BAD COWS, MENACING MACHINERY, & LONG HOURS:

Washington Supreme Court holds overtime protections apply to dairy workers

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PHOTO ©Getty / Clara Bastian

APR/MAY 2021 | Washington State Bar News
Editor’s Note

Some Thoughts On How We Think

The first sentence on the National Institute of Mental Health's website is: “Mental illnesses are common in the United States.”¹

More than 50 million Americans (one out of every five people) live with a mental health disorder. That’s the same percentage of people who, for example, live in a rural area,² speak a language other than English at home,³ or use a smartwatch or fitness tracker.⁴ So even if you don’t personally have a mental illness, the numbers suggest you probably know a person (or multiple people) who does.

I don’t share these statistics simply to explain how widespread mental illness is in this country. I share them to underscore that something experienced by so many should not be so isolating, should not carry any shame or embarrassment.

According to a 2019 survey released by the American Psychological Association, the general feeling around these issues may be changing—Americans are becoming more open about mental health.⁵ The survey showed that the vast majority of adults believe that having a mental health disorder is nothing to be ashamed of, and that people who have mental health disorders can get better.

You have probably heard the statistics around mental health and the legal profession—that rates of mental health disorders and addiction are approximately twice as high among lawyers as compared with the general population. That means the opportunities for solidarity and support among lawyers should be greater, too.

This year, in an effort to increase support and awareness of available resources, the WSBA is participating in Well-Being Week in Law from May 3-7. You can read more about it on page 32.

Also in this edition of Bar News: the cover story about the monumental Supreme Court decision in Martinez-Cuevas v. DeRuyter Bros. Dairy (page 36); Mark Fucile’s Ethics & the Law column on closing your law practice when you retire (page 16); a Write to Counsel column on deep issue statements (page 20), and more.

NOTES

A TWO-TIERED CHESS GAME

The causation requirement in a legal malpractice action requires proving the merits of the underlying matter — the case within the case — which may be more complex than the professional negligence claim itself.

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We welcome letters to the editor on issues presented in the magazine. The full letters to the editor policy is available at www.wsba.org/news-events/Bar-News. Email letters to wabarnews@wsba.org.

Beware the Allure Of Analogy

I just finished reading Professor Benjamin Halasz’s excellent article on how to effectively present arguments by analogy (February 2021 Bar News). The article instantly reminded me of Washington Supreme Court Justice Stephen J. Chadwick’s admonition in State ex rel. Syverson v. Foster, cautioning lawyers against overreliance on arguments by analogy:

[No] cases are cited by counsel on either side. They say none can be found, ... but it does not follow that there is no law to cover the case. A more frequent reference to fundamental principles would make for better law and save much time and energy wasted in reading, approving, discussing, distinguishing, or rejecting cases from the great mass of judicial opinions to be found in the published reports.

“Case law is fast becoming the great bane of the bench and bar. Our old-time great thinkers and profound reasoners, who conspicuously honored and distinguished our jurisprudence, have been succeeded very largely by an industrious, painstaking, far-searching army of sleuths, of the type of Sherlock Holmes, hunting some precedent in some case, confidently assured that if the search be long enough and far enough some apparently parallel case may be found to justify even the most absurd and ridiculous contention.”

State ex rel. Syverson v. Foster, 84 Wash. 58, 60-61, 146 P. 169 (1915) (quoting State v. Rose, 89 Ohio St. 383, 388-89, 106 N.E. 50 (1914)).

Andrew Van Winkle
Spokane
Our Pandemic Movie Picks for Lawyers

For cinophiles, the past year has been the aphoristic blessing and curse: watch brand new titles from home, but find yourself yearning for the sticky floors caked in overpriced movie-theater foodstuff. Oddly enough for legal professionals, the past year has resulted in a plethora of movies, series, and shows based on the law, the people who practice it, and the lives affected by it. Here are a few of the top recommended things to view, compiled by the WSBA's ...

nwsidebar.wsba.org

Statewide Electronic Filing is on the Way to Washington Courts

The Administrative Office of the Courts (AOC) will soon begin rolling out a new electronic system for case management and electronic filing (e-filing) for Washington's district and municipal courts and probation offices. The AOC is trying to [...] nwsidebar.wsba.org

Court of Appeals Issues Decision on Revoking Consent to Conflict Waiver

Earlier this year, Division I of the Washington Court of Appeals issued a decision touching on an area of the Rules of Professional Conduct (RPC) that is rarely litigated: revoking consent to conflict waivers. The decision was “unpublished” under [...] nwsidebar.wsba.org

Tell Us Your Most Interesting Case

What is the most interesting case you’ve ever handled and why? Share your story (while maintaining client confidentiality, of course) for a chance to be included in an upcoming Bar News feature. Submit your response of no more than 500 words to wabarnews@wsba.org or here: https://forms.gle/nJPSVVR5AZoDoHY48.

Summer Book Reviews Needed

What’s that one book you can’t shut up about, the thing that everyone just has to read? We want to help you spread the word. Submit a review of no more than 150 words on any genre (law-related books welcome but not mandatory) to wabarnews@wsba.org or here: https://forms.gle/FDbqDqDbuC75sahi7.
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President’s Corner

‘A Home of Our Own’

A full year after the WSBA Board of Governors suspended in-person meetings, Immediate Past President Rajeev Majumdar and I were back in the WSBA’s downtown Seattle headquarters for the March 2021 meeting of the Board of Governors. During the meeting, we both wore masks and were spaced 20 feet from each other. Our temperatures were taken prior to entering the conference center and we abided by all of the restrictions required by the state of Washington for a safe meeting. All of the other members of the Board of Governors appeared via Zoom.

The primary reason for the two of us to be there was to test new headsets, socially distanced spacing protocols, sound systems, and other COVID-19-generated measures in an effort to start transitioning to a hybrid model of part in-person and part virtual meetings. Soon many of us will be fully vaccinated and, while I believe we will be living with masks, hand sanitizer, and an elevated sense of caution for the foreseeable future, it is time to see what our new normal looks like. While the WSBA offices felt empty, I trust that it is only a matter of time before we will see life once again return to our corridors and the Bar headquarters humming with activity.

While I enjoyed visiting the WSBA’s offices, I’ve often wondered whether the location in downtown Seattle is ideal. For as long as anyone can remember, the WSBA offices have been located in rented space in the core of the city. In my last President’s Corner, I floated the idea of relocating the WSBA offices outside of Seattle and investing in a building. One member reached out to me directly to say that a suitable building might soon become available in Olympia. The prospect of purchasing a building for our organization is an exciting one. But it is not a new idea.

After the Board meeting last month and before heading home to Vancouver, I took some time to stop by the room where the WSBA keeps issues of Bar News going back as far as 1954. Throughout the 1950s and 1960s, Bar News was little more than a leaflet that reported on the happenings of local bar associations across the state. It also reported on deaths of members and contained attorney general opinions and ads for members selling or wishing to purchase relics of the past such as the Washington Reports, Remington’s Compiled Statutes, and American Jurisprudence. Over the years, the leaflet grew in pages and content. Eventually, it carried the messages of newly minted bar presidents, published the names and cities of the newest members to have passed the bar, and started to print articles about law and law practice of interest to the membership. While reading the pages, it became readily apparent to me that the adage of “everything old is new again” is just as true today as it ever was. I read about mandatory malpractice insurance, initiatives to encourage attorneys to practice in rural locations, and the pros and cons of a paraprofessional program.

One article in particular caught my eye. In highlighting the work of the Board of Governors at its annual meeting/convention in Spokane, President A.J. Schweppe (1954-55) wrote, “The matter of the association’s owning its own headquarters building was suggested and urged by retiring President F.A. Kern (1953-54), who started the ball rolling with a personal contribution of $1,000.”1 In his Report of the President, Kern related how he recently read an article in the American Law Review describing how other bar associations in the United States had taken steps to own their headquarters’ building and that many were successful in reaching their goal. Kern wrote, “After I read that article it occurred to me what a wonderful thing it would be, if we here in the State of Washington put up our own home; to not have to go from pillar to post and rent a place and then stay there for a few years and then to move on...”2 With the help of the staff of the WSBA, President Kern surveyed the states and explored how a bar association could raise the money to fund the project. He noted that some states had created a bar foundation to take advantage of tax deductions. Eventually, these foundations would build or purchase buildings and lease the property to the state bar. President Kern urged the WSBA to organize the Washington State Bar Foundation as “an ideal way to obtain a headquarters building.”3

Kern wrote, “You might ask ‘What are the advantages in our Association owning its own home?’ Well, you have asked yourself the same question, when you decided to secure for yourself a home; a home to suit your family needs and for your enjoyment. No more moving. All betterments and additions resulting in improving your own property. All summed
President’s Corner
CONTINUED >

up in ‘Be it ever so humble there is no place like home.’”

A Committee on the Foundation Fund was established and chaired by then-former President Kern. One year later, in the fall of 1955, Kern reported on the work of the committee and the progress of other states in purchasing or constructing their own buildings. Kern thought two states were doing more than any others: California and Oregon. California decided on two headquarters buildings—one in Los Angeles and one in San Francisco. Oregon had formed a committee and “had definitely decided to go ahead on a building program.” Former President Kern moved the adoption of the committee’s recommendation to organize a bar foundation with the aim of “steady progress towards headquarters building construction at a certain definite time.” The motion was carried, whereupon former President Kern made the initial contribution referenced in President Schweppes’s article of $1,000 to the Bar Foundation Fund.

While both Oregon and California would eventually own their own headquarters and still do to this day, Washington has not yet reached its goal. But not for lack of effort. In December 1957, the Bar News published an update on the recent incorporation of the Washington State Bar Foundation as a charitable organization and encouraged fundraising through subscriptions, bequests in wills, and memorial contributions for deceased members of the Bar. The article concluded, “Our state association, the center and heart of all legal activity in the state, should have a home,” and ended with a letter from the secretary of the New Jersey State Bar Association: “[I] hope that your association will finally own its own headquarters as we find ours has done us a great deal of good.”

Another article appearing in the May/June 1958 edition of Bar News reminded readers of the work of the Washington State Bar Foundation and informed them that:

The Board of Governors will soon call on every lawyer in the state to make a contribution of some amount towards carrying out the objects of the foundation, one of which is the owning of its own headquarters building. If every member makes an initial contribution of some amount at this time, whatever the size of the gift, the lawyers of the State of Washington will know for a certainty that some time in the future they will be the owners of their headquarters building. Each member of the bar association in Kittitas County has subscribed. It is hoped that this example of 100% participation will be followed by the rest of the state bar.

In later editions of Bar News, the organization would publish updates with forms to accompany a member’s check donation and a note, “Remember, the Washington State Bar Foundation’s goal of ‘a home of our own.’”8 How much was raised remains a mystery, as excitement about finding a “home” appears to have fallen off after the death of its principal cheerleader. In August 1961, Bar News reported that former President F.A. Kern had passed away. In honor of Kern and in recognition of his service as president of the WSBA and chair of the Bar Foundation for seven years, past WSBA President V.O. Nichoson (1949-50) of Yakima made a contribution of an undisclosed amount to the Bar Foundation Fund.

By 1965, the WSBA’s focus had clearly changed. In his President’s Corner article, President George W. McCush of Bellingham updated the membership on the progress of the construction of the new College Club building at Fifth and Madison, in which the offices of the WSBA would be located.9 Apparently, the “increasing inadequacies of the present offices” demanded that the Bar Association relocate with some urgency and the organization lost sight of its quest for “a home of our own.” The lease with the new College Club building was signed in February 1966—its location directly across the street from the U.S. Courthouse.10 In the April 1967 edition of Bar News, President John N. Rupp (1967-1968), announced that the Board of Governors had hosted its first meeting in the Bar’s new offices. But instead of pride of ownership of a new building, the focus was on the brass-top conference room table that was the result of a compromise between those wanting a practical simulated wood top made of plastic and others preferring real wood.12

What ever happened to the $1,000 donated by President Kern? What ever happened to the idea of “a home of our own?” What ever happened to that conference room table?

In the years since the WSBA signed that lease in 1966, the organization has occupied several rented locations in downtown Seattle. The current lease runs through December 2026. Downtown office space is expensive and I am told the WSBA spends almost $2,000,000 per year (or $166,000 per month) in total rent, leasehold excise tax, and rent escalation expenses. Perhaps that money could be better spent on a mortgage on property in a more affordable location, or multiple locations. Perhaps with a building, the WSBA could offer conference rooms and temporary office space or hoteling to members who have chosen to close their offices and work from home and are in need of such amenities. Perhaps additional space would allow the WSBA to explore the possibility of a House of Delegates that could meet and help guide the organization. Perhaps it’s time to consider once again President Kern’s dream of a “home of our own.”

NOTES
3. Id. at 317.
4. Id. at 319-20.
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Short- and Long-Term Planning: A Time of Possibilities

March marked the middle of the WSBA’s fiscal year (October through September), and our budget narrative, I surmise, mirrors many of our personal outlooks: We have made many adjustments to weather an extraordinarily challenging period and are coming to terms with some of our “new normal” modes of operation. For the WSBA, this means finding opportunities to be innovative and expand service levels and benefits for members, all while continuing to look for efficiencies.

As I mentioned in this column last month, the WSBA is just completing its annual reforecast process, which is what we do mid-fiscal year to compare budgeted revenues and expenditures in each cost center with actual revenues and expenditures; we adjust projections for the remainder of the fiscal year based on this. The Budget and Audit Committee has been reviewing the reforecast figures, and we will have presented a final version to the entire WSBA Board of Governors by the time this issue of Bar News goes to press. In the midst of this review and approval process, here is what I can share at the high level: We do not expect any significant deviations from the original budget.

If you have been following my monthly financial updates (I am sure you have—you probably have them memorized!), you know that through January, the WSBA had an actual overall net revenue (over expenses) of about $825,000 in the General Fund for the fiscal year. That was especially remarkable considering the original FY 21 budget anticipated spending about $200,000 in General Fund reserves. Looking at preliminary reforecast numbers, there is still good news: We expect to outperform our original budget; however, I want to explain why we project that our current actual net revenue will be much closer to revenue/expense-neutral by fiscal year’s end. (Again, I will have actual numbers once the reforecast is approved by the full Board.)

First, the WSBA fiscal-year cycle is always revenue-heavy in the first half (license season) and expense-heavy in the second half (when many service contracts and expenses come due). That is an expected pattern; we expect to see expenses outpace revenue in the final months of the fiscal year. What has not been expected, of course, are the myriad ways in which the pandemic has impacted operations. Throughout the fiscal year, we have made adjustments. The reforecast yielded savings, in fact, in the range of about $400,000. These savings, though, were offset by revenue drops driven mainly by fewer licensing late fees, which are included in the budget based on historical patterns.

While we have managed to keep the General Fund essentially revenue/cost-neutral, the CLE Fund is an area that has been hit particularly hard by COVID-19 conditions. While we have been able to fulfill one of my and the Board’s main goals—to keep lawyer license fees steady (in fact, reducing the overall annual expense by decreasing the Client Protection Fund assessment) from 2019 through at least 2022—all while outperforming budget estimates and weathering one of the most unpredictable, rapidly changing, and challenging times for the legal community—and, indeed, the world.

More than that, we are beginning to look carefully at emerging opportunities as a state bar; while we are still as committed as ever to careful fiscal shepherding of license fees, we are planning how to capitalize on some of our cost-saving measures to add value to the profession and to the public. For instance, WSBA President Kyle Sciuicetti, the Board of Governors, and I have committed to a more robust Member Wellness Program and services—something asked for by members in a recent COVID-19 impact survey and something we know is much needed from our own experiences within the legal community.
Consecutive Years of ‘Clean’ Audit Reports Reflect Confidence in WSBA’s Financial Integrity

Certified public accounting firm Clark Nuber has issued an unmodified, “clean” audit opinion for the Washington State Bar Association’s 2020 fiscal year. This marks several decades of similar outstanding independent audit reports for the WSBA.

The audit report certifies that the Bar’s finances are well managed and accurate in all material respects. An unmodified opinion means there were no adjustments made, no material weaknesses found, and no management letter issued.

As WSBA treasurer, I believe this gives us a high degree of confidence in the Bar’s financial integrity. It shows that the data we report on our financial statements is true and accurate, which indicates we are being responsible stewards of membership dollars. It is important that we do this to ensure adequate internal controls for the organization, and that member license fee revenue is being spent accurately and prudently.

When presenting the audit findings to the WSBA Board of Governors, Certified Public Accountant Mitchell Hansen noted that the WSBA received no audit adjustments in its report when “the average number of adjustments we identify is three to four …” for nonprofit organizations. “To have none is a good indicator of the quality of the systems and people you have here,” he added.

community. We are reprioritizing funds in the reforecasted budget to begin that much-needed work this year.

I am proud of what we have accomplished—and what we are projected to accomplish—this fiscal year. We are looking at an almost revenue/expense-neutral year, all while navigating a pandemic and still finding ways to expand member services—as well as keeping lawyer license fees steady.

It is an honor and a privilege to serve as WSBA treasurer. In keeping with my goal of transparency to members, you can expect to see continued reports of more concrete budget numbers next month when the reforecast is finalized.
Over the past decade, both national and state bar organizations—including the WSBA—have studied a key trend in the legal profession: The average age of lawyers is rising as the baby-boom generation grows older. Although there are many implications from this trend, one of the clearest is retirement. For lawyers at midsize and larger firms, transitioning into retirement usually means simply having other lawyers at their firms step into continuing client relationships. For solos and lawyers at small firms who may be roughly the same age, selling their law practice can provide the functional equivalent. For many solos and small-firm lawyers, however, this transition means closing their law practices altogether.

In this column, we’ll look at three risk management aspects of closing a law practice upon retirement. First, we’ll survey file retention. Second, we’ll address closing the firm’s trust account. Finally, we’ll discuss “tail” insurance coverage.

Before we do, three preliminary points are in order.

First, this column addresses lawyers who are executing a retirement plan developed in advance. Such a retirement plan is to be distinguished from what bar associations nationally have long suggested that solos (in particular) have—the equivalent
of law firm “advance directives” outlining business basics and designating trusted colleagues who have agreed to assist in the event the lawyer dies unexpectedly or has a health crisis that prevents the lawyer from practicing. Second, “retirement” from a law firm does not necessarily mean retirement from the law completely. Many lawyers who have closed their own firms remain active through pro bono and other volunteer work, mediation, teaching, and a variety of other pursuits that draw on their legal training and experience. The WSBA website Status Changes page has information on how these other law-related activities may affect licensing.

Third, we’ll focus on the risk management aspects of closing a law practice. Commercial landlord-tenant law and employment law may also enter the mix to address the business aspects of winding down a practice, such as dealing with the firm’s office lease and its staff. The WSBA’s Practice Management Assistance Program offers a wealth of resources and personal advice on a wide spectrum of retirement-related topics.

FILE RETENTION

When a file is closed, RPC 1.15A(f) ordinarily requires returning client originals that hold legal significance in their paper form—such as original wills—to the client. Although in the past some lawyers, particularly in the estate planning area, obtained client consent to hold original wills and similar documents having legal significance in their paper form, contemporary risk management practice recommends simply returning these kinds of documents when the initial work of creating them is completed. Otherwise, the lawyer has a continuing duty to safeguard those kinds of paper documents and ongoing retention creates the risk in our very mobile society that the lawyer will lose track of the clients over time.

Assuming paper originals holding independent legal significance have consistently been returned to clients throughout a lawyer’s practice, it still makes sense for the lawyer to retain files for a time after they are closed in the event the matter is reopened or questions arise. Other than trust account records, the Rules of Professional Conduct do not specify a particular file-retention period. The WSBA Practice Management Assistance Program instead has a very useful set of online file-retention guidelines that address both particular kinds of documents and specific practice areas.

When a lawyer is nearing retirement, files should be assessed to confirm that client originals of the kind noted earlier have been returned and to gauge whether some files may already exceed the recommended file-retention periods. If so on both counts, then those files can be destroyed. Just as we have a duty to protect confidential information when maintaining files, we also have a duty to securely destroy them. This applies to both paper and electronic files—and, with the latter, storage media or devices that are also being disposed. The Practice Management Assistance Program can provide recommendations on both secure paper shredding and electronic recyclers that will destroy hard drives (or the equivalent) and then salvage the remaining components.

Once older files and devices are addressed, most lawyers will still have a sizeable number of files that remain. Again, these should be surveyed and client original documents returned if this has not already been handled when the files involved were closed. To avoid the higher expense of paper file storage, paper files can be scanned into electronic form for long-term storage. Driven by both technology and the recent pandemic, many law firms have already converted their files into solely...
Dealing with a legal malpractice claim isn’t the way most lawyers would like to spend their retirement.

### TRUST ACCOUNTS

Under RPC 1.15A(h)(9), only an active WSBA member can maintain a trust account.15 Therefore, if a lawyer is fully retiring, the lawyer’s trust account will need to be closed. Trust account records must be maintained for seven years following the disposition of the funds involved under RPC 1.15A(c)(3) and 1.15B(a). The WSBA has an excellent trust account management booklet available for download that addresses, in relevant part, closing a trust account.16 Ideally, all disbursements should reconcile neatly and the account can be closed with a zero balance. Occasionally, however, lawyers winding down their practices discover small sums in their trust accounts owed to clients who, after a reasonable search, cannot be located. In that instance, Comment 6 to RPC 1.15A provides clear direction: “If after taking reasonable steps, the lawyer is still unable to locate the client or third person, the lawyer should treat the funds as unclaimed property under the Uniform Unclaimed Property Act, RCW 63.29.”17 RCW 63.29.170 and 63.29.190 address, respectively, reporting and payment over of unclaimed funds to the Washington Department of Revenue. The Department of Revenue has a downloadable booklet on its website that walks holders of unclaimed property through the process.18

### ‘TAIL’ COVERAGE

Dealing with a legal malpractice claim isn’t the way most lawyers would like to spend their retirement. Although Washington has a three-year limitation period for legal malpractice claims under RCW 4.16.080,19 it is subject to a “discovery rule.” In other words, the three-year limitation period “does not begin to run until the client discovers, or in the reasonable exercise of diligence should have discovered, the facts which give rise to the cause of action.”20 Potentially, therefore, a claim might not be asserted until long after a lawyer has retired. In addition to the risk of an adverse judgment, legal malpractice claims can also be expensive to defend due to their complexity.

To address this kind of unpleasant surprise, malpractice carriers typically offer “extended reporting” or “tail” coverage to their insureds when they leave practice. Although details on availability, length of coverage, and pricing vary by carrier, some form of tail coverage is almost always an important element on the risk management side of retirement planning. The ABA Standing Committee on Lawyers’ Professional Liability has useful guidance on its website for tailoring post-retirement coverage to particular practice areas—particularly those, such as estate planning, where the “tail” period may be longer than others.21 The WSBA also has a webpage with many malpractice insurance resources.22

### NOTES

1. The ABA has compiled a number of reports and articles discussing this trend; including here in Washington, at: www.americanbar.org/groups/professional_responsibility/resources/lawyersinhtransiti/onagingofthebar/.
2. RPC 1.17 addresses selling a law practice. See generally Mark J. Fucile, “Grey Area”—Selling a Law Practice, 70, No. 3 NWLawyer 43 (Apr./May 2016).
3. See generally ABA Formal Opinion 92-369 (1992) (counseling advance planning for solos). Comment 5 to ABA Model Rule 1.3 also suggests advance planning as being included within the duty of diligence reflected in the text of the rule. Although Washington did not adopt a comparable comment, advance planning—even if done informally—is prudent. The WSBA has a law firm disaster planning guide available at: www.wsba.org/for-legal-professionals/member-support/practice-management/guides/disaster-planning.
6. See RPC 115A(c)(3) (safeguarding property).
7. RCW 112.265 also permits original wills for living testators to be filed under seal with “any court having jurisdiction.”
9. RPCs 115A(c)(3) and 115B(a) generally require trust account records to be maintained for seven years.
13. See RPC 1.9(c) (continuing duty of confidentiality to former clients); see also Martin v. Shaen, 22 Wn.2d 505, 517, 156 P.2d 681 (1945) (privilege survives death of client); Swidler & Berlin v. United States, 524 U.S. 399, 410-11, 118 S. Ct. 2081, 141 L. Ed. 2d 379 (1998) (same).
15. See also WSBA Advisory Op. 201903 (2019) (citing RPC 115A(h)(g) and concluding that a retired lawyer could not maintain a trust account to receive future client settlement proceeds).
17. See also WSBA Advisory Op. 2176 (2009) (discussing unclaimed funds in trust and noting that a lawyer is not permitted to include a provision in a fee agreement granting the funds involved to the lawyer in the event the client cannot be found).
21. See www.americanbar.org/groups/lawyers_professional_liability/.
22. See www.wsba.org/for-legal-professionals/member-support/alps-malpractice-insurance.aba.
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FRAMING IT
How to use a deep issue statement to make a lasting first impression

BY MIREILLE BUTLER

“A good brief presents the issue clearly ... It makes you want to decide it. It’s like a good book; it will draw you in.”

There are many different ways to frame an issue. The various methods for framing the issue that attorneys currently use include some, or all, of the following principles:

• You should frame the issue in a single sentence.
• Your issue must start with the word “whether.”
• Your issue should ask a legal question but avoid stating any facts.
• You should give the relevant legal and factual context, but you must still fit it all into one sentence.

These methods are certainly not “wrong.” In fact, the single-sentence method is what I was taught and what many practitioners do. But this method can produce issue statements that are vague because they lack legal or factual context, confusing because they
Illustration ©Getty / mhatzapa

Justice Felix Frankfurter wrote “[p]utting the wrong questions is THE WRITING WILL BE CLEAR ON THE PAGE IF THE ISSUE IS CLEAR IN THE WRITER’S MIND, guessing what is important. dispute and focus the reader. You do not want to leave the reader deciding those issues. This information should be front and center in the reader’s mind. It is also the style that is the most clear, concise, and informative.

But before explaining the “deep issue” method for structuring issue statements in legal memoranda and briefs, it is helpful to understand why formulating the issues up front in the writing process is essential.

YOUR AUDIENCE IS BUSY

Legal writers must think about the many competing demands on their audience’s time. Judges want to know immediately what the dispute is and how to resolve it. This is why the Supreme Court rules require “Questions Presented for Review” to be the first thing judges see in a brief—immediately following the cover and before any tables. Similarly, the King County Superior Court local rules require issue statements at the start of motions.

And if you are writing a legal memorandum, it is helpful for your intended audience to understand the point of it quickly. What is the question? What is your answer? And what are the reasons for that answer?

MEMOS AND BRIEFS ARE NOT MYSTERY NOVELS

You as the writer want to focus the reader’s attention on the precise legal issues at stake and the legally significant facts that are key to deciding those issues. This information should be front and center in your memo or brief. YOUR AUDIENCE IS BUSY

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And if you are writing a legal memorandum, it is helpful for your intended audience to understand the point of it quickly. What is the question? What is your answer? And what are the reasons for that answer?
Student loans are statutorily non-dischargeable in bankruptcy unless repayment would cause the debtor an “undue hardship.” Debtor failed to prove undue hardship in an adversary proceeding as required by the Bankruptcy Rules, and instead, merely declared a discharge in his Chapter 13 plan. Are the orders confirming the plan and discharging debtor void?  

If the major premise is a well-known tenet of the law, alluding to it might be sufficient, as Eugene Volokh did with the Takings Clause:

[The Illinois Supreme Court held that a state law transferring the revenues of four Illinois casinos to five Illinois horse-racing tracks is categorically not susceptible to challenge under the Takings Clause of the Fifth Amendment because, in that court’s view, “regulatory actions requiring the payment of money are not takings.” The question presented is: Whether the state’s taking of money from private parties is wholly outside the scope of the Takings Clause.]

Indeed, the “deep issue” format is flexible. For example, statutory questions are particularly well-suited for a “deep issue” format (this is because statutory issues, when framed in a single-sentence question, often require too many sub-clauses to convey both the broader rules and the specific question). But to avoid weighing down the question with minutia that is not necessary to understand the statutory issue, the writer might omit much of the factual context and focus instead on the legal context.

An example of a “deep issue” applied to a statutory question can be found in Bloate v. United States:

The Speedy Trial Act, 18 U.S.C. § 3161 et seq., requires that a criminal defendant be tried within 70 days of indictment or the defendant’s first appearance in court, whichever is later. In calculating the 70-day period, 18 U.S.C. § 3161(h)(1) automatically excludes “delay resulting from other proceedings concerning the defendant, including but not limited to **(D)** delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of such motion.” The question presented here is: Whether time granted to prepare pretrial motions is excludable under § 3161(h)(1).

And this is an example from a 2016 brief written by Deepak Gupta, a well-known Supreme Court practitioner:

New York, like all states, allows merchants to charge higher prices to consumers who pay with a credit card instead of cash. But New York’s no-surcharge law, N.Y. Gen. Bus. Law § 518, requires merchants to label that price difference as a cash “discount” and makes it a crime—punishable by up to one year in jail—to label it as a credit card “surcharge.” The question presented is whether New York’s no-surcharge law unconstitutionally restricts speech.

An additional point about “deep issue” statements is that, in briefs, they are persuasive. The language should read objectively, but it should be clear which side you are on. The issue statement below, though seemingly objective, is slanted to suggest that the answer to the question is “no.”

Bankruptcy Rules permit discharge of a student loan only through an adversary proceeding, commenced by filing a complaint and serving it and a summons on an appropriate agent of the creditor. Instead, debtor merely included a declaration of discharge in his Chapter 13 plan and mailed it to creditor’s post office box. Does such procedure meet the rigorous demands of due process and entitle the resulting orders to respect under principles of res judicata?

Finally, beyond capturing your arguments clearly to make a lasting first impression, syllogistic thinking also helps you spot weaknesses in your opponents’ arguments. Whether their issue statements are framed as “deep issues” or not, using syllogistic thinking helps uncover the basis on which their arguments might fail. Are the premises untrue? Do they state the relevant, governing rule? Do they conceive of that rule too broadly or narrowly? Do they omit outcome-determinative facts? As Naguib Mahfouz wrote, you can tell whether people are clever by their answers; you can tell whether people are wise by their questions.

**NOTES**

4. 350 F.3d 925, 929 (9th Cir. 2003).
8. Gary T. Schwartz Professor of Law at the UCLA School of Law and academic affiliate at Mayer Brown LLP.
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Recent significant cases decided by the Washington Supreme Court

BY BRYAN HARNETIAUX

Legal Sufficiency of Recall Petition Against County Sheriff for Remarks Critical of Governor’s COVID-19 Proclamation

In the Matter of the Recall of Fortney, ___ Wn.2d ___. (slip op. #98683-5, decided Jan. 14, 2021), involves the question of the sufficiency of a recall petition against Snohomish County Sheriff Adam Fortney. Washington law allows voters a right to recall non-judicial elected officials who commit acts of malfeasance or misfeasance, or violate an oath of office. See Fortney, slip op. at 4; Wash. Const. Art. I, §33; Ch. 29A.56 RCW. Four Snohomish County voters brought a total of five recall charges against Fortney in May 2020, two of which related to public statements he made regarding Gov. Jay Inslee’s “Stay Home, Stay Healthy” proclamation. See id.; slip op. at 1-4. The superior court upheld four of the five charges, including the two related to the COVID-19 proclamation. On appeal to the Supreme Court, Fortney did not challenge the sufficiency of the charge based on his stated refusal to enforce the Stay Home, Stay Healthy proclamation. He did challenge the remaining three viable charges, including one accusing him of inciting the public to violate Gov. Inslee’s Stay Home, Stay Healthy proclamation. See id. at 3, 4. On de novo review, the Supreme Court was required to determine whether the recall charges were legally and factually sufficient. See id. at 5.

In a 6-3 opinion, the court upheld the legal and factual sufficiency of the COVID-19 “incitement” charge. The majority described Fortney’s anti-proclamation public statements as follows:

Fortney unambiguously proclaimed that the Stay Home, Stay Healthy proclamation was unconstitutional and that the governor’s judgment should be questioned, and he advocated that residents had the right to work. Fortney specifically directed his message to Snohomish “business owners,” declaring that “it is time to open up this freedom [to work]” for “small business owners,” and it was “time to lead the way.”

Id. at 8-9 (record citation omitted).

After extended analysis, the majority concluded that “[w]e agree with the trial court’s determination that a voter could reasonably conclude that Fortney’s specific words ‘incit[ed] folks to violate the stay-at-home order’” Id. at 9 (record citation omitted). Ultimately, the majority determined it was a question for the voters whether Fortney’s public acts constituted misfeasance, malfeasance, or violation of his oath of office, and allowed this recall charge to proceed to the signature-gathering phase. See Fortney, Gordon McCloud, J., concurring/dissenting, slip op. at 7.

Viability of Tort Claim for Negligent Performance of Law Enforcement Activities

In Mancini v. City of Tacoma, et al., ___ Wn.2d ___. (slip op. #97583-3, decided Jan. 28, 2021), Mancini brought a civil action against the city for mistakenly executing a search warrant at her apartment. City of Tacoma police officers obtained a search warrant at her apartment. Eight officers executed the warrant for suspect Logstrom’s person, vehicle, and what was purported to be his apartment. Eight officers executed the search warrant on that apartment using a battering ram, and with guns drawn. As it turns out, the officers executed the war-
rant on Mancini’s apartment. It was later determined that Logstrom lived in another apartment in a nearby building. See Mancini, slip op. at 1-4. In the course of executing the warrant, the officers handcuffed Mancini, dragged her out of the apartment in her nightgown, and denied her request to put on her shoes. She was released within about 15 minutes and advised that the officers had raided the wrong apartment. See id. at 5.

Mancini sued the city, et al, for negligence and other tort claims. The city apparently successfully argued at the superior court that it breached no duty owed to Mancini, and that, to the extent her claim was based upon “negligent investigation,” such a claim is not recognized under Washington law. The Court of Appeals reversed and remanded, finding viable claims existed centered on execution of the warrant, rejecting the city’s attempt to cast the negligence claim as one for negligent investigation. See id. at 7-8.

On remand, the case was tried to a jury under theories of negligence, invasion of privacy, false imprisonment, and assault and battery. Mancini only prevailed on the negligence claim. See id. at 11. The jury was given a standard instruction defining negligence as the failure to exercise ordinary care, and the verdict form did not include special interrogatories requiring the jury to specify the basis for any negligence finding. The jury returned a verdict for Mancini on the negligence claim and awarded $250,000. See id.

On appeal, the Court of Appeals reversed, concluding that the case was tried as a negligent investigation claim, not cognizable under Washington law. See id. at 11-12. The Supreme Court granted review on whether the city’s CR 50 motion for a directed verdict on the negligence claim should have been granted under the circumstances. See id. at 12.

In an 8-1 opinion, the Supreme Court upheld the negligence verdict against the city. See id. at 15, 28. In the course of its analysis, and despite the fact that Mancini emphasized the inadequacy of the underlying police investigation throughout the trial, the court recognized that Washington law allows for potential tort liability for negligent performance of law enforcement duties, and extended this liability to situations involving negligence in the execution of a search warrant. See id. at 14, 16-17. In so doing, the court held law enforcement officers to a duty of ordinary care. See id. at 17 & n.8. The court found there was substantial evidence supporting the jury verdict of negligence based upon the execution of the search warrant. See id. at 21, 25-28. In resolving the appeal, the court was careful to leave open the question of whether it will recognize a claim for negligent investigation against law enforcement officers. See id. at 15 & n.7.

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Post-Conviction Relief—Availability of Equitable Tolling Doctrine to Overcome a Criminal Defendant’s Untimely Personal Restraint Petition

In In re Fowler, ___ Wn.2d ___ (slip op. #97456-0, decided Feb. 4, 2021), petitioner Fowler sought to avoid dismissal of a personal restraint petition seeking post-conviction relief due to untimeliness by invoking the doctrine of equitable tolling. Under Washington law, Fowler had one year from the time his criminal judgment became final to seek habeas-type relief via a personal restraint petition. See Fowler, slip op. at 1; RCW 10.73.090-.100. The Court of Appeals rejected Fowler’s argument that his belated filing should be subject to “equitable tolling” because his former attorney had egregiously failed to pursue timely post-conviction relief on his behalf. It concluded that “equitable tolling applies only when a petitioner asserts bad faith, deception, or false assurances by the opposing party ...” Id. at 5.

The Supreme Court granted review on the unresolved question of whether a claim of equitable tolling can be based upon the conduct of the petitioner’s own legal counsel. See id. at 7-9. In a 6-3 opinion, the court held that equitable tolling can be based on egregious misconduct by the petitioner’s own attorney and that Fowler’s original legal counsel’s complete failure to prepare and file a timely personal restraint petition was an extraordinary circumstance; it further found that Fowler had acted diligently in seeking to remedy this failure. See id. at 10-11. Consequently, Fowler’s belatedly filed personal restraint petition was deemed timely, and the case was remanded for consideration on the merits. See id. at 13.

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NOTES

1. This proclamation temporarily closed non-essential businesses and prohibited non-essential travel and activities. See Fortney, slip op. at 6.

2. The Supreme Court reversed in part the superior court determination on the other two charges unrelated to COVID-19, which are not addressed further here. See id. at 13-22.

3. The court acknowledged that while a county sheriff has a great deal of discretion in enforcing the laws, he must not exercise that discretion in a “manifestly unreasonable manner,” and that on this record that question was for the voters to resolve. See Fortney, slip op. at 9-10.

4. The Supreme Court has also addressed, in two other recent cases, the legal and factual sufficiency of recall charges against public officials based upon criticisms of executive branch proclamations or orders involving the COVID-19 crisis. See In re Recall of White, 196 Wn.2d 492 (2020) (finding recall charge against a city councilman based on criticism of the state’s COVID-19 response insufficient); In re Recall of Snaza, ___ Wn.2d ___ (slip op. #98918-4, decided Feb. 11, 2021) (finding recall charge based upon a county sheriff’s press release that he would not criminally enforce a State Secretary of Health COVID-19 order legally and factually insufficient).

5. The majority disagreed with the dissent that a plaintiff’s proof of negligence must be supported by law enforcement expert testimony, concluding a jury is capable of deciding whether a law enforcement officer’s conduct is unreasonable under the circumstances. See Mancini, slip op. at 27 n.15, & Madsen, J., dissenting, slip op. at 1, 5 (urging “reasonably prudent police officer” standard).

6. In upholding the verdict, the court also rejected the city’s arguments based upon discretionary immunity and application of the public duty doctrine. See Mancini, slip op. at 21-25.

7. While the Supreme Court recognized that the Court of Appeals has denied recovery based upon a theory of negligent police investigation, it noted that it has not authoritatively ruled on this question outside of the child abuse context. See Mancini, slip op. at 15 n.7.

8. In reaching this result, the court clarified that petitioners seeking to establish equitable tolling bear the burden of showing “(1) that they diligently pursued their rights and (2) that an extraordinary circumstance prevented a timely filing.” Id. at 8 (citation omitted).

9. The three-justice dissent questioned the substantive equitable tolling standard articulated by the majority, and also disagreed with its determination that Fowler had acted with due diligence. See Fowler, Whitmer, J., dissenting, slip op. at 1-2.
I was admitted to the Bar in 2012, and I guess you could call me a millennial. Coming out of law school at the tender age of 24, I had a very specific idea of what a lawyer looked like. There seemed to be a common understanding in the profession that there is a certain way to be—a particular way a “real” lawyer dresses, talks, writes, and acts. A formality to it all. You are inducted into the mystical land of the barrister, so you speak the language of legal-ese. You put on the dark suit.

The sentiment seemed to be that it has been this way since the white wigs, and for God’s sake we all had to get through 1L and take (not to mention pass) the bar exam to get here, so yes, it is a special club with special rules. Learn the rules and conduct yourself in this specific way or get out.

So I did. And I was proud of it at first, proud to wear the dark suit. I was in the club! I made it! I am a lawyer! Now respect me. Be afraid of what this dark suit can do.

Yet as I settled into the profession, the dark suit identity always felt a little stiff to me. A little too stuffy and tight around the collar. I found it kind of hard to breathe in, actually.

I’ve had a few different roles in my legal career so far, in government and private practice, and now my husband and I run our own law firm. I have been so grateful for this most recent iteration of my career, because being the boss means I make the rules, and making my own rules caused me to ask myself whether the dark suit is necessary—and if it is even a hindrance—for me to do my job in the best possible way.

It’s like roots that grow up and bloom into a sprout, instead of a sprout trying to force down a particular image of what its roots need to look like.

Bit by bit I’ve loosened the collar of the itchy suit, taking small but steady steps away from the way I am “supposed” to be in this profession, away from blindly copying the cadence and standards set by those before me, which were set by those before them, and those before them. At what point do we question what, for us, is no longer relevant or effective? For me, to step out of the dark suit is to come into something more natural, and I suspect it is in what is natural where true power lies.

And I’m not losing clients, getting taken less seriously in court, or sacrificing my authority with opposing counsel. It is quite the opposite. There is a sort of magic that happens when you move with honesty. There is a magnetic quality to it. You attract good cases, the clients you want, the results you seek. It’s like the great world out there can sense that you are being YOU—not trying to fake it as anyone or anything else—and is automatically drawn to your you-ness.

I challenge the unspoken understanding of the way we all “are
supposed to be” as lawyers—the stuffiness, the formality, the long and complicated prose (especially to our clients), the aggressive (including passive-aggressive) emails, the antagonism, the metaphorical (or literal) high heels and shoulder pads—if none of that is really you.

There is something very effective about authenticity in our cases. There is something so powerful about approachability with our clients. There is something very productive about warmth and directness with opposing counsel, administrative staff, or anyone else we deal with in our day. There doesn’t need to be so much puffery. It doesn’t have to be so much of a fight. We can have smoothness and ease even in the most difficult parts of our work by being more real.

I was very moved recently to receive a set of discovery responses from opposing counsel that simply, and in an incredibly straightforward manner, answered the questions posed. No long list of rambling objections. No dodging or deferring to answer until a later time. Just a simple response, because that’s what the case really called for.

It blew my mind.
What a beautiful way to move as a lawyer.

Of course we go to bat when it’s required, and of course we don’t become a doormat. Doing this work with honesty and humanness doesn’t mean you become weak. It means you work from a place of what is true. You move from a wide-open heart. Clear and direct. No hostility, no unapproachable dark suit.

Turns out, it’s just not needed.
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Using ‘Reasonable Cause’ to Avoid IRS Penalties

BY ROBERT W. WOOD

NOTE: This article originally appeared in Tax Insider. ©2021 Association of International Certified Professional Accountants.

Taxpayers ask to have IRS penalties forgiven for many reasons. One of the most common, and most misunderstood, is the assertion that the taxpayer had “reasonable cause” for the failure to file a return or pay tax that is due. “Reasonable cause” might sound like a simple phrase, but even if you think your cause is reasonable, the IRS may not agree. How the IRS evaluates reasonable cause depends on which penalty has been assessed and how you behaved. On top of reasonable cause, some penalty defenses involve an absence of willful neglect. Isn’t that proving a negative? Yes, and guess who wins in a tax penalty stalemate? The IRS, of course.

The IRS applies reasonableness on a case-by-case basis, which sometimes leads to inconsistent results. However, you bear the burden of substantiating your claim of reasonable cause. The stakes can be big, from 20 percent to a whopping 75 percent of your tax bill. The tax code is chock-full of penalty provisions, so you always want to behave reasonably and in good faith.

TAX RETURN REPORTING

According to the IRS, the most significant factors in determining whether you have reasonable cause and acted in good faith are your efforts to report your proper tax liability. Were you careful in doing your best to report the right amount?

For example, suppose that you report the amount from an erroneous Form 1099, but you didn’t actually know that the Form 1099 was wrong. You think the Form 1099 shows the total you were paid, but under audit you discover that the Form 1099 reported less than you actually received. That could happen to anyone. We all rely on Form 1099 data, so reasonable cause may apply if you just picked up a reported number and reasonably assumed it was correct.

But what if you were paid $300,000, and the Form 1099 said you received $300? It might be harder to say you reasonably relied on that number as being correct and reported it, compared to an error where the inaccurate Form 1099 said you received $285,000.

Still, how you behave and what you did may be reasonable, even with a big error. For example, an isolated computation or transposition error may be consistent with reasonable cause and a good faith effort. A mistake or two can often be explained, even if it is clear in the end that you were just plain wrong. However, if you have a dozen of these errors on your return, it becomes less likely that the IRS will understand and let you off the penalty hook.

RELIANCE ON A TAX ADVISER

Other factors the IRS considers include the taxpayer’s experience, knowledge, education, and reliance on the advice of a tax adviser. If you do use a tax adviser, you must provide that person with all of the necessary information to evaluate your tax matter. In other words, cherry-picking what you tell your tax adviser to get the answer you want to hear is not reasonable.

The IRS says that the adviser must have knowledge and expertise related to the tax matter. If you have a complex corporate tax problem and you go to an individual income tax adviser who does not handle corporate tax matters, it might not be reasonable for you to rely on that person, no matter how faithfully you follow his or her advice.

RELIANCE ON ADVICE FROM THE IRS

Some mistakes and circumstances are beyond your control. However, the IRS also asks whether you could have foreseen or anticipated the event that caused the problem in the first place. How about relying on tax advice from the IRS, isn’t that always reasonable? Not necessarily. This can be a
surprisingly touchy issue, particularly in the case of oral advice.

Oral advice usually isn't worth the paper it's not printed on. If you point to something the IRS told you in writing, the IRS evaluates the information and determines if the advice was in response to a specific request and related to the facts contained in that request. The IRS also wants to know if you actually relied on its advice.

IN WRITING
Like just about everything else with the IRS, you almost always should lay it out in writing. In fact, in many cases, the tax regulations actually require the taxpayer's request for waiver of the penalty to be in writing and even signed under penalties of perjury.¹

ORDINARY BUSINESS CARE
The IRS will consider any reason that establishes that you used all ordinary business care and prudence to meet your tax obligations but were nevertheless unable to do so. Ordinary business care and prudence means taking the degree of care that a reasonably prudent person would exercise, while still being unable to comply with the law.

Your effort to report the proper tax liability is the most important factor in determining reasonable cause. The IRS considers all facts and circumstances, and reviews all available information such as the taxpayer's reason, compliance history, length of time, and circumstances beyond the taxpayer's control. You might assume that this is just about the tax year involved. However, the IRS often looks at the three previous tax years for your payment patterns and compliance history. If you are hit with the same penalty each year, you may not be exercising ordinary business care. On the other hand, if this is your first incidence of noncompliance, the IRS will consider that, along with the other reasons and circumstances you provide.

Some penalty sections also require that you act in good faith, or that your failure to comply was not due to willful neglect. You want to show how your facts and your conduct meet all the required tests.
WHAT ISN’T REASONABLE

Taxes are complex, but some errors aren’t reasonable. For example, the IRS says you generally do not have reasonable cause if the penalty relates to the late filing of a tax return or late payment of a tax obligation. Saying that you thought tax returns were due May 15, not April 15—even if a tax professional told you that—isn’t likely to save you from penalties.

Also, saying that your accountant had your return, you told him to file it, and he forgot? The IRS says everyone is responsible for timely filing taxes, and for paying them, and those duties cannot be delegated. So even if you rely on accountants, bookkeepers, or attorneys, you cannot delegate responsibility to timely file tax returns and timely pay tax obligations. On the other hand, things like the unavailability of records or a change to the law that could not reasonably have been expected to know might be forgiven.

In some cases, you can even seek penalty relief due to a lack of knowledge of the law. Relevant factors include your education, whether you have been subject to the tax before, whether you have been penalized before, the complexity of the tax issue, and recent changes in the tax law or forms.

How about forgetfulness as a basis for reasonable cause? Nope, the IRS says forgetfulness indicates a lack of reasonable cause.

CONCLUSION

Avoiding penalties with the IRS is a vast subject. If you or a client are being penalized, analyze the facts from a common sense perspective and look into the large body of governing tax law. And if the dollars are significant to your pocketbook, get some professional advice. [98]

NOTES

1. See Treas. Reg. 301.6651-1(c)(1) and 301.6724-1(m).
2. Of course, May 17 is the deadline this year for filing 2020 tax returns.
When then-WSBA President Rajeev Majumdar gave an interview about his own mental health journey entitled “Working to Combat the Stigma Around Seeking Help” in the September 2020 issue of Bar News, and when current WSBA President Kyle Sciuchetti began his 2020-2021 term with a Bar News article about the importance of member wellness, the WSBA Member Wellness Program welcomed the appearance of two prominent allies.

Discussed in more detail later in this article, but summarized here, are a cascade of positive developments in recent years aimed at supporting the mental health of attorneys. In 2016, we saw improved clinical research into attorney mental health; in 2017, the formation of well-being committees; in 2018, law firms began making well-being pledges. In 2020, the Institute for Well-Being in Law was formed to provide research and best practices across various venues of legal culture. The Institute also created Well-Being Week in Law, which the WSBA will celebrate in May. These are all part of a national trend of bar associations thinking about how best to support the profession.

The seminal piece of research that inspired such recent changes was “The Prevalence of Substance Use and Other Mental Health Concerns Among American Attorneys” published in the Journal of Addiction

Hearing about another attorney’s personal struggles can reinforce that it’s OK to talk about mental health.
While it had been speculated for decades that attorneys have a higher rate of addiction and mental health problems than the general population, no research with a viable sample size had been published in 25 years. With a sample size of 13,000 attorneys, the researchers found that between 21 and 36 percent of lawyers qualify as “problem drinkers” and 28 percent struggle with depression. In general, rates of mental illness and addiction among lawyers were approximately twice those of the general population. This article was quickly picked up by the media and led to a ground-swell of interest by the ABA, state bar associations and their practice area sections, and the public.

An increase in attorney suicide became the next focus of media reporting. For instance, a 2017 article in The New York Times, “The Lawyer, The Addict,” examined the suicide of a talented attorney who had managed to disguise a profound drug addiction and vast depression from his family and colleagues. Another article from Law.com, “Big Law Killed My Husband,” pointed the finger at law firm management for a spouse’s suicide at his firm. Where once such cases were seen as triggered by private and personal issues, they started to be seen as a not-unexpected result of joining a culture with punitive rules and few options to seek help.

Several recent initiatives have shown potential to break through the inertia of institutional cultures. In 2017, the National Taskforce on Lawyer Well-Being put

SIDEBAR

Participate Virtually in May

From May 3-7, the WSBA will be participating in Well-Being Week in Law. During this week we will promote activity ideas for members for every day:

MONDAY. “Stay Strong” is about physical well-being, nutrition, exercise, and sleep.

TUESDAY. “Align” is about spiritual well-being. Foster a sense of purpose and align your work with your values.

WEDNESDAY. “Engage and Grow” supports improving occupational and intellectual wellness. Find ways to think about where your career is headed and what you need to take you there.

THURSDAY. “Connect—Social Well-Being” advocates for building connection, belonging, and a reliable support group.

FRIDAY. “Feel Well—Emotional Well-Being” encourages understanding and leveraging your emotions effectively and seeking mental health support as needed.

The WSBA’s Member Wellness Program team is working on a crowdsourced video of attorneys statewide speaking about what they love about their firms and what helps them to feel engaged in the profession. And a keynote presentation on May 5 will feature Mindfulness-Based Stress Reduction (MBSR) expert Stefanie Harris.

LEARN MORE >
https://lawyerwellbeing.net/lawyer-well-being-week/
The WSBA’s Commitment to Wellness

CONTINUED >

out a report entitled “The Path to Lawyer Well-Being: Practical Recommendations for Positive Change” that details 44 objectives the legal profession can adopt to promote attorney well-being. Objectives include: provision of wellness-based CLE programming; outreach to statewide addictions groups for attorneys; support for judicial assistance; reviewing character and fitness committees that are part of the admissions process; examining the methods and tone disciplinary counsel take in reviewing grievances; reviewing law school practices for supporting student well-being; and promoting healthy work environments in law firms. Thirty-one state bars thus far have either formed committees to study or have begun implementing these changes.

In 2018, the Commission on Lawyer Assistance Programs (COLAP) initiated a pledge campaign to promote best practices for law firms to take care of their attorneys, promote a cohesive work environment, and prevent turnover in the process. While just 13 firms signed the initial pledge, 197 have now signed and the number keeps growing. The pledge includes a seven-point checklist for law firms to improve the messaging to lawyers about a firm’s interest in well-being and the available methods of addressing difficulties. The seven points are as follows:

1. Provide enhanced and robust education to attorneys and staff on topics related to well-being, mental health, and substance use disorders.
2. Disrupt the status quo of drinking-based events.
3. Develop visible partnerships with outside resources committed to reducing substance use disorders and mental health distress in the profession: health care insurers, lawyer assistance programs, Employee Assistance Plans (EAPs), and experts in the field.
4. Provide confidential access to addiction and mental health experts and resources, including free, in-house self-assessment tools.
5. Develop proactive policies and protocols to support assessment and treatment of substance use and mental health problems, including a defined back-to-work policy following treatment.
6. Actively and consistently demonstrate that help-seeking and self-care are core cultural values, by regularly supporting programs to improve physical, mental, and emotional well-being.
7. Highlight the adoption of this well-being framework to attract and retain the best lawyers and staff.

Here in Washington, a group of attorneys is looking at ways to bring this pledge to firms throughout the state. One of the first local signatories to the pledge was Perkins Coie.

Perkins Coie Director of Communications Jodi Joung explained that the firm enthusiastically supported the pledge from the get-go because it has long recognized that the practice of law is inherently demanding, and that’s especially true in large law firms where the pressure to deliver excellent work at all times, and to generate new work, can be extraordinary. She shared that the firm’s former managing partner first learned about the pledge at a meeting of the Attorneys Liability Assurance Society (ALAS).

Joung said that Perkins Coie regularly communicates to its lawyers and staff about mental health and addiction issues facing the industry and highlights resources available to address these issues. Over the past year, in particular, Perkins Coie took extra measures to ensure that its lawyers were offered flexibility and reduced schedule options to deal with the unique challenges and stresses resulting from the pandemic, and it established discussion forums for personnel to feel heard and supported. The firm’s human resources department also arranged for several outside experts to speak to its personnel about the importance and benefits of stress-reduction, relaxation and meditation, and more. The firm has also welcomed lawyers at Perkins Coie who have struggled with mental health or addiction issues to speak about their own experiences to other lawyers.

I spoke to one lawyer who gave a presentation to Perkins Coie attorneys about his own recovery from alcoholism. It is one thing to hear a mental health expert give a clinical take on substance abuse and depression, but it’s far more impactful to hear about another attorney’s personal struggles—it creates a unique connection that can give hope to other attorneys that there’s a way forward, and reinforces that it’s OK to talk about mental health.

When it comes to communicating the availability of mental health treatment and leave of absence options to staff, Joung said that Perkins Coie shares this through EAP emails, information about how medical plans fund treatment, and by posting the Well-Being Pledge and available resources on the firm’s intranet. She added that the

For more information about the WSBA Member Wellness Program, visit www.wsba.org/wellness.

In addition, the WSBA Connects program provides all WSBA members with free counseling on topics including work stress, career challenges, addiction, and anxiety. Call 800-765-0770 or visit www.wsba.org/connects.
firm contracts with an EAP that promotes itself as a “lifeline for healthcare help” and assists employees and their families with medical referrals and inpatient hospitalizations. In general, she noted that the firm strives to create a culture in which the issues of mental health—for lawyers and their family members—are recognized and discussed and are accepted as a normal part of the work they do.

Of course, these resources need not be exclusively for Big Law. Government offices nationwide are signing the pledge. And if these resources can be promoted in a readily accessible, cost-efficient way, it can inspire greater buy-in by small firms and even solo practitioners statewide.

We encourage you and your firm to commit to Well-Being Week in Law. If colleagues can unite in their objectives, your workplace can become a community and not just a place you draw a paycheck. If you have suggestions for our program, the Well-Being Pledge, or Well-Being Week in Law, or if you would like to contribute to the WSBA’s ongoing analysis of its commitment to member well-being, we hope to hear from you at wellness@wsba.org.

NOTES
The Washington Supreme Court’s foundation-shaking decision in *Martinez-Cuevas v. DeRuyter Bros. Dairy* holds dairy workers entitled to overtime protections

**BY MARC LAMPSON**
Holsteins are huge in the Yakima Valley.¹

They’re the most popular dairy cow in the U.S. and, when mature, typically weigh around 1,500 pounds.² Handling them is dangerous: “A stressed cow may kick, charge, or ram workers who enter its flight zone or blind spot during various work activities.”³ Eighty percent of workers in large-herd milking parlors reported being kicked or stepped on by a cow.⁴ Heavy machinery⁵ and exposed mechanical parts like rotating shafts, belts, flywheels, pulleys, chains, gears, blades, sprockets, shear points, and skid-steer or tractor rollovers can bring injury and death.⁶ Add to that the long hours that dairy workers put in each week, and it’s a risky situation all around.⁷

As for the long hours, the majority opinion⁹ held that the part of the state’s Minimum Wage Act (MWA), which says farmworkers¹⁰ are not entitled to overtime pay for hours worked over 40 per week, violated the state’s constitution, as applied to dairy workers.¹¹ Three justices signed a concurrence;¹² four justices dissented.¹³ But the majority held that because the statute excluded farmworkers from overtime pay, the statute granted “legislative favoritism” to a group of employers at the expense of a fundamental right of workers to health and safety protection, and it thus violated article 1, section 12 of the Washington Constitution: “No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations.”¹⁴ Further, the majority held the workers’ fundamental right to health and safety protection was guaranteed under article II, section 35 of the Washington Constitution, which says the Legislature “shall pass necessary laws for the protection of persons working in ... employments dangerous to life or

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debiterious to health.” The dangerous nature of dairy work was thus central to the decision, as the majority noted: “[D]airy work is some of the most hazardous in the United States,” and “[o]vertime work is particularly injurious. ...”

THE HISTORY OF THE CASE—AND OF THE DEFENDANT DAIRY
Jose Martinez-Cuevas and Patricia Aguilar were the named plaintiffs in the class action lawsuit against DeRuyter Brothers. Martinez-Cuevas said he had been injured twice in 15 months while working at the DeRuyter dairy. In one instance, a cow stepped on his hand, and in another a cow kicked him in the shoulder, for which he was sent to the Sunnyside Hospital. He said he “almost always worked over 40 hours per week” at DeRuyter, was never paid overtime, and thought the long hours made him more susceptible to injury. Martinez-Cuevas had attended school through the fifth grade. He said in the time he had worked at the dairy, he knew of only two milkers who were “not Latino.” Similarly, Aguilar, who had attended Toppenish High School online, but did not graduate, said she knew of only one milker at DeRuyter who was “not Latino.” Aguilar said she had been injured four times in 15 months at DeRuyter, always by contact with cows, including once when a cow kicked her in the hand and once when a cow kicked her in the chest, both times while she was hooking up the milking machine. She said her mother had worked there too and had also been injured when cows pinned her against a wall while she was pushing them into one of two milking parlors at the DeRuyter dairy.

The plaintiffs’ legal team at Columbia Legal Services (CLS) had examined Occupational Safety and Health Administration (OSHA) reports that DeRuyter submitted for 2014-2016. CLS estimated from these records that 75 percent of the accidents DeRuyter reported were related to contact with the dairy farm’s animals and that during those years, approximately 10 percent of the workers had suffered some sort of injury; some were injured more than once at the dairy.

DeRuyter Brothers Dairy, the defendant in the case, was founded in 1976 with 90 cows and 40 acres of leased land on Van Belle Road in Outlook, Washington, by Jake and Nick DeRuyter, sons of Wilhelmus (Bill) DeRuyter. Bill had been born in Holland in 1926 and immigrated with his parents and siblings to Southern California after World War II. He and his wife later owned and operated a dairy in San Diego until he retired in 1976 and moved the family to Outlook. In 2005, Jake’s wife Geneva (Genny) Van de Graaf (now DeRuyter) filed articles of incorporation in Washington listing her and her husband as owners of the dairy. By 2017, the farm had at least 3,100 Holsteins.

By 2020, Dun & Bradstreet Hoovers reported the company had 70 employees and had generated $11.33 million in sales.

Marc Lampson serves on the Bar News Editorial Advisory Committee. He wrote a legal history of King County, From Profanity Hill: The King County Bar Association’s Story. He works as a review judge for the Board of Appeals at the Department of Social and Health Services in Olympia. He can be reached at mrlampson1@gmail.com.
The intervention of the Farm Bureau on the dairy’s behalf against the dairy workers ... began the latest clash in a half-century of battles between the Farm Bureau and legal services.

**DIVERSE IMMIGRATION POLICIES**

The Immigration Act of 1924, in effect until 1965, set immigration quotas to the U.S. from many countries, but favored immigrants from Northwestern Europe. The period in which Bill DeRuyter, his parents, and siblings emigrated from Holland was not long after the Dutch famine of 1944-45, known as *Hongerwinter* (hunger winter) in the Netherlands. It took place toward the end of World War II, under the Nazi occupation and a blockade that cut off food from farm towns. After the war, a new cohort of 80,000 Dutch immigrants came to the United States with Dutch government encouragement. Most, like the DeRuyters, settled in California, while others settled in Washington and six other states.

Immigration for Mexican people was more problematic during the same period. It was the era of the “Bracero Program,” which “set up a labor contracting system by which the U.S. government negotiated the temporary importation of 4.8 million Mexican workers to be used primarily in agriculture between the years 1942 and 1964.” The contract bound the “guest worker” to perform consistent labor and then return to Mexico at the end of the harvest. The American Farm Bureau Federation extolled this “temporary” aspect of the program and the California Farm Bureau saw the virtue of the program as being the requirement that “braceros” had to stay in their jobs no matter what (as contrasted with domestic workers, who could relocate if they were dissatisfied with working conditions). Of course, not all Mexican workers came to the U.S. via the Bracero Program, and many undocumented workers were periodically rounded up *en masse* and deported. In 1954, the Immigration and Naturalization Service (INS), through its Border Patrol, launched its offensively named “Operation Wetback,” which it claimed eventually seized 1.1 million “unauthorized Mexican immigrants” and took them back deep into Mexico’s interior.

These programs and operations created a highly vulnerable immigrant work force, reluctant to complain about their working conditions.

**NEW ROUTES FOR OLD DISPUTES**

Working conditions were at the root of the *Martinez-Cuevas* case, which began in Yakima Superior Court over the milkers’ claims that they were not getting rest breaks and meal periods mandated by state law, and were not getting paid overtime. The parties reached a court-approved settlement of the break and meal-time claims and stipulated to the class certification for the remaining overtime claims. After the plaintiffs filed for summary judgment on the overtime claims, the Washington State Dairy Federation and the Washington Farm Bureau intervened in the case on behalf of DeRuyter Brothers Dairy.

The intervention of the Farm Bureau on the dairy’s behalf against the dairy workers, who were represented in part by CLS, began the latest clash in a half-century of battles between the Farm Bureau and legal services. Lori J. Isley, an attorney with CLS, and Marc Cote of Frank Freed Subit & Thomas represented the plaintiffs. Timothy O’Connell, a partner at Stoel Rives, LLP, represented the intervening Washington Farm Bureau.

The American Farm Bureau Federation, the parent of the state farm bureaus, is an independent, nongovernmental, voluntary organization governed by and representing...
farm and ranch families. It was founded in 1919 as a “conservative alternative to the progressive Grange,” and it became a formidable force on Capitol Hill in mid-century. The Farm Bureau had actively opposed the Legal Services Corporation, which funded legal services for the poor, since the early 1960s. When California Rural Legal Assistance (CRLA), one of the earliest and most successful legal services offices, became deeply involved in representing farmworkers throughout the state, the California Farm Bureau urged then-Gov. Ronald Reagan to put a stop to it. In 1978, the Farm Bureau passed a resolution demanding that the federal government abolish LSC. In the 1980s, the Farm Bureau launched another campaign to eliminate LSC because, in part, “Legal Services attorneys” were “stirring up controversy particularly among migrant and seasonal farm workers.” Its most successful effort came in the mid-1990s when the GOP held a majority in Congress and the Farm Bureau pushed once again to eliminate LSC. In 1996, Congress slashed federal funding for LSC and imposed restrictions on what LSC-funded offices could do, including prohibiting them from representing undocumented workers, collecting attorney fees awards, and conducting class action litigation.

The slashed federal budget nearly wiped out federal funding for legal services in Washington (and elsewhere). Evergreen Legal Services, the federally funded program in Washington, had to be closed. But the civil legal aid community in Washington soon created two new legal aid agencies. One, the Northwest Justice Project (NJP), would get the limited federal funding still available and abide by the LSC restrictions. The other would seek a separate stream of funding that would allow it to represent anyone who needed legal representation and to carry on, when necessary, class action litigation; that agency became Columbia Legal Services (CLS). Years later, both entities would have an impact on dairy workers at DeRuyter Brothers Dairy. NJP brought a lawsuit against the dairy for one worker who was sexually harassed at the dairy. She was granted a Sexual Assault Protection Order and an award to compensate her for the harm caused by the harassment. And CLS brought the Martinez-Cuevas v. DeRuyter Bros. Dairy lawsuit in Yakima Superior Court, seeking work breaks and meal periods and claiming in part that the statutory exclusion of farmworkers from overtime pay violated the equal protection provision of the state constitution.

CONCURRING AND DISSENTING OPINIONS
The concurring opinion in Martinez-Cuevas agreed that excluding farmworkers from overtime violated equal protection. The concurrence’s author, the Washington Supreme Court’s current Chief Justice, Steven González, held that because the privileges

Economic concerns are undeniably significant in the dairy industry, which has historically been known for its booms and busts.
and immunities clause of the state constitution, art. I, section 12, prohibits discrimination, the Minimum Wage Act’s exclusion of farmworkers from overtime compensation was unconstitutional on its face. The opinion reviewed the legislative history, during the New Deal, of the National Labor Relations Act, the Social Security Act, and the Fair Labor Standards Act (FLSA), which was enacted in 1938. The history showed that farmworkers had been excluded from the protections of these acts through racism which “directly influenced these exclusionary policies.” Congressional proponents of these acts agreed to exclude agricultural workers, who were largely African American in the South, so that southern Democrats would support the legislation. When the Washington Legislature enacted its Minimum Wage Act in 1959, it based that act on the FLSA and the farmworker exclusions that were part of it.

Justice González’s opinion notes that in Washington, 99 percent of farmworkers today are Latinx and more than three-quarters do not read or write in English. Because the overtime exclusion treated farmworkers, who are largely people of color and the sort of “politically powerless minority whose interests are a central concern of equal protection,” their exclusion from overtime pay violated the state constitution’s mandate for equality under the law.

At oral argument, Justice González asked the Farm Bureau’s counsel if the justices could just ignore the national history of the FLSA and other New Deal legislation and its “underpinning” of excluding Black workers. Counsel replied, “Well, Your Honor, respectfully, I don’t believe that the conduct of Congress decades before [1938] our Legislature acted [1959] can be imparted to our Legislature, and the demographics of our workforce was different at the time our Legislature acted.” Counsel also said that the exclusion of Black workers from the FLSA was “not undisputed” and to the contrary it was “a highly contested matter.” He added that the “danger of farm working is plainly disputed” as well.

Justice Debra Stephens asked the first question of plaintiffs’ counsel at oral argument in the Martinez-Cuevas case—whether the purpose of the farmworker overtime exemption was to encourage more employment by limiting employees to 40 hours, so that the “extra hours” would be worked by additional employees. As appellate attorneys observe, the first question from the bench in oral argument often comes from the justice least convinced by your argument.

And indeed, Justice Stephens wrote the principal dissent in Martinez-Cuevas, which is the longest of the four opinions from the court. It marshalled decades of case law, including the Slaughter-House Cases, and decades of legal scholarship to support its conclusions: “In sum, I would hold that the agricultural exemption from overtime pay does not confer a privilege or immunity under article I, section 12 because no fundamental right is at issue.”

Further, Justice Stephens asserted that if “rational basis review” was applicable to the equal protection challenge to the farmworker overtime exception, then under that standard of review, “the legislature could have rationally concluded that lower operation costs may decrease the overall cost of agricultural commodities and these benefits may be passed on to Washington consumers. ... Because the agricultural exemption is rationally related to legitimate governmental policy, I would hold” that the MWA’s exclusion of agricultural workers from overtime pay “does not violate article I, section 12 on state equal protection grounds.”

Justice Charles Johnson asked the second question at oral argument, and indeed he wrote the second dissent, which also focused on the economic aspect of the overtime exemption. Justice Johnson addressed only the issue of whether the majority’s holding on overtime pay would be applied retroactively or prospectively, which the
majority opinion had stated was not properly before the court because neither side had raised it as an issue for review. He concluded that “Farm employers should not bear the overwhelming risk of financial devastation because they paid what the law required of them at the time. The balancing of the equities in this case requires the court to apply today’s decision only prospectively to future cases.”

**THE DAIRY COMMUNITY IN THE PACIFIC NORTHWEST**

Economic concerns are undeniably significant in the dairy industry, which has historically been known for its booms and busts, and it has become even more volatile in recent years. As a Seattle Times article noted at the beginning of 2020, “many Washington dairies are struggling.” But the article noted that the Pacific Northwest’s biggest dairy processor, Darigold, a farmer-owned cooperative, was still seeing sales increases and in 2019 reported “net sales of $2.3 billion, up nearly 8 percent from 2017.” Darigold, the marketing and processing subsidiary of the Northwest Dairy Association (NDA), traces its roots back to the formation of the United Dairymen’s Association (NDA), traces its roots back to the formation of the United Dairymen’s Association of Washington in 1918. It has been a fixture in the dairy community ever since, including in the Yakima Valley.

Darigold was a big part of the 11th Annual Sunnyside Country Christmas Lighted Farm Implement Parade some years ago. Jake and Genny DeRuyter were the Grand Marshalls of the parade and led a procession of 60 lighted farm implements and Christmas floats, including their own John Deere 3350 Low Operator. The Sweepstakes Award, however, went to DeRuyter’s float, “Flying Through the Milky Way.” It was lit up by thousands of tiny lights and was the company’s huge, creative take on Santa’s sleigh and reindeer. Instead of reindeer, though, there were six Holstein cows made from insulation foam, each cow 8 feet long and 6 feet high, pulling a 24-foot-long sleigh carrying “Mr. and Mrs. Santa Cows,” also Holsteins. That float must have been huge.

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**NOTES**

5. Id.
8. Justice Madsen wrote the majority opinion, which Justices González, Gordon McCcloud, Yu, and Justice pro tem Wiggins joined.
9. RCW 49.46130(2)(g).
10. Martinez-Cuevas, 196 Wn.2d at 51, 526.
11. Current Chief Justice González wrote the concurring opinion, which Justices Gordon McCcloud and Yu joined.
12. Then-Chief Justice Stephens wrote the first dissent, which Justices Owens, Johnson, and Justice pro tem Fairhurst joined. At the Supreme Court oral argument of the case, then-Chief Justice Fairhurst had presided.
13. Martinez-Cuevas, 196 Wn.2d at 51 (emphasis added).
14. Id. at 520.
17. Id.
20. Sec. of State website, DeRuyter Farm Properties, Inc. (see articles of amendment in 2017) d/b/a DeRuyter Bros. Dairy, Inc.
22. www.dnb.com/business-directory/company-profiles.deruyter_brothers_dairy_inc_a0284c14464d7757f2c8babb6a56246f.html.
27. Id.
28. Id. at 141.
29. Id. at 142.
30. Paul Spickard, supra n.23. at 305.
31. American Farm Bureau Federation: <https://www.fb.org/about/overview>.
33. Id.
34. Id.
37. Martinez-Cuevas, 196 Wn.2d at 526-27 (González, J., concurring).
38. Id. at 528-29 (González, J., concurring).
40. Martinez-Cuevas, 196 Wn.2d at 530 (González, J., concurring).
41. Martinez-Cuevas, 196 Wn.2d at 531-32 (González, J., concurring).
42. Systemic racism and the court’s obligation to combat it was the topic of the Washington Supreme Court’s June 2020 open letter to the judiciary and legal community, which it had posted six months before the court filed its decision in Martinez-Cuevas.
43. Washington Supreme Court oral argument: Jose Martinez-Cuevas v. Deruyter Brothers Dairy, Inc., et al., available at TVW.org: https://www.tvw.org/watch/?eventID=201910067, at approximate recording time of 00:35:12 – 00:37:12 (note: machine-generated transcriptions are not an official transcript of the video).
44. Martinez-Cuevas, 196 Wn.2d at 551-52 (Stephens, C.J., dissenting).
45. Martinez-Cuevas, 196 Wn.2d at 560 (Stephens, C.J., dissenting)(emphasis added).
46. Martinez-Cuevas, 196 Wn.2d at 563 (Johnson, J., dissenting).
48. Id.
49. Darigold: About Our History; www.darigold.com/about/our-history/.
The Beauty of Brevity

When less is more: Advocate more effectively for your client with a short and simple story

By Paul Luvera
Tell the whole story in the first paragraph, in as few words as possible.

He outlined the basic format of all well-told stories, known as “the hero’s journey.” Campbell argues that all stories have the same basic outline, regardless of cultural differences. In the hero’s journey, an ordinary person is faced with a challenge. First, they avoid it, but then change their mind and take the first step to meet it. They are faced with tests, find allies, and confront enemies. In spite of the challenge, they persist, and in the end their efforts are rewarded and they triumph.

The presentation of a case can and should be told as a story, structured like a hero’s journey. Considerations for a compelling story include the following:

• The starting point of the story.
• The perspective or viewpoint from which the story will be told.
• The sequence of events that make up the content of the story.

In choosing the starting point of your client’s story, keep in mind it doesn’t have to follow the chronological sequence of events. For example, a products liability case doesn’t have to start at the injury event. It can start at the factory where the product was made or even the board room where the product was approved. The perspective the story is told from can be that of someone other than your client, such as the doctor or a witness. The order in which you present the facts that make up the content of the story is equally important. Once you decide on a starting point and a perspective, you should strive to lay out the content in a compelling sequence that holds your audience’s attention.

Here are some illustrations of these points from journalists and television and movie screenwriters:

Jimmy Breslin won a Pulitzer Prize for his work as a syndicated columnist for the New York Herald Tribune. His manner of writing about John F. Kennedy’s burial became a subject taught in journalism classes—known as “the gravemaker school of news writing”—because he wrote from the perspective of the man who dug JFK’s grave. Breslin was the only reporter to track down this man and write about the funeral from his perspective. Here’s how he starts the article:

Clifton Pollard was pretty sure he was going to be working on Sunday, so when he woke up at 9 a.m., in his three-room apartment on Corcoran Street, he put on khaki overalls before going into the kitchen for breakfast. His wife, Hettie, made bacon and eggs for him. Pollard was in the middle of eating them when he received the phone call he had been expecting. It was from Mazo Kawalchik, who is the foreman of the gravediggers at Arlington National Cemetery, which...

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Paul Luvera is the retired founder of the Luvera Law Firm, and he tried over 280 cases to juries in 55 years of practice. He is a fellow of the American College of Trial Lawyers, the International Academy of Trial Advocates, and the International Barristers Society, and has taught at the Spence Trial College. He is the only Washington lawyer inducted into the National Trial Lawyers Hall of Fame. He is the author of five books on law and the contributing author to seven other legal books. He can be reached at Paul@Luvera.org.

All-powerful leader. Jerry Espenson is fundamentally, a law-abiding man, who simply saw an injustice and tried to do something about it. If he’s guilty of anything, it’s of appealing to his sense of fairness. Now, I suppose, he’s appealing to yours.

Movie scripts have also compellingly framed legal issues so as to hold the audience’s interest. In the 1991 movie Class Action, Gene Hackman, playing the role of a lawyer defending an environmental protester, says the following:

This is not a court of law. You did not enter through a doorway. That gentlemen, is the rabbit hole and we, like so many Alice’s, have plunged through it directly into Wonderland. Behold, the Queen of Hearts, Carraghan Chemical. A company that has spewed its bile into the Leffingwell River for 17 years. Plants wither. Children die. And there isn’t a court in the land that can stop them. Finally, one man has had enough. Frustrated, desperate, he slams his truck into the plant manager’s office and for one bright, shiny day, that hellhole of a factory shuts down. Do we honor him? Do we throw him a parade? Do we even say thank you? No. He is put on trial. Welcome to the Mad Hatter’s tea party. Yes, yes. He rammed through that wall. And, yes, he did shut down that hellish factory for one day. And, yes, he is responsible for damages in the amount of $427,000. How high a price is that to pay if you save just one single life?

These are three illustrations of telling facts through a compelling story using short and clearly understandable words. It is how great advocates should communicate.

CONCLUSION
The legal advocate’s role is to communicate clearly so as to persuade. In today’s world of instant communication and shrinking attention spans, we need to respond to our audiences’ needs. Good communication—whether to clients, judges, or juries—should be short and clear and should tell a compelling story. To accomplish this, consider using the techniques outlined in this article.

NOTES
Darrell Cochran's record speaks for itself. He takes on the most daunting, challenging, and toughest cases — and wins. He's helped his clients recover hundreds of millions of dollars.

Each client and case is personally important to Darrell. His goal is to level the playing field for those severely injured or damaged by well-funded defendants who have abused their power or acted recklessly.

Darrell Cochran: a trial lawyer whose tenacity, creativity and fearless pursuit to punish wrongdoers is loved by his clients, opposing counsel, not so much.

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MARCH 18-19, 2021

A Summary of the Board of Governors Meeting

The WSBA Board of Governors determines the Bar's general policies and approves its annual budget.

Note: Because of public directives to curb the spread of the coronavirus, the March 2021 meeting was held in a virtual-only format.

TOP 7 MEETING TAKEAWAYS

1. A moment of silence. The Board began with a moment of silence to honor and mourn the victims of the horrific shootings in Atlanta last week. Read the WSBA's statement encouraging members to work together to eradicate anti-Asian racism at www.wsba.org.

2. The Bar Exam ... Under Exam. In March, the Washington Supreme Court convened its Washington Bar Licensure Task Force to evaluate current lawyer licensing requirements and recommend whether the Court should consider alternatives. The WSBA is represented on the task force and will keep members updated as the Court establishes a webpage, resources, and feedback opportunities. After much dialogue, the Board tabled a resolution regarding its stance on the lawyer bar exam until its April meeting; an ad hoc Board task force will collect member feedback before then.

3. Financial confidence. Mitchell Hansen with accounting firm Clark Nuber confirmed that the WSBA has once again earned a “clean” (unmodified opinion) annual audit report. He noted that the WSBA has no audit adjustments in the report when “the average number of adjustments we identify is three to four ...” for nonprofit organizations.

4. We need YOU! It’s volunteer recruitment season at the WSBA, and there are many, many committees and boards—which are critical to the legal profession and practice of law—to match members’ expertise, interests, and availability. Find more information here: www.wsba.org/connect-serve/volunteer-opportunities.

5. Local Heroes. The WSBA honored two Local Heroes: Meredith Gerhart, a dedicated youth advocate and volunteer who strives to proactively engage in child-centered and trauma-focused representation (nominated by the Thurston County Bar Association); and Emily Nelson, a prolific volunteer dedicated to fighting for human rights who has devoted extensive time to helping people threatened with eviction during the COVID-19 crisis (nominated by the Government Lawyers Bar Association of Washington). Read more at: www.wsba.org/news-events/media-center/media-releases.

6. The future of work at WSBA. At its January meeting, the Board of Governors authorized Executive Director Terra Nevitt to explore and execute a plan to shrink the WSBA's office footprint through flexible remote schedules for most staff. This shift might also provide opportunities for other potential long-term goals, such as moving the main office location and/or creating satellite WSBA offices. (Note: the current office lease in downtown Seattle runs through 2026; the WSBA is gauging interest in subleases in the interim.)

7. Legislative update. The 2021 session is more than two-thirds complete. The WSBA is supporting two bills promoted by the Business Law Section—SB 5005 (concerning business corporations) and SB 5034 (concerning nonprofit corporations)—both of which have been voted out of the House Civil Rights and Judiciary Committee with a “do pass” recommendation. Overall this session, the WSBA has referred more than

MORE ONLINE

The agenda, materials, and video recording from this virtual Board of Governors meeting, as well as past meetings, are online at www.wsba.org/about-wsba/who-we-are/board-of-governors.
LEAD

Run for the WSBA Board of Governors

The WSBA Board of Governors focuses on the strategy, oversight, and policy of the organization. Service on the Board requires vision, leadership, diplomacy, and passion in pursuit of the WSBA’s mission to serve the public and the members of the WSBA, to ensure the integrity of the legal profession, and to champion justice.

OPEN POSITIONS

3 Year Term: September 2021 – September 2024

PRESIDENT-ELECT

The President-elect performs the duties of the President at the request of the President. The President-elect is not a voting member unless called upon to do so in the President’s place and then only if the vote will affect the result. The Board will elect an Active lawyer member of the WSBA to serve as President-elect at the May 2021 Board meeting.

*Active lawyer members of the WSBA whose primary place of business is in Eastern Washington are eligible to apply to serve as president-elect.

AT-LARGE (YOUNG LAWYER)

This is a unique opportunity to share the perspectives of young lawyer members of the WSBA on the Board of Governors. Because of this, all applicants will be interviewed by the Washington Young Lawyers Committee (WYLC). The WYLC will select at least three applicants to be placed on the ballot. The election will be June 1 – June 15.

*WSBA members qualify for this position if they are age 36 by 12/31/21, or if they are within the fifth year of their admission to practice in any state by 12/31/21.

APPLICATION DEADLINES

PRESIDENT-ELECT POSITION
APRIL 20

AT-LARGE POSITION (YOUNG LAWYER)
APRIL 20

For more information go to: www.wsba.org/elections.

OTHER BUSINESS

The Board also:

• **Voted** to maintain the active Limited License Legal Technician (LLLT) license fee at $229 next year. In November, the Board voted to increase the fee by $11, which the Washington Supreme Court disapproved.

• **Approved** an amendment to WSBA bylaws to provide an application/investigation fee waiver for Limited Practice Officers and LLLTs who return to active status from inactive status after 90 days or less. The amendment will now go before the Washington Supreme Court for review.

• **Approved** a request from the WSBA Pro Bono and Public Service Committee to submit a comment to the Washington Supreme Court in support of an amendment to APR 11 (to devote at least one of six MCLE credits per reporting period to the topic of “equity, inclusion, and the mitigation of bias in the legal profession”). **Note:** Public comments about this proposed rule amendment are due April 30. For more information, visit www.courts.wa.gov/court_rules/.

• **Heard** the annual report from the Client Protection Fund. The fund balance at the beginning of 2020 was $3,816,143. The fund paid 33 applicants last year, for a total combined payout of $586,266.

• **Reported** back about equity, diversity, and inclusion efforts, including appointing a liaison, Alec Stephens, to the Washington Race, Equity, and Justice Initiative and connecting with minority bars.
WSBA NEWS
2021 License Renewal Notice

If any portion of your license fee, Client Protection Fund assessment, or late fee remains unpaid, or if required certifications have not been filed by 5 p.m. PDT on May 4, 2021, the Washington Supreme Court will enter an order suspending your license to practice law (Admission and Practice Rule 17).

WSBA Deskbooks Now Available Through LexisNexis®

The WSBA and LexisNexis® Legal & Professional have entered into a joint publishing agreement under which LexisNexis will handle the sale and distribution of deskbooks in print and will also offer deskbooks for the first time in eBook format. The WSBA’s staff will continue to recruit and work with leading Washington practitioners to develop and update its library of deskbooks, which have been recognized as authoritative sources on Washington law and practice and have been cited in over 250 Washington appellate court opinions. You can now find WSBA deskbooks on the LexisNexis store at https://store.lexisnexis.com/site/wsba. Questions? Call 800-533-1637.

Run for Governor At-Large

Applications are due April 20 for the governor at-large position representing young lawyers. The election for the at-large position will begin June 1. All materials should be emailed to barleaders@wsba.org. More information is available at www.wsba.org/elections.

Run for WSBA President-Elect

Applications are due April 20. Candidates must have their primary place of business in Eastern Washington. Candidates will be interviewed and selected by a vote of the full Board of Governors at the May Board meeting. Email your application form, letter of interest, and résumé to barleaders@wsba.org. More information available at www.wsba.org/elections.

WSBA Board Feedback

Send your feedback to the newly created email address: boardfeedback@wsba.org. Please note that all WSBA emails are subject to public records requests.

Comment on MCLE Proposal

The Washington Supreme Court is seeking comments on a proposed change to Admission and Practice Rule (APR) 11 that would require legal professionals to devote at least one of six mandated ethics credits, per reporting cycle, to the topic of “equity, inclusion, and the mitigation of bias in the legal profession and practice of law.” The proposal was suggested by the MCLE Board with support from the WSBA Board of Governors. The MCLE Board appreciates all the input provided thus far and encourages everyone—even those who have previously commented—to provide their comments to the court at this time. The deadline for comments is April 30. Comments are to be submitted to the clerk of the Supreme Court at supreme@courts.wa.gov, or mailed to P.O. Box 40929, Olympia, Washington 98504-0929. (Note: emailed comments must be less than 1,500 words.) Learn more at www.courts.wa.gov/court_rules.

Volunteers Needed As Attorney Advocates

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Volunteer with the Lawyer Discipline System

Learn more about volunteering as an adjunct disciplinary counsel (ADC). ADCs assist as needed in carrying out the functions of the lawyer discipline system pursuant to Rule 2.9 of the Rules for Enforcement of Lawyer Conduct. An ADC must have been an active lawyer or judicial member of the WSBA for at least seven years at the time of appointment. Appointment is for a five-year term. Visit www.wsba.org/adc-panel or contact theaj@wsba.org to learn more.

Custodians Needed

The WSBA is seeking interested lawyers as potential volunteer custodians of files and records to protect clients’ interests. Visit www.wsba.org/connect-serv/volunteer-opportunities/act-as-custodian, or contact Sandra Schilling: sandras@wsba.org, 206-239-2118, 800-945-9722, ext. 2118; or Darlene Neumann: darlenen@wsba.org, 206-733-5923, 800-945-9722, ext. 5923.

Volunteer Leaders Wanted

The annual WSBA volunteer application and selection cycle opened March 15. The WSBA and the legal community greatly benefit from the incredible dedication, skill, and knowledge of our 1,000 (and counting) volunteers. More information here: www.wsba.org/connect-serv/volunteer-opportunities.

Save on CLEs

From April 27 through May 11, more than 500 on-demand CLEs are 50 percent off! Visit www.wsbacle.org.

The Bar Buzz

THE BAR BUZZ

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The Bar Buzz

Washington State Bar News  |  APR/MAY 2021
serving as a volunteer attorney advocate on the first-ever national advocacy hotline. Work from home or office at times you choose with hotline calls routed there. Resolution is typically achieved in under an hour. The nonprofit Help Now! Advocacy has assisted at no fee over 8,700 clients, mostly in Oregon, over the past 17 years. The organization is expanding its unique services to a national scope through the hotline. Contact LMKahn@HelpNowAdvocacy.org for more information.

RESOURCES

Practice Guides Available


Information for Job Seekers and Employers

Visit the WSBA Career Center to view or post job openings at https://jobs.wsba.org. The special discounted rate for nonprofit, government, and small-firm employers, to prevent pricing from becoming a barrier as the legal community continues to navigate the effects of the COVID-19 crisis, has been extended through June 30. Contact Michael Reynolds at 612-968-3431 or michael.reynolds@communitybrands.com for more information.

HAVE SOMETHING NEWSWORTHY TO SHARE?

Email wabarnews@wsba.org if you have an item you would like to place in Need to Know.
WSBA COVID-19 Resource Webpage

All WSBA resources, including member support, law firm management, free CLEs and webinars, information about Washington courts, opportunities to help, and resources for the public can be found here: www.wsba.org/COVID-19.

Court Emergency Operations & Closures

The Washington Supreme Court has published a COVID-19 response page, which is a compilation of its emergency orders and court modifications: www.courts.wa.gov/newsinfo/index.cfm?fa=newsinfo.COVID19.

Law Office Reopening Guide


Quick Reference

April 2021 Usury

The usury rate for April 2021 is 12.00%. The auction yield of the March 1, 2021, auction of the six-month Treasury Bill was 0.061%. The interest rate required by RCW 4.56.110(3)(a) and 4.56.111 for April 2021 is 5.25%.

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Law Office Reopening Guide


Quick Reference

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Their generous contributions provide crucial funding for the Washington State Bar Association’s public service programs, such as the Powerful Communities Project.

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To join these generous donors, visit wsba.org/foundation

This list reflects gifts received from January-December 2020.

BRIDGING THE GAP TO FREE LEGAL AID

With its Powerful Communities Project grant, Chelan-Douglas County Volunteer Attorney Services pivoted their outreach efforts and connected with a regional back to school, food bank and resource event to spread the word about free civil legal services. Their bilingual Outreach Coordinator spoke to over 300 families, nearly 75% of which were Spanish speaking. Many attendees (some of whom currently needed assistance) were not previously aware of the free civil legal help available in their community.

Megan Kappler,
Chelan-Douglas County VAS Board member
is pleased to announce successful completion of litigation support re

DIVORCING SPOUSE  v.  DIVORCING SPOUSE

Performed calculation of value of 5 construction related entities for collaborative marital dissolution purposes. Analyzed financial data for potential fraud and pro-forma adjustments to valuation. Prepared schedules for mediation settlement purposes, and attended related conferences.

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Suspended

Roberto Diaz-Luong (WSBA No. 38477, admitted 2006) of Tacoma, was suspended for two years, effective 3/02/2021, by order of the Washington Supreme Court. Diaz-Luong’s conduct violated the following Rules of Professional Conduct: 1.16 (Declining or Terminating Representation), 3.3 (Candor Toward the Tribunal), 3.4 (Fairstness to Opposing Party and Counsel), 8.4(c) (Dishonesty, Fraud, Deceit or Misrepresentation), 8.4(d) (Prejudicial to the Administration of Justice).

In relation to his employment, subsequent separation from, and litigation with a law firm, Diaz-Luong stipulated to suspension for: 1) failing to promptly return client files and information after being asked to do so by the clients; 2) making false statements to the trial court in his filed declaration, and in offering evidence he knew to be false; 3) destroying, falsifying, and concealing material having potential evidentiary value; and 4) knowingly disobeying the trial court’s preliminary injunction order and/or the court’s contempt orders.

Scott G. Busby and M Craig Bray acted as disciplinary counsel. Todd Maybrown represented Respondent. Andrekta Silva was the settlement hearing officer. The online version of Washington State Bar News contains links to the following documents: Order Approving Stipulation to Two Year Suspension; Stipulation to Suspension and Probation; and Washington Supreme Court Order.

Reprimanded

Howard Joseph Marcus (WSBA No. 12529, admitted 1982) of Edmonds, was reprimanded, effective 2/04/2021, by order of the hearing officer. Marcus’ conduct violated the following Rules of Professional Conduct: 1.15A (Safeguarding Property), 8.4(d) (Prejudicial to the Administration of Justice).

In relation to his law practice focused on representation of landlords in eviction matters, Marcus stipulated to a reprimand for: 1) failing to promptly comply with a court order to return money to the registry of the court; 2) failing to reconcile trust account records; and 3) failing to promptly pay or deliver funds to clients.

Jonathan Burke acted as disciplinary counsel. Anne I. Seidel represented Respondent. Anne Elizabeth Tweedy was the hearing officer. Anthony Angelo Russo was the settlement hearing officer. The online version of Washington State Bar News contains links to the following documents: Order Approving Stipulation to Reprimand; Stipulation to Reprimand; and Notice of Reprimand.
Announcements

FLOYD, PFLUEGER & RINGER, P.S.

is pleased to announce that

DANIELLE P. SMITH

has joined the firm as an associate.

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FRANK FREED SUBIT & THOMAS LLP

is pleased to announce that

Ellicott Dandy

has joined the firm as an associate.

Ellicott’s practice will focus on representing employees in class actions, individual matters, and labor union representation.

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is pleased to announce that

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has joined the firm as an associate.

Ellicott’s practice will focus on representing employees in class actions, individual matters, and labor union representation.

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PISKEL YAHNE KOVARIK, PLLC

is pleased to announce

Benjamin J. McDonnell

has been promoted to Principal.

Ben is a dedicated, strategic, and aggressive litigator who is recognized not only by PYK but also by the legal community that continually distinguishes him as a Super Lawyers Rising Star. Ben focuses his practice on commercial litigation including construction litigation arising from public and private construction projects, creditor/debtor law including bankruptcy litigation, and real estate and employment disputes. He is licensed in Washington and Oregon.

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Schwabe, Williamson & Wyatt
is pleased to share that
Sarah Lawson
has been elected to the Board of Directors for the National Native American Bar Association.

Sarah works with tribal governments and tribal entities to achieve self-governance and economic development goals while protecting tribal resources and sovereignty. Her work is particularly focused on tribal tax and real estate matters, and she is widely regarded as an authority on issues involving Indian trust land.

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VANDEBERG JOHNSON & GANDARA, LLP
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ERICA A. DOCTOR
DAELYN JULIUS
and
HEIDI M. MAYNARD
have become Shareholders in the firm
and welcomes
NICHOLAS M. ILLARIO
as an Associate.

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Bloggers Wanted!

Write for the WSBA’s award-winning blog — NWSidebar [nwsidebar.wsba.org]. Connect with the legal community!

For more information, contact blog@wsba.org.

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BUSINESS IMMIGRATION

I-9 COMPLIANCE

SOCIAL SECURITY NO-MATCH LETTERS

Most companies in WA now have business connections abroad or foreign-born employees. We work with business and employment lawyers regarding immigration needs, and advise employers on I-9 compliance and social security no-match letters. Our lead immigration attorney earned a master’s degree in international business, which together with 27 years of immigration experience makes her particularly well-qualified to guide you and your clients.

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FREEDOM OF SPEECH

(See, e.g.,):
Yates v. Fithian,
2010 WL 3788272
(W.D. Wash. 2010)

City of Seattle v. Menotti,
409 F.3d 1113 (9th Cir. 2005)

State v. Letourneau,
100 Wn. App. 424 (2000)

Fordyce v. Seattle,
55 F.3d 436 (9th Cir. 1995)

LIMIT v. Maleng,
874 F. Supp. 1138 (W.D. Wash. 1994)

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Karin B. Swope, a nationally recognized civil litigator, is joining Cotchett, Pitre & McCarthy, LLP. Swope was a Partner for several years at Keller Rohrback in Seattle and will join as a new partner and launch CPM’s new Seattle office.

Swope is a graduate of Amherst College and Columbia Law School, and later served as a law clerk to the Honorable John C. Coughenour in the U.S. District Court for the Western District of Washington. Following that, she served as a clerk to the Honorable Robert E. Cowen of the Third Circuit Court of Appeals in Philadelphia. Swope is a leader on many of the largest, most complex class action cases in the country, and developed a national reputation on intellectual property and privacy, consumer, antitrust and securities cases around the country.

Swope is a leader in promoting women in the legal profession and repeatedly acknowledged as one of the leading women attorneys in the country. She is an Adjunct Professor at Seattle University School of Law, where she teaches the Intellectual Property Art Law Clinic. She is currently serving as President of the Board of the Intellectual Property Section of the Washington State Bar Association. She has presented or co-chaired numerous CLEs on topics ranging from E-Discovery practices to Intellectual Property around the country to bar associations.

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Before law school, I was a Peace Corps Volunteer in Guatemala. My greatest talent as a lawyer is that I remember the reasons why I became a lawyer. My greatest accomplishment as a lawyer is working to enjoin the first Muslim travel ban. The best advice I have for new lawyers is to ask questions—some things don’t make sense and asking why is the only way to figure that out.

A funny story that happened to me while practicing: I was interviewed on camera by Univision about one of my cases when I worked in legal aid. Unfortunately, I only realized when I got home that my dress was on backward.

Technology has changed the practice of law by requiring me to know what metadata means.

The most memorable trip I ever took was to Montrose, Colorado, where I lived in a tent for the summer and worked on an organic farm owned by two chain-smoking sisters. I enjoy reading People magazine; i.e., the New Yorker of tabloids. My best recipe I make at home is fried rice.

My fitness routine is non-existent, but used to be my bike commute to work. I worry about my to-do list. I am happiest when dancing with my kids. I grew up in Virginia. Nobody would ever suspect that I once worked as a ramp agent, directing airplanes into gates, at Dulles International Airport. I regret that third donut. An item I will never throw out is leftovers. My idea of misery is cleaning out the fridge. My first car was a 1997 Honda Accord. In the 10 years that I owned it, it was stolen three times, but it came back to me every time.

You should give this a try: eggs and salsa in your oatmeal. It’s delicious, and I’m pretty sure it’s good for you. I have been telling others not to miss Pamela Adlon’s Better Things. It’s about the highs and lows of raising daughters, and I just had my third, so I’ve been taking notes.
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