most significant changes.

Cooperation

Rule 1 sets forth the “Scope and Purpose” of the Federal Rules of Civil Procedure. This rule will be amended as follows:

These rules govern the procedure in all civil actions and proceedings in the United States district courts, except as stated in Rule 81. They should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding.

The Committee Note states, “Rule 1 is amended to emphasize that just as the court should construe and administer these rules to secure the just, speedy, and inexpensive determination of every action, so the parties share the responsibility to employ the rules in the same way.” The Note further states that “[m]ost lawyers and parties cooperate to achieve these ends,” and that “[e]ffective advocacy is consistent with — and indeed depends upon — cooperative and proportional use of procedure.

In response to concerns expressed during the comment period that “this change may invite ill-founded attempts to seek sanctions for violating a duty to cooperate,” the Note makes it clear that “[t]his amendment does not create a new or independent source of sanctions.”

Proportionality

Proportionality of discovery just makes sense. There should be less discovery for a small case than there is for a large case. And the concept of proportionality is being put front and center of the discovery rules. Rule 26(b)(1), which governs the “Scope and Limits” of discovery, will be amended to add the concept of “proportionality” while eliminating some longstanding language, including the concepts of “matter relevant to the subject matter” and discovery that is “reasonably calculated to lead to the discovery of admissible evidence.”

But, arguably one of the biggest changes to the Federal Rules this year is really just a change in emphasis. As the Note makes clear, this amendment simply moves language from one place in Rule 26 to another: “The considerations that bear on proportionality are moved from present Rule 26(b)(2)(C)(iii), slightly rearranged and with one addition.”

Indeed, the proportionality rule has been in the federal rules for a long time: “Most of what now appears in Rule 26(b)(2)(C)(iii) was first adopted in 1983.” The Committee Note summarizes how amendments in 1993 and 2000 deemphasized the role of proportionality in determining the scope of discovery, and states that “[t]he present amendment restores the proportionality factors to their original place in defining the scope of discovery,” and “reinforces the Rule 26(g) obligation of the parties to consider these factors in making discovery requests, responses, or objections.”

But the Note also cautions that the amendment “does not change the existing responsibilities of the court and the parties to consider proportionality, and the change does not place on the party seeking discovery the burden of addressing all proportionality considerations.”

The factors expressly listed in the amended rule to be considered are:

• the importance of the issues (note this is listed ahead of amount in controversy);
• the amount in controversy;
• the parties’ relative access to relevant information (a new factor not previously in Rule 26(b)(2)(C)(iii));
• the parties’ resources;
• the importance of the discovery in resolving issues; and
• whether the burden or expense of the proposed discovery outweighs its likely benefit.

One challenge for implementing proportionality is that the court, and often the parties, do not have much information regarding the above factors early in the litigation when decisions regarding scope of discovery and proportionality must be made. The Committee Note states, “The parties may begin discovery without a full appreciation of the factors that bear on proportionality.”

For example, “A party requesting discovery ... may have little information about the burden or expense of responding” and “[a] party requested to provide discovery may have little information about the importance of the discovery in resolving the issues as understood by the requesting party.” The Note adds, “Many of these uncertainties should be addressed and reduced in the parties’ 26(f) conference and in scheduling and pretrial conferences with the court,” and “if the parties continue to disagree, the discovery dispute could seek settlement or referral to mediation.”
be brought before the court."

**Early Discovery Requests**

Currently under Rule 26(d)(1), “A party may not seek discovery from any source before the parties have conferred as required by Rule 26(f), except in a proceeding exempted from initial disclosure ... or when authorized by these rules, by stipulation, or by court order.” Rule 26(d)(2) will be replaced with a new rule to allow delivery of requests for production before the Rule 26(f) conference. The new rule provides:

(2) Early Rule 34 Requests. (A) Time to Deliver. More than 21 days after the summons and complaint are served on a party, a request under Rule 34 may be delivered:

(i) to that party by any other party, and

(ii) by that party to any plaintiff or to any other party that has been served.

(B) When Considered Served. The request is considered to have been served at the first Rule 26(f) conference.

This change allows the “delivery” of requests for production under Rule 34 (but not interrogatories or requests for admission). As the Committee Note clarifies, “Delivery does not count as service; the requests are considered to be served at the first Rule 26(f) conference.” The Note explains the purpose of the amendment: “This relaxation of the discovery moratorium is designed to facilitate focused discussion during the Rule 26(f) conference.”

**Failure to Preserve Electronically Stored Information**

Rule 37(e) will changed entirely by its amendment:

Failure to Provide Preserve Electronically Stored Information. Almost exceptionally circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good faith operation of an electronic information system, if electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced, through additional discovery, the court:

1. upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or

2. only upon finding that the party acted with the intent to deprive another party of the information’s use in the litigation may:

   (A) assume that the lost information was unfavorable to the party;

   (B) instruct the jury that it may or must presume the information was unfavorable to the party; or

   (C) dismiss the action or enter a default judgment.

All of the original text of the rule has been deleted and an entirely new rule put in its place. The Committee Note makes clear that the original rule “has not adequately addressed the serious problems resulting from the continued exponential growth in the volume of such information.”

The new rule applies only to electronic information (as opposed to all discovery) and only to information that is lost (meaning that it cannot be restored or replaced as is often possible with electronic information). The rule is based on the “common-law duty” to preserve, and “does not attempt to create a new duty to preserve.” The rule does not apply when information is lost before a duty to preserve arises.

“The rule applies only if the information was lost because the party failed to take reasonable steps to preserve the information.... Due to the ever-increasing volume of electronically stored information and the multitude of devices that generate such information, perfection in preserving all relevant electronically stored information is often impossible.”

The rule does not apply to the loss of information despite reasonable efforts to preserve, or loss caused by events outside of the parties’ control (like hacking). Also, “proportionality” is a factor in evaluating the reasonableness of preservation efforts (i.e., preservation of large amounts of information should generally not be required for a small case).

If there is a loss of information because of a failure to take reasonable steps to preserve, and the court finds prejudice to another party because of that loss, the court may take “measures no greater than necessary to cure the prejudice” under subdivision (e)(1). The range of these measures is “quite broad,” and could include forbidding a party from using certain evidence, allowing a party to make arguments about the loss of information to the jury, or even give a jury instruction to “assist in [the jury’s] evaluation of such evidence.”

But care must be taken “to ensure that curative measures under subdivision (e)(1) do not have the effect of measures that are permitted under subdivision (e)(2) only on a finding of intent to deprive another party of the lost information’s use in the litigation.” Adverse inference instructions and default judgments under (e)(2) are only authorized when there is a showing of intent.

This subdivision is designed to provide a uniform standard in federal court for use of these serious measures. The court does not have to find prejudice to another party to impose the listed sanctions, only intentional destruction. The precise effect of these amendments remains to be seen and will have to await their application by the federal courts. But they will certainly provide new tools and arguments, opportunities and risks for parties in litigation in federal court.

Todd Hunn is a litigation partner in K&L Gates’ Seattle office. His current practice emphasizes wage-and-hour litigation, class action defense and electronic discovery. He is an editor and author for the WSBA Civil Procedure Deskbook (3d ed. 2014) and an adjunct professor of law at Seattle University School of Law where he teaches courses in civil procedure.
When Clients Leave:

The Perils of Replacement Counsel — and How to Manage Them

By Brian J. Waid, Jessica M. Creager and Anna C. Kitson

First of Two Parts

When the attorney-client relationship sours, the client and the original attorney usually share a mutual interest in the client's retention of capable replacement counsel. For example, in a contingent fee representation, the recovery of any fee by the attorney left behind may depend on successful completion of the case by replacement counsel. Or, if the first attorney arguably committed malpractice, competent replacement counsel may succeed in mitigating or preventing damages, thus reducing the chance of a legal malpractice claim ever being asserted.

Original counsel also has an ethical obligation under RPC 1.16(d) to “take steps to the extent reasonably practicable to protect a client’s interests” upon termination of the relationship. Cooperation with replacement counsel thus also helps avoid later questions about whether the original counsel fulfilled his professional responsibilities at withdrawal.

One might thus presume that the first attorney would eagerly assist the client in finding a competent replacement, help new counsel get up to speed and do everything reasonably possible to facilitate the transition. However, in practice, the old adage “no good deed goes unpunished” often prevails. Replacement attorneys may thus encounter unanticipated perils and unwarranted hostility from their predecessor counsel. Recent Washington cases highlight some of these perils.

Expect To Become a Witness

Replacement counsel commonly become witnesses in follow-on litigation, and may be called upon to testify on issues such as the reasonableness of the client’s decision to settle the underlying matter, the amount of the client’s damages, or other issues related to potential legal malpractice and breach of fiduciary duty claims against original counsel. Flint v. Hart, for example, established that a client may settle his underlying claim without interrupting causation relative to any legal malpractice claim against former counsel, as long as the client’s decision to settle was “reasonable.” Evidence that the client relied on the advice of replacement counsel provides a ready means of proving the “reasonableness” of the decision. Flint also established that the client can recover “mitigation” expenses incurred to reduce or avoid the damage caused by original counsel’s malpractice as damages in the malpractice lawsuit. Mitigation expenses frequently include the fees and expenses incurred with replacement counsel. The client may thus call upon replacement counsel to testify that replacement counsel’s fees and expenses were indeed reasonable and necessary to mitigate the client’s damages.

Replacement counsel may also be called upon to testify about whether predecessor counsel met the standard of care or breached the attorney’s fiduciary duties to the client. Indeed, replacement counsel can be compelled to testify relative to the standard of care. (Replacement counsel may not welcome that opportunity, particularly if unpaid for providing that opinion testimony, thus, counsel on both sides must carefully consider the strategic decision of whether to force a recalcitrant replacement counsel to express a standard of care opinion.)

Using the opinion testimony of replacement counsel has obvious appeal to the client because replacement counsel will not need to re-familiarize himself with the client file and will, therefore, usually charge fees significantly lower than that of an outside expert. That decision, however, carries with it other ramifications discussed below.

Replacement counsel therefore should anticipate, at the outset of representation, the possibility of being called upon to testify in follow-on proceedings, particularly when the conduct of predecessor counsel presents potential issues of possible malpractice or breach of fiduciary duty.

Expect To Become a Scapegoat

Attorneys sued for legal malpractice usually try to find someone else to blame. Replacement counsel frequently becomes the scapegoat-in-waiting, because the defendant attorney sued for malpractice may try to allocate fault to replacement counsel, including as an intervening and superseding cause that relieves the predecessor attorney of all liability for malpractice.

The negligence of replacement counsel can be, but is not necessarily a superseding cause exculpating the first attorney from liability. Thus, “Under the rules of causation, proximate cause is not interrupted by an intervening event that was foreseeable and should have been anticipated.” For example, in Beck v. Grafe, the client alleged that Grafe had negligently failed to assert indemnification against a third party and that the statute of limitations on the third-party claim had thus expired. In response, Grafe alleged that replacement counsel (Middleton) had adequate time to amend the complaint to add the third party as a defendant, but negligently failed to do so.

Grafe thus alleged that Middleton’s failure to cure Grafe’s negligence constituted an intervening cause and defeated proximate cause. Although the trial court agreed with Grafe, the Court of Appeals did not, holding instead that a jury would decide whether Grafe should have foreseen the negligence of replacement counsel, and characterized the negligence of both as “a concurrent cause of the damage rather than an independent intervening cause.”

Similarly, the defendant law firm in Puget Sound Elec. Workers Health Trust & Vacation Plan v. McKenzie Rothwell Barlow & Korpi, P.S., tried to allocate responsibility to replacement counsel (Ekhman Bohrer), because the Ekhman firm also had an “opportunity to collect some of the delinquent accounts”

Robert N. Gellatly inducted into the International Academy of Trial Lawyers

Robert Gellatly was inducted into the International Academy of Trial Lawyers on March 20, 2015 at its annual meeting in Santa Barbara, CA. The Academy limits membership to 500 Fellows from the U.S., and only invites lawyers who have attained the highest level of advocacy. A comprehensive screening process identifies the most distinguished members of the trial bar by means of both peer and judicial review.

Mr. Gellatly was evaluated by his colleagues and the judges in his jurisdiction and was highly recommended by them as possessing those qualifications and characteristics.

Mr. Gellatly is also a Fellow in the American College of Trial Lawyers, and has been chosen by his peers as one of the Best Lawyers in America for many years.

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BAR BULLETIN
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and its failure to collect those accounts constituted a superseding cause. However, the Court rejected McKenzie's superseding cause argument for lack of expert testimony establishing a breach of the standard of care, holding that when a defendant alleges a subsequent lawyer was negligent as part of his defense, “evidence about the standard of care must be established by expert testimony.”

Presume That Others Will Scrutinize Everything You Do, Say and Write

Replacement counsel should presume that others, including the predecessor attorney, may eventually scrutinize everything replacement counsel does, says and writes. Beyond this, the client's follow-on legal malpractice case may waive attorney-client and work product privileges between the client and replacement counsel. Hearn v. Rhay thus held that a party asserting attorney-client privilege has impliedly waived that privilege where (1) assertion of the privilege was the result of some affirmative act, such as filing suit, by the asserting party; (2) through this affirmative act, the asserting party put the protected information at issue by making it relevant to the case; and (3) application of the privilege would have denied the opposing party access to information vital to his defense.

The Hearn approach is not the only method of assessing whether a party has impliedly waived attorney-client privilege. Yet, in Pappas v. Hol- laway, the Washington Supreme Court followed Hearn, finding an implied waiver of attorney-client privilege after the defendants (the Holloways) coun- terclaimed for legal malpractice in an- swer to a lawsuit filed by their former counsel (Pappas) to collect unpaid at- torney fees. In response to defendants’ counterclaim, Pappas filed third-party complaints “against all [other] attorneys who also represented [plaintiffs] in the underlying litigation.”

Pappas then successfully moved to compel production of correspondence between the Holloways and the third-party defendants, despite the Holloways’ assertion of attorney-client privilege. On appeal, the Supreme Court applied the Hearn test and determined that the Holloways’ assertion of attorney-client privilege was the result of their filing of a counterclaim or an affirmative act.

The Court further concluded that the Holloways’ legal malpractice coun- terclaim put their correspondence with the third-party defendants at issue and, as a result, the denial of Pappas’s discovery request would effectively deny Pappas an adequate defense. Noting the danger of “making illusory the attorney-client privilege in legal malpractice actions,” Pappas distinguished its facts from cases in which the attorney-client communications of the party asserting privilege were not relevant beyond the issue of damages.

Although Pappas limited the reach of Hearn, resolution of whether attorney-client privilege has been waived often turns on a case-by-case, factual analysis. Replacement counsel should therefore recognize, at the outset of representation, that privileged communica- tions may ultimately be discoverable in a later legal malpractice claim against original counsel.  

Brian J. Waid and Jessica M. Creager of Waid Law Office primarily represent clients in legal malpractice and fee disputes. Their law clerk, Anna C. Kitson, is a 2L at Seattle University School of Law.

2 See Dana v. Piper, 173 Wn. App. 764, 776–77, 295 P.3d 505 (2013), rev’g denial, 295 Wn.2d 305 (2013) (holding that determination of the "reason- ableness of the client’s underlying settlement did not require the testimony of replacement counsel").
3 Pinto, 92 Wn. App. at 223–24.
10 Id. at 1034.
11 Id. at 1039.
16 See Smith v. Kavanaugh, Pierson & Talley, 513 So. 2d 1138, 1146 (La. 1987) (rejecting the Hearn test in favor of the anticipatory waiver theory, where the court must concern itself solely with whether the privileged communication was one that would have denied the opposing party access to information vital to his defense).
18 Id.
19 Cf. Jakoboff v. Cerrato, Sweeney & Cohn, 97 A.D.3d 834, 835, 468 N.Y.S.2d 895, 898 (2008) (find- ing no implied waiver of attorney-client privilege in a legal malpractice action where plaintiff’s attor- ney was not involved in the underlying action and was impeded only relative to damages). Pappas distinguished Jakoboff.
MEMORANDUM

May 5, 1981

This is in answer to your request for a summary of the method I use as a mediator under Local Rule CR 39.1.

1. The first step is to send a letter to all counsel confirming the appointment of the mediator, confirming the time and place of the mediation session, and reminding counsel of the main things they are required to do under the rule. The following is a suggested form of letter:

Gentlemen:

This will confirm that I have agreed to act as mediator in the above-listed case under Local Rule CR 39.1. The mediation session will be held at my office in Seattle commencing at 9:30 a.m. Wednesday, June 17, 1981. Please be prepared to spend as much of that day as may prove to be necessary.

Please be sure to bring with you each client, or a representative of each client, who is authorized to engage in the settlement and to resolve the controversy between the parties — I will meet with plaintiff and his lawyer, and counsel to stand by while a short memorandum of reasonableness, should go over the terms of the settlement, in the area which the mediator considers reasonable. The mediator should call upon the lawyer to accept (or pay). Often the lawyer prefers to give this figure in confidence. I also try to find out what the settlement history has been; if there have been previous offers or demands, it is helpful to know about them.
Eating In

This month, the Dining Out squad eats in, sampling take-out or delivery fare in the comfort of one’s own home.

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MEDIATION

continued from page 24

agreement will usually be valid even if implementing documents remain to be prepared.

Furthermore, a settlement cannot be reached, the second (and last) general session should be held anyway, and the mediator should thank all concerned for their efforts, and invite them to stipulate to arbitration (either binding or non-binding) under the rule. This will require an explanation of the arbitration procedure.

6. The last step is to report to the Court by letter on the results of the mediation, with a short statement either that the mediation did, or that it did not, succeed in settling the case.

DINING OUT

continued on page 30
Despite the potential implications for global warming, I am happy as a clam to be sitting here in June dictating this column in my favorite summer outfit while the sun sparkles on Elliott Bay. I hope July brings more of the same.

Partner Pronouncements

Nicholas Beermann has joined Fisher & Phillips as a partner opening its new Seattle office. Fisher & Phillips represents employers nationally in labor and employment matters. Beermann was formerly with Jackson Lewis.

Emily Harris Gant recently joined Garvey Schubert Barer as an owner in the firm's Hospitality, Travel and Tourism Group. She practices in the areas of regulatory compliance, licensing, contracts, commercial transactions and litigation. Gant was formerly with my absolute favorite law firm, Ogden Murphy Wallace, PLLC.

A. Troy Hunter has joined Issaquah Law Group as a partner. Hunter’s practice focuses on personal injury defense.

Frank Paganelli has joined Lane Powell as a shareholder in the firm’s Lenders and Finance Group. He handles matters involving social impact companies and investments.

Benjamin Stone has become a partner with Lewis Brisbois Bisgaard & Smith LLP. His practice focuses on complex civil litigation, including defending employers against federal and state law employment claims and other matters involving consumer litigation defense, financial services, class action, mass tort and professional liability. He was formerly with Veris Law Group PLLC.

Associate Additions

Patricia Robert and Elise Fandrich have joined Skellenger Bender, P.S. as associates. Robert is in the firm’s Litigation Group and Fandrich has joined the Family Law Group.

Stacy Marchesano has joined Hills Clark Martin & Peterson P.S. as an associate in the firm’s Lender Services and Finance Group. Marchesano’s practice includes lender services and commercial transactions. She was previously an associate at Holmes, Weddle & Barcots.

Karl Heffter has joined Seed IP Law Group as an associate in its Electrical Engineering and Computer Science Group.

Other Attorney News

Molly Barker recently joined Veris Law Group PLLC. She has broad experience with environmental matters and recently completed a term as a law clerk to four judges in Kitsap County Superior Court.

Joseph Corr and Jacob Downs recently formed the eponymous Corr|Downs PLLC. The new firm focuses on employment, business, personal injury and consumer protection disputes. They both were formerly shareholders with Lane Powell.

Honors, Appointments and Awards

Steve Fogg of Corr Cronin Michelson Baumgardner Fogg & Moore LLP was inducted as a Fellow of the American College of Trial Lawyers.

The Washington Association of Criminal Defense Lawyers recently announced its annual awards, which included several King County-based recipients.

Suzanne Elliott received the William O. Douglas Award. Lila Silverstein received one of the President’s Awards. The Champion of Justice Award went to the legal team behind the ruling in Trueblood vs. DSHS, et al., which included Anita Khandelwal, Christopher Carney, David Carlson, Emily Cooper, La Rond Baker, Margaret Chen and Sarah Dunne.

Rafael Stone was elected to The National Black Lawyers - Top 100. Stone is a member of Foster Pepper.

The Estate Planning Council of Seattle named the following attorneys as officers: Kurt Olson with Fahiman Olson & Little, PLLC as president-elect, and Carla Wigen with Wells Fargo Private Bank as secretary.

Scott Snyder of Ogden Murphy Wallace, PLLC has been named president of the Washington State Association of Municipal Attorneys for 2015-2016. His practice focuses on municipal law.

Joseph McCarthy was elected a Fellow of the American College of Real Estate Lawyers. He is a partner with Stoel Rives.

Important Things About Bar Talk

Due to space limitations, Bar Talk cannot include everything that happens in the legal community, nor is there room for photos of people who are mentioned in this column. Bar Talk covers lawyers whose primary office is or was in King County if they change jobs, get promoted, become judges, receive an award or honor, open a new law office or pass away.

Bar Talk does not include information about being selected or honored by a magazine or other publication, nor does Bar Talk write about case decisions, deals consummated, websites launched, branding initiatives or similar activities. Bar Talk will also occasionally reference major accomplishments that are not law related if they are interesting enough, such as sailing around the world or starring in a play.

Anything that is included in Bar Talk may be subject to editing. We also reserve the right to change our mind about what goes into Bar Talk without notice at any time. If you send Bar Talk a photo, it may end up getting included in an art project, as the Bar Talk columnist enjoys making collages.

Karen Sutherland is the chair of the Employment and Labor Law Practice Group at Ogden Murphy Wallace, PLLC, and chair of the King County Bar Association Bar Bulletin Committee. Her practice focuses on employment law, workplace investigations and complex litigation. She can be reached by mail at 901 Fifth Avenue, Suite 3500, Seattle, WA 98164, by phone at 206-447-7000 or by email at ksutherland@omlaw.com.

A Hospital Mistake . . . .

“After my husband checked into a hospital ER with a blood clot in his leg, the nurse failed to give him prescribed blood thinners before a scheduled procedure. He died the next morning of a pulmonary embolus.”

“I feel my path led me to CMG’s office and Tyler Goldberg-Hoss. Not only is Tyler personable, but he went above and beyond to ensure the process was not a burden to me and to achieve the final result. The settlement will take care of my daughter’s needs for the rest of her life.”

~ Jessica H.

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Tyler Goldberg-Hoss, Partner
By Dana Barnett

Celeste A. McDonell began her pro bono work at the King County Bar Association with Volunteer Attorneys for People with HIV/AIDS, which today is part of the general Volunteer Legal Services (VLS) program. The entire Pro Bono Services team proudly recognizes McDonell for her 28 years of dedicated service to low-income clients.

McDonell has worked with more than 25 VLS clients with issues involving wills or other estate planning, and often visits clients suffering from terminal medical conditions in their homes or in the hospital. Her calm demeanor and outstanding legal assistance provide VLS clients with the comfort of knowing their final wishes will be honored. McDonell is always willing to mentor new volunteers and frequently provides assistance to VLS client-intake staff.

KCBA has received numerous words of thanks and praise from McDonell’s clients. Her work is best summed up by a recent client who said, “Ms. McDonell treated me as if I was paying thousands of dollars in legal fees. She never made me feel like a charity case, which I deeply appreciated. Ms. McDonell is a five-star attorney.”

McDonell is a principal in the Skelenger Bender law firm. She focuses her practice in the areas of family law, guardianships, estate planning and probate. McDonell recently answered some questions for the Bar Bulletin:

Q. What inspires you to volunteer?
A. I grew up in a family where both my parents were very active volunteers and frequently provided assistance to VLS clients.

Q. What was your childhood dream job?
A. Being a lawyer (like my father.)

Q. Words of advice for fellow volunteers?
A. Keep up the great work!
Q. What do you do for fun?
A. I row with my crew team early in the mornings, volunteer for my high school (Holy Names Academy) and parish (St. James Cathedral), and spend time with my wonderful husband Michael and our son Conner.
Q. Favorite quote?
A. “You don’t have to have a point to have a point.”
Q. Title of the last book you read?
A. The Boys in the Boat — again.
Q. Who is your favorite Supreme Court Justice?
A. Ruth Bader Ginsberg.

The King County Bar Association sincerely thanks McDonell for her many years of service to Pro Bono Services clients and for her exceptional commitment to the Volunteer Legal Services program.

In Memoriam: Steve Nourse, Bob Burke and David Ashbaugh

By Michael J. Bond

Today, I went to another funeral service. It was a gathering of friends, colleagues and partners of Steve Nourse. Steve was a partner at Garney Badley and one of our best construction lawyers. Today, I also learned that Bob Burke died about four months ago. Bob was a partner at Oles Morrison and another one of our best construction lawyers. And I was reminded that David Ashbaugh left us recently, too; another great construction lawyer. He was a partner with R. Miles Stanislav for many years.

I’ve worked with and against all of them over the years. We are all about the same age and vintage, and the similarity of our pedigrees is uncanny. Like me, Steve was a Marine Corps officer; Bob served in the U.S. Army. I don’t know if David served in the military; he didn’t cotton to authority, so it seems unlikely. This is weighing on my soul. Maybe I should do something other than construction cases.

Bob and I worked on the Bangor Nuclear Sub Base case together, called McBride v. Pan Am. Two guys drank a bottle of Wild Turkey at a bar in Silverdale one day, and then on the way home to Poulsbo they took the wrong exit, and drove headlong at 55 mph into the bollard at the Bangor Base main gate. They never slowed down. Today, they would have been blown to smithereens before they got there; in those days, they were allowed to impale themselves on the bollard. McBride, the passenger, broke his neck up high, and he sued the Navy, Pan Am (which had the maintenance contract at Bangor), the architect for his gate design, and the electrical engineer for the lighting. I had the architect; Bob had the engineer.

Judge Rothstein denied all our motions for summary judgment even though the driver had a blood alcohol level of 0.28. Right, maybe a second bottle of Wild Turkey would have done the trick. This wasn’t some dark alley; the gate was lit like a super nova.

The Wild Turkey label says it’s 100 proof, strong stuff, and I put a new bottle on the exhibit list. Plaintiff made a proof, strong stuff, and I put a new bottle on the exhibit list. Plaintiff made a motion in limine to bar the bottle, but Judge Rafeedie, who came up from Los Angeles to try the case, said he would deal with motions in limine on the first day of trial. I took the Wild Turkey into the courtroom on the first day and, with a flourish, I put it on the table as if to say, “set ‘em up barkeep.” When the judge came on the bench, he told us to see him in chambers, and then he ordered us to go out in the hallway and settle the case.

That is what passed for mediation in those days; sorry Chris. We did as we were told, and settled this high-level quadriplegia case for $200,000, paying $50,000 each. And from there we proceeded across the street to Bob’s office where we opened the Wild Turkey. As the saying goes, it was noon somewhere. I still have that bottle, exhibit label and all, having refilled it several times. Time erased my memory of any case.

The third defendant retained Phil Talmadge, who just came off the Supreme Court bench after serving several years in the Legislature. We would have only 20 minutes to argue the case, and I knew it wasn’t going to work if all three of us had to get up and say something. I scheduled a meeting of all three of us at Phil’s office to prepare for oral argument.

Steve came to our meeting prepared to handle the whole thing himself. Well, I knew Phil had to argue, and I was determined to get in the game, too. Shortly after the meeting started, I told Steve I thought it would be best if he let Phil and me handle it. If you know what happened on Mount St. Helens, you can imagine what happened next. He ranted and raved in his quiet-fury way. When I graduated from the Marine Corps Basic Training School, the C.O. told us whenever two Marines are there, one of you better be the leader. Steve was a leader, no question about it. He led his firm, his family and his friends. We hear a lot about leadership these days. But just as important as good leadership is the skill of good followership. After venting his frustration and hurt feelings, Steve stopped, gave me a deep long look that his partners and associates would recognize, and said, “Okay.”

Tonight, I’m going to open the Wild Turkey again and say thank you for the memories, Steve and Bob and David, and happy trails. I’m sorry you’re gone, but I look forward to our next meeting. And I can now say that we won that case thanks to Steve Nourse.
Coming Home: Border Crossing for U.S. Citizens

By Kim Ositis
Assistant Law Librarian
for Reference Services

Is a trip to Canada in your future? Be sure you know what sort of travel documents you’ll need so that you and your yummy maple sugar candy treats can cross the border back to the U.S.

In the wake of the terrorist attacks of 2001, the Intelligence Reform and Terrorism Prevention Act of 2004 (IRTPA) was passed to facilitate entry for U.S. citizens and legitimate foreign visitors, while strengthening U.S. border security. The result of this effort is the Western Hemisphere Travel Initiative (WHTI), which requires U.S. citizens to present a passport or other document that denotes identity and citizenship when entering the U.S.

Prior to 2007, U.S. citizens were not required to provide more than a valid driver’s license or other approved form of ID to travel between certain countries, such as Canada and Mexico. That has now changed. Below is a discussion of what travel documents are now required for different types of travel within the Western Hemisphere (Canada, Mexico, the Caribbean, and Central and South America).

Travel Type

Air Travel

All U.S. citizens, including children, must present a passport or NEXUS card when entering the United States by air. This includes infants.

Land and Sea Travel

U.S. citizens entering the United States at sea or land ports of entry are required to have documents that comply with the WHTI, most commonly a U.S. passport, a passport card, or an enhanced driver’s license. Other forms of acceptable identification are trusted traveler cards (Global Entry, NEXUS, SENTRI or FAST); military identification cards (for members of the U.S. armed forces on official orders); and U.S. merchant mariner document (for U.S. citizens on official maritime business).

Children 15 and younger may continue crossing land and sea borders using only a U.S. birth certificate (or other form of U.S. citizenship such as a naturalization certificate). The original birth certificate or a copy may be used.

U.S. children aged 16-18, who are traveling with an adult-supervised group or team at a land or sea crossing from a contiguous territory, may also be able to use a U.S. birth certificate or similar naturalization document. See https://help.chip.gov/app/answers/detail/a_id/747/u-s-citizens-documents-needed-for-entry-into-the-u-s.

Travel Documents

Washington’s Enhanced Driver License/Enhanced ID Card

If you are a Washington resident, you can apply for an enhanced driver license (EDL) or enhanced ID card to make land and sea border crossings to and from Canada. These also can be used for travel to Mexico, Bermuda and the Caribbean without showing another form of ID.

Residents pay $15-20 more than a regular driver license or ID card and provide proof of citizenship, identity and Washington residency, as well as Social Security number. After approval at one of the EDL/EID licensing offices throughout the state, the license is encoded with a radio frequency device that allows border patrol agents to scan the license for faster processing.

For more information, go to http://www.dol.wa.gov/driverslicense/edl.html. A handy fact sheet that might be useful to have on hand is available at http://www.dol.wa.gov/driverslicense/docs/whtisheet.pdf.

U.S. Passport Book

A passport is the main document required to travel internationally. In the United States, U.S. passports are issued by the U.S. State Department. http://travel.state.gov/content/passports/english.html/

Previously infants were included in a parent’s U.S. passport book. However, as noted above, as of January 23, 2007, previous passports for children, including infants, cannot be used for travel to Canada, Mexico, the Caribbean and Bermuda. A passport issued to a person age 16 years or older lasts for 10 years. For minors 15 or younger when the passport was issued, passports are good for five years.

If you already possess a U.S. passport, you can renew by mail. You will need to include a completed and signed Passport Renewal Application Form DS-80, your old passport, two photographs of yourself, any document necessary to show a name change (if applicable), and the appropriate fees. Information on U.S. passport renewal can be found at the State Department website: http://travel.state.gov/passport/get/renew/renew_833.html.

Note: There are a few exceptions to renewal by mail. You may not apply for a renewal if: (1) you were younger than 16 when the first passport was issued; (2) your previous passport is damaged or was issued more than 15 years ago; or (3) you have a new name and cannot legally document how the name change occurred with a certified copy of a marriage license or similar type of legal document.

If you do not have a U.S. passport, you must appear in person at a U.S. passport acceptance facility and provide a complete set, but unsigned, U.S. Passport Application (Form DS-11), two photographs of yourself, a U.S. government-issued ID, proof of U.S. citizenship and the appropriate fees. For more information on applying for a U.S. passport in person, visit: http://www.travel.state.gov/passport/get/first/first_830.html.

U.S. Passport Card

The U.S. Department of State began issuing passport cards in 2008. The U.S. passport card is a travel document that can be used to enter the U.S. by land border or sea port of entry (not air travel) from Canada, Mexico, the Caribbean and Bermuda. The passport card lasts for 10 years for persons 16 or older, and five years for minors 15 or younger. The card cannot be used for international air travel.

The benefits of the passport card are its smaller size and its cost. The passport card is wallet sized, approximately the same size as a driver license. Application procedures for the card can be found here: http://www.travel.state.gov/passport/ppt_card/ppt_card_3926.html.

Did You Know?

The Law Library maintains an archival collection of the RCW, Seattle Municipal Code and the King County Code. This material can be very helpful if a client is having trouble crossing the border due to a criminal conviction and has been asked to provide a copy of the statutes in force at the time of conviction.
Peace at Home:
OurFamilyWizard Lessens Parenting Disputes

By Matt Havrevold

For co-parents who are prone to conflict, long email exchanges and vague text messages often create ambiguity or miscommunication, and make admissible records difficult for counsel to compile. As a result, courts routinely order parent communication on the OurFamilyWizard (OFW) website in cases spanning all 50 states, Washington, D.C., and five Canadian provinces.

OFW is even ordered in domestic violence cases to keep parents informed while reducing opportunities for coercive control and harassment.

Lower courts’ orders for communication with OFW are regularly upheld. In a sealed 2011 opinion, Hon. Carolyn Tornetta Carluccio of Montgomery County, Pa., wrote: (Our)FamilyWizard is utilized by courts in cases involving litigious parents whose credibility is lacking and who are unable to communicate with each other. The tool protects each party against false contempt petitions by preserving evidence … [and] it facilitates communication between the parties in a non-hostile, non-confrontation, non-intrusive, monitored format…. The tool is objective and applies equally to each party.

Now in its 14th year, OFW has helped more than 100,000 families maintain more amicable communication using secure mobile and web-based features for parents to communicate in a simple, well-documented and highly organized manner. Along with their legal or mental health practitioners, co-parents are linked together to share information using these main features:

- Free professional accounts give practitioners access to simple court-ready printouts.
- Text and email notifications keep parents and professionals up to date on new activity.
- A calendar equipped with parented parenting time modification requests, easy-to-use parenting schedules and protected journal entries for both parents.
- A message board that documents when messages are read by recipients for the first time. Tonometer provides feedback that helps parents be mindful of their messages tone, and gives the author a chance to reframe a message before sending.
- An information bank where parents store vital medical records, insurance information, emergency contacts, school work and more.
- An expense log where parents make reimbursements and requests for unreimbursed medical expenses, child support and other parenting expenses. Expenses and payments are easily categorized and reconciled. A parent’s banking information is not shared with the co-parent.
- Children, grandparents and other family members also can be included in the conversation with limited access to the calendar, journal and messages.
- Mobile apps make OFW accessible even to those without a computer. Mobile and tablet applications for professional accounts will be released later this year.

Family law professionals are offered an unfiltered window into co-parent communication via their free professional account. The OFW Professional Account monitors parent activity without copying the practitioner on endless emails. Professionals utilize one account to create new accounts for clients, link to parents already using OFW, and retrieve records. Parent coordinators/facilitators, guardians ad litem and others appointed to a case can even set up expense categories and parenting schedules for the family.

Courts regularly order that co-parent communication take place exclusively through OFW, barring the parties from email and phone communication. In McGrath v. Long (2014), a California Superior Court judge wrote:

Except in the case of a true emergency involving either party or the minor child, the parents shall use Our Family Wizard as the principal means of documenting all information related to the health, safety, welfare and education of the minor child.

Rules built into OFW all but eliminate game playing. Each feature intuitively anticipates points of conflict and prompts parents for complete and timely information. Parents can never backdate entries or edit items created by others.

Entries show who authored items and when, but more importantly show a history of edits, complete with content changes. Date and time stamps indicate how often parents see information, and a “sign-in history” is maintained for each member of the family.

In a 2010 opinion (Telek v. Bucher), the Kentucky Court of Appeals wrote: …the Family Wizard software assists the trial court in supervising its orders and reducing excessive litigation through the facilitation of effective communication between the parties.

While courts recognize how the website helps family communication, so do the families themselves. Thousands have chosen to sign up for OFW all on their own. To ensure these tools are available to those who need it most, OFW offers discounted and free accounts to those who qualify. Several thousand low-income parents have moved their families forward using scholarship accounts.

In any case, OurFamilyWizard provides an effective long-term solution for families and professionals alike by opening lines of communication in a secure, accessible and well-documented forum.

KCBA Bylaws Cleanup Under Way

THE BOARD

The following are highlights from the KCBA Board of Trustees meeting held on May 20, convened by KCBA President Steven Rovig.

Rovig briefed trustees on efforts during the past year to develop a restated bylaws document, given eight amendments over the past 23 years without an overall review of the underlying document. David Lawson, an associate at Davis Wright Tremaine, was tasked with giving the existing bylaws a thorough review with a goal of better organization, compliance with the Washington Nonprofit Corporations Act, and inclusion of best practices for nonprofit governance.

Lawson reviewed the changes he had proposed and the Board engaged in an initial discussion. Rovig then encouraged trustees to continue their review of the materials for additional discussion at the June board meeting.

Rovig reviewed his recent presentation to the King County Bar Foundation trustees, discussed the April diversity meetings with representatives of the Seattle University and University of Washington schools of law, reported on the past presidents’ breakfast reunion, and highlighted the May 5 new member mixer event.

Executive Director Andrew Prazuch noted that with the closing of the filing period for judicial elections, no contested elections would be on the 2015 election ballot. He reported on staff vacancies and recruitment plans. Finally, he thanked vice presidents Kim Tran and Kate Battuello for attending with him an upcoming leadership training program on exceptional boards.

Treasurer Jennifer Payseno reported as of March 31, the end of the first nine months of the fiscal year, KCBA had received $2.7 million in revenue, with $2.2 million in expenses, for net income of $514,000. In addition, the Association has $1.4 million in cash and cash equivalents and $866,000 in reserves.

Payseno and Prazuch reviewed the proposed fiscal year 2016 work plan and budget. The proposal would include a balanced budget for the upcoming year with the use of some carryover funds from the current fiscal year. Trustees were asked to review the materials during the next month so that the plan and budget could be considered for adoption at the June board meeting.

Finally, the Board adjourned to executive session to conduct Prazuch’s annual performance evaluation.
School District Steps up While ITA Court Challenges Mount

By Judge Susan Craighead

Maybe the stars aligned; maybe one or two of you made a call. In any event, I am happy to report that after years of unsuccessfully trying to engage the Seattle School District about including the Alder Academy in the new Children and Family Justice Center, the District has come to the table! We are still working out the details, but this is the best news the County has received from the School District in a very long time.

In addition, Superintendent Larry Nyland expressed his willingness to participate in the Steering Committee for the County’s Disproportionality Action Plan. We are delighted. There is no way to address seriously the school-to-prison pipeline without the District’s participation. By the time this column goes to print, we will have announced the membership of a unique group comprised of about 50 percent “systems people” (school superintendents, police chiefs, etc.) and 50 percent community members and leaders, including some of our most vociferous critics.

We hope to hire a talented facilitator who can manage strong and passionate people talking about tough issues. There is no question that this is the most exciting chapter of my career to date.

Excitement might be one way to describe recent weeks on our Involuntary Treatment Act (ITA) calendar at Harborview as well. As you may recall, we have seen a 60-percent increase in caseload over the past five years; there was a 9-percent increase in the first quarter of this year alone. As if this were not enough to keep Judge Ken Schubert and Commissioner Hollis Holman busy, in April we learned that the ambulance company that brought patients who needed to be on gurneys to the courtroom would be terminating its contract with Crisis and Commitments with 30 days’ notice.

The ambulance company’s decision was made for financial and operational reasons, and despite many efforts the County was not able to reverse its decision. The other major ambulance company in town at one time served the membership of a unique group comprised of about 50 percent “systems people” (school superintendents, police chiefs, etc.) and 50 percent community members and leaders, including some of our most vociferous critics.

We hope to hire a talented facilitator who can manage strong and passionate people talking about tough issues. There is no question that this is the most exciting chapter of my career to date.

My best friend and I were able to see a judge within 72 hours of their detention. The only option we could envision was to conduct hearings for these patients via video hookup from the hospitals.

Sounds easy; but, of course, it is not. We are still operating with the same number of attorneys, even though defense counsel have to leave court at noon to represent their “gurney” clients at their hospitals. It is more difficult to interview witnesses and negotiate cases by phone or video. And it is hard to arrange the all-important meetings between family members and patients that can result in a patient returning home, or else hearing Mom say: “Son, you need to get better before I can take you back home.”

Still, those unstable patients are no longer being strapped to gurneys for ambulance rides across town and then held in restraints for hours while waiting for their cases to be called. Judge Schubert reports that they are now whisked into the video room straight from their hospital rooms. They generally present better this way than they do after five hours in four-point restraints.

The jury is out on whether they really understand what is happening and feel they are being treated fairly, however. This is just a step that circumstances have forced the Court to take.

It is not yet clear, but there may be more hearings now that patients do not have to go to court in restraints and it is more difficult to negotiate cases. I can report that we are regularly using a third judge to hear cases. We wheel a video cart into the judge’s downtown courtroom and the hearing is conducted with all parties and the witnesses in separate windows on the screen.

As slick as that sounds, there are technological challenges. When conducting hearings from one hospital, Judge Schubert recently told the King County Council, the screen would freeze. This was particularly problematic when the prosecutor was examining a witness, since it simply appeared that defense counsel and the patient were listening attentively. Then they would call to notify the court that they had missed the last few minutes of testimony. They would get the system back up and running and then do a second take of the testimony.

I am told that the problem is the hospital’s Internet connection and it should be fixed before this column goes to press. But it is illustrative of the problems caused by the not infrequent fluctuations in hospital’s Internet connection and the technological challenges. When conducted with all parties and the witnesses in separate windows on the screen.

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The King County Bar Association’s 2015 Annual Awards Dinner was held on June 18. The annual “Passing of the Gavel” tradition marked the commencement of Kim Tran’s tenure as KCBA president for 2015–2016, while acknowledging the service and accomplishments of our now past President Steve Rovig (2014–2015).

The 2015 honorees included: Llewelyn G. Pritchard, Outstanding Lawyer; Honorable Marsha J. Pechman, William L. Dwyer Outstanding Jurist; Daniel Gandara, Helen M. Geissness Outstanding Lawyer; Joanna Plichta Boisen, Outstanding Young Lawyer; Robert I. Heller, Pro Bono Award; and the President’s Award recipients — the Arlene’s Flowers litigation team: Todd Bowers, Margaret Chen, Sarah A. Dunne, Michael Edwards, Jake Ewart, Kim Gunning, Kurt E. Kruckeberg, Andrew G. Murphy, Noah Purcell, Amit D. Ranade, Michael R. Scott and Sarah Shifley. The King County Bar Association thanks our sponsors for their support of the 2015 Annual Awards Dinner.

KCBA Annual Award Dinner honorees (L to R): Robert I. Heller; Joanna Plichta Boisen; Hon. Marsha J. Pechman; KCBA President Steven R. Rovig; Llewelyn G. Pritchard; Daniel Gandara.

Past President Judge Thomas S. Zilly and Judge Patrick H. Oishi.

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