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13 Marriage Equality Comes to Washington
Practice Tips for Representing Same-Sex Couples and Their Families
by Jill Mullins and Jennie Laird

22 Whistleblower Update
Recent Court Decisions Broaden Whistleblower Protections
by Daniel M. Weiskopf

25 On 20 Jury Trials
by Alexander F. Ransom

27 The Foreign Corrupt Practices Act
Staying Above Suspicion
by Todd Williams and Hugh Handeyside

34 Is It Legal to Just Eat Appetizers for Dinner?
by David Skeen

38 The Previous Play Is Under Review
Using Appellate Court Standards of Review to Understand NFL Instant Replay
by Tip Wonhoff
President’s Corner
Civility: Just Be Nice?
by Michele Radosevich

Bar Notes
Moving Forward
by Paula Littlewood

The Bar Beat
With Regrets
by Michael Heatherly

Letters to the Editor

Online
A Side of Sidebar
What’s Happening at the NWSidebar Blog

OnBoard
The Work of the WSBA Board of Governors
by Michael Heatherly

In Remembrance

Need to Know
News and Information for WSBA Members

Disciplinary Notices

Professionals

Announcements

CLE Calendar

Classifieds
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Power of Initiative

Seattle voters exercise the power of initiative and referendum pursuant to Article IV, Section 1, of the City Charter. It preceded by several years the adoption of Amendment 7 of the Washington Constitution (Nov. 5, 1912), which provided for initiative and referendum at the state level. Article XI, Section 10, authorizes any city with a population of over 20,000 inhabitants or more to frame a charter for its own government.

— Jorgen Bader, Seattle

Diversity Divides

I have a few comments about the President’s Corner column in the December/January NWLawyer. Ms. Radosevich begins by saying that Governor Romney, in the recent presidential election, “received less than 10 percent of the African-American vote and less than a third of the Hispanic and Asian-American vote.” She then proceeds, using these same numbers, to draw a conclusion that “[i]t is not okay if only 10 percent of African-Americans think the [judicial] system is fair, or if a third of Hispanics and Asian-Americans do.” That conclusion, by itself, is no doubt valid. It would not be okay if only those percentages of minorities thought that the “judicial” system (I would prefer to call it the justice system) was fair. But what is the relationship between the percentage of minorities voting for Governor Romney and some perceived percentage of minorities who think the justice system is unfair? Is there any connection between the two at all? Does she mean to say that if you vote for a Democrat, you think the justice system is not fair? Is there any actual evidence to show that minorities think the justice system is unfair? (If there is, why is it not noted?)

But, she goes on, we (presumably meaning “we” lawyers who are in the justice system) are not doing “a whole lot better” than Mr. Romney at being “inclusive.” And the proof of that, according to Ms. Radosevich, is that “African-American and American-Indian youth who are arrested are more than twice as likely to be referred to court as white youth. The criminal justice system as a whole disproportionately punishes minorities.” So, according to Ms. Radosevich, because more
attorneys are white than from racial or ethnic minorities, African-American and American-Indian youth who are arrested are more likely to be "referred to court" and are disproportionately punished. The non sequiturs abound.

The real questions, left unanswered by Ms. Radosevich, are whether minorities are "disproportionately punished" relative to their percentage of the general population or whether they are, in fact, punished in proportion to the crimes they commit. Without evidence on that issue, the balance of Ms. Radosevich's article lacks substance. Whether minorities are punished disproportionately relative to their percentage of the general population is entirely irrelevant unless one first answers the second question posed. But failure to address or answer the second question does not prevent Ms. Radosevich from using the percentage of the general population numbers for her diversity apologia.

The problem with the concept of “diversity” as presented by Ms. Radosevich and others is that it seeks to develop policies that address a group rather than individuals in that group. No group, as such, ever took the Bar Exam. No group, as such, ever practiced law. Without any evidence to show that individuals from any hyphenated minority group have been unfairly denied access to law school or the Bar Association, her argument is wholly specious.

Perhaps an example will help clarify my point. I would like to be a professional athlete (or at least be paid like one). But people like me are never hired by any professional athletic team. Of course, the reason I'm never hired is because I'm short, old, overweight and not very athletic. My point is that there are some requirements that must be met in order to achieve any particular profession or even specialized employment. If you don't fit the criteria, you probably won't make it. But you will not be rejected because your group is not allowed to participate; you will be rejected because you, as an individual, are not qualified.

Diversity, as applied by Ms. Radosevich, is corrosive and divisive and ultimately destructive of our body politic. E pluribus unum!

— James A. Winterstein, Olympia

Taking a Stand
I was surprised that the Board of Governors committed the +35,000 membership of the Washington State Bar Association to a position on the controversial Referendum 74 (November 2012, Bar News). I wonder what position will be ascribed to the Bar on Agenda 21?

— Carleton B. Waldrop, Pullman

Rather Revealing
I appreciate the thorough discussion of “information relating to the representation of a client” [“Pillow Talk,” Nov. 2012 Bar News] However, RPC 1.6 prefaces that phrase with the word “reveal.” Surely at some point of creating public records and sometimes with accompanying news articles, the attorney is no longer “revealing” anything. I would like to see some discussion of how public something must be for it to no longer be considered being “revealed” by the attorney.

— Mel Simburg, Seattle

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Civility: Just Be Nice?

Probably more has been written to less effect about civility than almost any other topic for lawyers. Law is adversarial. We want to win. We believe that’s what our clients are paying us for, and we owe them our best efforts.

What kind of effort is best? It depends on the contest. Chess and wrestling are both adversarial, but the winning strategies are different. Lawyers sometimes like to compare litigation to armed conflict. We tell “war stories” and engage in “battle.” We conduct “frontal assaults” and “ambushes.”

But a trial is not a battle. Our legal system was meant to resolve disputes without resorting to weapons. I like to think of it as a truth-testing method, a way of arriving at a reasonably accurate set of facts to which the law can be applied. How many times have we congratulated ourselves at wringing an admission from an opposing party in their deposition or at trial, only to find ourselves shocked at the words coming out of our own client’s mouth on cross-examination? The formality of the setting, the oath, and the questions of opposing counsel often produce a more nuanced version of reality than the one heard in the lawyer’s office.

The lawyer can affect the proceeding in a number of ways. First and most importantly, she can know her case inside out and prepare her witnesses to present it. This aspect is pretty un-warlike. Preparing witnesses involves more nurturing than directing.

Cross-examination, however, provides an opportunity for aggression. We’ve all worked with lawyers who tried to intimidate opposing witnesses. If you are good at intimidation, you can undermine the witness’s confidence and affect his demeanor. But this doesn’t always work to your advantage. At trial, the judge or jury may see you as a bully and sympathize with the witness.

In a deposition, the tactics that intimidate are pretty much the opposite of the open-ended questions that elicit new information. By using these tactics, you forgo the opportunity to learn as much as possible about what the witness knows and is likely to say at trial. So intimidation is, at best, a two-edged sword when applied to opposing parties.

How about opposing counsel? Judging from the sheer number of uncivil statements by opposing counsel to one another, you would think these statements must confer some sort of advantage. To the best of my recollection, I cannot remember a single time in my career when that was true. Shouting at opposing counsel or questioning their honesty is likely to result in cutting off all communication that is not absolutely necessary — and relegating that to email. You then won’t have an opportunity to talk your way through scheduling issues and discovery deadlines, where a little cooperation can sometimes make both you and opposing counsel much happier. And it is much more difficult to settle the case.

There are a few lawyers who question the honesty of opposing counsel in front of the judge. There may be a thin line between pointing out that your opponent has taken a quote out of context and asserting that your opponent has deliberately misrepresented the facts of the case, but most of us can find — and appreciate — that line. The character attack may fluster an opponent, but if the judge is offended, it can also have an adverse impact on the attacker.

Some lawyers engage in this kind of behavior because they believe clients expect it. We’ve all been asked by friends for recommendations for a really aggressive lawyer to take on a case. But we don’t let our clients tell us how to do our job. Instead, we explain to clients the best and most effective ways to achieve their objectives. Incivility toward opposing parties and their lawyers is simply not an effective way to win. It is an unpleasant distraction at best, and at worst, has a significant risk of backfiring.

At the end of the day, the biggest victim of incivility is the lawyer who practices it. Repeated unpleasant encounters with other attorneys have an effect on one’s reputation within the legal community. But they also have an effect on the uncivil lawyer. In a recent column about civility in politics, David Brooks, of The New York Times, observed: “Smart people who’ve thought about this usually understand that the habits we put in practice end up shaping the people we are within.” Brooks went on to quote Edmund Burke: “Man...
Manners are of more importance than laws. Manners are what vex or soothe, corrupt or purify, exalt or debase, barbarize or refine us, by a constant, steady, uniform, insensible operation, like that of the air we breathe in.”

Politeness is a discipline that compels respectful behavior, according to Brooks. As lawyers, we know this. By formalizing and ritualizing conflict, we work through it. When we instead personalize the conflict, we make it more difficult to resolve. Our clients are entitled to efficient and effective conflict resolution, not to a particular result. We therefore have a duty to the system to be polite and respectful that is inseparable from our duty to our clients. Civility is not about being nice, it’s about being effective.

WSBA President Michele Radosevich practices in Seattle. She can be reached at micheleradosevich@dwt.com or 206-757-8124. Read more from Michele at nwlsidebar.wsba.org, the blog for Washington’s legal community.

The WSBA Professionalism Committee is committed to assisting attorneys in fostering better client relations, improving civility within the legal community, and developing a better public image for the profession. Programs and activities include:

**LAW SCHOOL OUTREACH** — Committee members, along with WSBA staff, give presentations about professionalism in professional responsibility classes at the three Washington law schools.

**MEMBER OUTREACH** — The committee has made presentations on professionalism topics to the Tacoma-Pierce County Bar Association, the Washington State Association for Justice, and other legal groups.

**CREED OF PROFESSIONALISM** — Developed by the Professionalism Committee and adopted by the WSBA Board of Governors in 2001, the Creed is displayed in courtrooms and law offices across the state.

**RANDOM ACTS OF PROFESSIONALISM PROGRAM** — This program allows lawyers and judges to honor others in the profession who have conducted themselves in a highly professional manner consistent with the spirit of the Creed of Professionalism.

**ROBERT’S FUND** — The committee is working in collaboration with Robert’s Fund, which offers CLEs in both Washington state and Italy on civility in the legal profession.

To learn more about these efforts and the work of the Professionalism Committee, go to www.wsba.org/profcomm or contact committee chair Hunter Abell at habell@williamskastner.com.
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A Side of Sidebar

What’s happening online at NWSidebar, the blog for Washington’s legal community. [nwsidebar.wsba.org]

If you accept credit cards from clients, you need to read this!

On Jan. 1, a new IRS regulation went into effect that impacts lawyers who accept debit and credit card payments from clients. Read this article to learn about the changes and make sure you’re in compliance.

The Transition: Moving from Plaintiff to Defense

Attorney Justin Walsh recently transitioned from plaintiff’s work to defense work. In this post, which also appears on his blog The Amateur Law Professor (http://theamateur-lawprofessor.com/), he answers the question, “What is it like working on the dark side?”

Jury Service Revisited

Timothy MB Farrell explains why jury duty can make you a better advocate for your client.

Friday 5

5 Steps to an Effective Deposition

From asking the obvious questions to remembering to breathe, attorney Brittany Pitcher offers five tips to conducting an effective deposition in our weekly Friday 5 series.

The Public Service Loan Forgiveness Program – Too good to be true?

Is the Public Service Loan Forgiveness Program a student loan debt panacea for those working in public service? WSBA Online Communications Specialist Julia Nardelli Gross breaks down the practical implications of the eligibility requirements for this program.

NWSidebar is a tool for the legal community to engage and interact by sharing thoughts, opinions, and ideas in a less formal format. Add your voice to NWSidebar! Whether you maintain your own legal blog or have never written a blog post, we welcome submissions from all members of the legal community.
Moving Forward
Taking a fresh look at law and the profession

In my column last month, I outlined many of the trends influencing our profession that are leading to rapid change on many fronts (“Let’s Seize the Moment”). The column briefly discussed five major influences, including a shifting lawyer demographic; the changing nature of the world and our clients; how we deliver our services; and the delivery of legal education. My message overall in that column was that we should seize this opportunity to make changes to how we do our work and bring the profession into the 21st century.

The 21st-Century Judicial System
So how do we seize the moment and move forward? Foremost, I think we must allow ourselves to let go of past practices and notions and innovate in three areas. First, with respect to the court system and judicial system funding, we need to ask ourselves what the judiciary of the 21st century should look like. We are working with a judicial system that was created hundreds of years ago and it may be time to rethink how the judiciary delivers its services. In this day and age, it seems unimaginable that someone has to go to the courthouse sometimes upwards of eight times to get a divorce. The public accesses information and services in a different manner now and our profession needs to keep up with these trends (e.g., think of how technology has impacted the newspaper, music, and book industries).

While I don’t disagree that court funding is a real crisis in our country, I wonder if we approached the Legislature with a new model for delivery of judicial services, whether we might have more success in securing additional funding. That is, rather than asking the Legislature to keep nursing along a horse that may have come to the end of its ride, perhaps we could develop a restructured, progressive system and ask the Legislature to fund it. We are lucky to live in a state where judicial officers all around the state are developing progressive models for the delivery of services at every level of court; we are also fortunate to have a chief justice who is leading the branch toward thinking in new and exciting ways to serve the public and its needs of today. But judges cannot redevelop the system alone, and the profession, that is, judges and lawyers, need to come together to produce the best system possible for the clients and public we serve.

An Overcomplicated System?
Second, I think we as a profession need to own that we have made the system too complicated. While no one set out to reach this result deliberately, we must acknowledge that fact and work to simplify things. I often remark that I am a lawyer and there are numerous things that I could not figure out on my own if I needed to. I don’t mean to discount the importance of the nuances that have developed over the decades with respect to numerous areas of law, but it seems coordination and simplification of the system in many areas might be a good starting point.

Navigating the System
Third, and this recommendation flows from the two outlined above, we need to acknowledge that some people can navigate the system on their own and we need to give them the tools to do so. While the recession has led to a significant increase in pro se representation, if given the proper information and roadmap, many people could do it on their own. The reality is we will never have enough lawyers to serve every person facing a legal problem, so how do we slice the system in a way that allows for some people to navigate it...
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There Is More Control in Letting Go

The reality is this: technology and other drivers will continue to move legal work out the side door in response to a public that demands more affordable legal services and a system that is more easily accessed. To me, there is more control in letting go. Letting go, for example, of the pieces that don’t require the training that we received in law school.

To (admittedly) oversimplify legal services, think of a grid with four boxes (see illustration above). The top two boxes represent what I believe to be the special training that I received in law school; the bottom two boxes capture the work that can be, and already is being, commoditized. Does it make sense to let go and think of ways to allow the consuming public to access those bottom two boxes more easily and affordably?

What’s at Stake?

The cornerstone of our system is based on the rule of law. As I wrote about in my column in March 2012 (“Lawyer Volunteers: Preserving our Democracy and Enhancing our Profession”), the foundation of our system requires that the judiciary be fair and impartial and free from undue influence by the other branches of government; a fair and impartial judiciary relies on an independent legal profession free of similar pressures from outside influences in order to preserve its independence. That is why lawyers have been given self-regulation independent of the legislative and executive branches. That is why we must preserve the system we have by meeting the needs of the public.

It is imperative that we seize the moment and innovate. While many of these trends and implications are overwhelming, I think this time for our profession presents exciting opportunity. And what excites and motivates lawyers more than a challenging problem? I say, let’s get to solving!

Paula Littlewood is the WSBA executive director and can be reached at paulal@wsba.org or 206-239-2120.
Marriage equality finally became a reality for same-sex couples in Washington state on Dec. 6, 2012. Leading up to this, there have been significant changes in Washington state’s recognition of and protections for same-sex couples and same-sex families, which were instituted in stages over the last half-decade. In 2007, Washington first recognized and provided minimal death and dying protections to same-sex couples. The law was significantly expanded in 2008 and in 2009 the “Everything but Marriage” Law passed. In 2011, the Uniform Parentage Act was amended. The Uniform Parentage Act created stronger protections for non-traditional families generally, but specifically clarified that children born in a state-registered domestic partnership...
or a marriage are legally presumed to be the child of both partners. Most recently, the Legislature voted in 2012 to extend the rights and responsibilities of civil “marriage” to same-sex couples, and the citizens of Washington voted to approve the law in November 2012. On the first day same-sex couples could get married, hundreds of same-sex couples took part in ceremonies throughout the state.

Despite the changes in Washington, there are significant barriers to same-sex couples and their families because of the Federal Defense of Marriage Act (DOMA) and DOMAs passed at the state level elsewhere. Attorneys representing same-sex couples need to understand the unique hurdles facing their clients. The goal of this article is to provide family law practitioners with an understanding of what the law is at present, and to highlight differences between representing opposite-sex and same-sex couples in order to avoid putting clients who are part of a same-sex couple at risk — either financially, or due to another state’s refusal to recognize that family in the future.

As “family law” is often a euphemism for “divorce law,” we will start with a discussion of practice issues for practitioners helping individuals whose same-sex relationship or marriage is ending in divorce. Next, we’ll talk about death and dying issues. Finally, we’ll look at adding children to the marriage, the Uniform Parentage Act of 2011 (UPA), and related issues of adoption and surrogacy.

**Dissolution: What’s Different for Same-Sex Couples?**

Since 2009, State Registered Domestic Partners have been required to go through the dissolution process in the same manner as opposite-sex couples. Despite legislative efforts on the state level, there are a number of different issues for same-sex couples to consider when dissolving their relationships that do not exist for opposite-sex couples.

**Marriage Excitement Issues**

One issue specific to same-sex couples is their potential participation in the marriage excitement that swept the country over the last decade, as more and more states granted same-sex couples marriage or some other form of legal recognition of their relationship. In response to the excitement of different jurisdictions granting legal protections in a variety of forms to same-sex couples, couples may have traveled to other jurisdictions to take advantage of legal recognitions of their relationship that were not available in their home state at that time. The same couple may have entered into a marriage, a civil union, and a registered domestic partnership in different jurisdictions. It would not be uncommon for a same-sex couple to have married in Canada or California, and then registered as state-registered domestic partners in Washington. It is important to inquire of your client not just “Did you enter into a civil union, a marriage, or a registered domestic partnership?” but also ask where (in which jurisdiction) and when (the date may make a difference as to the legality and validity of the event).

When the dissolution is filed, all of the various unions should be listed, if applicable, and they should all be dissolved by the court. Because Washington recognizes legal unions entered into in other states, the courts have jurisdiction to dissolve out-of-state unions.

Another important factor to consider is that many states, including Washington, have residency requirements for filing for a dissolution. In Washington, the residen-
cy requirement requires a party to be 1) a resident of this state, or 2) a member of the armed forces and stationed in this state, or 3) married or in a domestic partnership to a party who is a resident of this state.9 Sometimes couples, in their excitement to get married or to sign up for whatever version of relationship recognition exists in a particular jurisdiction at a particular time, visit a state or country and get married (or registered, etc.) — but if the relationship later ends, that couple may be left without the practical ability to terminate that legal relationship.10

Determining the Start Date
The marriage law is not retroactive for the title of “married,” meaning that same-sex couples in registered domestic partnerships in Washington state do not become automatically or retroactively “married.” Rather, the marriage date for same-sex couples will be the date of a couple’s actual marriage after Dec. 6, 2012, or, if they choose not to affirmatively apply for a marriage license and have not yet dissolved their state-registered domestic partnership, their marriage date will be June 30, 2014 (the date when all state-registered domestic partnerships where the parties are under 62 years of age will be automatically converted to marriages). If registered domestic partners prefer their relationship not be converted to a marriage as of June 30, 2014, then the parties must file for dissolution of their registered domestic partnership by that date.11

Nevertheless, for the purposes of determining the legal rights and responsibilities under community property principles for couples who previously had a state-registered domestic partnership but who have been issued a marriage license or who are deemed married, the date of the original legal union is the date the court will look to as the effective date for all the rights and responsibilities associated with marriage.12 For couples whose relationships predate the availability of registering as domestic partners, or who never registered as domestic partners, the law regarding committed intimate relationships should apply to their pre-legally recognized relationship according to the facts asserted and proven about their relationship. Property acquired during a committed intimate relationship (formerly known in case law as a “meretricious relationship”) may be subject to equitable division and community property laws by analogy in the same manner as for

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**Same-Sex Marriage FAQs**

**By David Ward**

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Do same-sex couples need to marry again in Washington if they legally married in another state or country before Referendum 74 passed?

No. Washington will recognize marriages of same-sex couples who were legally married in another state or country.

How does Referendum 74 change the state’s domestic partnership law?

Previously, couples could register domestic partners with the state if both partners were of the same sex, or if one partner was 62 years old or older. However, starting on June 30, 2014, state-registered domestic partnerships will only be available for couples in which at least one partner is 62 or older.

What happens to same-sex couples who registered as domestic partners in Washington?

In most cases, these couples must now decide whether they want to become married. That’s because Referendum 74 phases out domestic partnerships on June 30, 2014, except for senior couples. If a couple in a registered domestic partnership wants to get married now, they can do so. But if they do nothing, their domestic partnership will be automatically converted to a marriage by the state on June 30, 2014, unless 1) at least one partner is 62 or older on June 30, 2014; or 2) the couple has started proceedings to dissolve their domestic partnership by June 30, 2014.

Will the federal government recognize marriages of same-sex couples?

Not yet. The federal Defense of Marriage Act prohibits the federal government from recognizing marriages of same-sex couples. That means married same-sex couples in Washington do not have over 1,000 federal rights and benefits provided to other married couples — ranging from the ability to file joint federal tax returns to the right to receive Social Security survivor benefits if their spouse dies. But the U.S. Supreme Court will hear a challenge to DOMA later this year, so this policy could change soon.

What’s happening in the U.S. Supreme Court?

In December, the Supreme Court announced it would hear two cases concerning marriage for same-sex couples. Decisions are expected in late June.

The first case, *United States v. Windsor*, challenges the DOMA provision that prohibits the federal government from recognizing marriages of same-sex couples who are legally married under the laws of their home states. The Second Circuit struck down this provision of DOMA as unconstitutional in October 2012; the First Circuit issued a similar ruling earlier in the year.

The second case, *Hollingsworth v. Perry*, challenges California’s ban on marriage for same-sex couples, which voters approved in 2008 as Proposition 8. The Ninth Circuit struck down the ban in 2012, affirming an earlier ruling by the U.S. District Court that the law was unconstitutional.

David Ward is legal and legislative counsel at Legal Voice, an organization that works to advance the legal rights of women in the Northwest. He may be reached at dward@legalvoice.org.
opposite-sex married couples.  

Federal Defense of Marriage Act Issues

The area of law around the federal DOMA and state DOMAs is rapidly changing. In fact, the Supreme Court announced on Dec. 7, 2012, that it will hear two same-sex marriage cases. Decisions are anticipated to be issued by the end of June 2013. If the decision in the Windsor case is in favor of same-sex couples, the federal DOMA will be eliminated and the tax issues will be the same as opposite-sex couples. The other case granted certiorari is the “Proposition 8” case out of California. The decision in this case could focus narrowly on California, or the Supreme Court could rule expansively and apply it to all state laws and constitutional amendments banning marriage. With that caveat, at the time of the publication of this article the following are the current issues related to federal DOMA.

Despite the efforts of the Washington State Legislature to remedy inequities between the way state laws treat same-sex and opposite-sex couples by expanding registered domestic partnership rights in 2009 and then passing the 2012 marriage equality law, there are still unique issues that impact same-sex couples because of DOMA and individual state “baby” DOMAs. DOMA creates significant differences in the treatment of same-sex couples for tax purposes, which factors into issues around property distribution and maintenance, regardless of the legality of a same-sex couple’s marriage in Washington state. It is beyond the scope of this article to enumerate the details of the tax code and the impact of DOMA on the tax consequences for same-sex couples. Thus, the discussion below should be viewed as highlighting relevant issues and giving context for the considerations of the parties. Best practice would include consulting with a CPA or tax attorney knowledgeable in tax issues for same-sex couples created by DOMA, or referring your client to such a professional directly.

Spousal Maintenance: Of particular interest in a dissolution context is that tax consequences of spousal support are controlled by §§71 and 215 of the Internal Revenue Code. Federal tax code allows opposite-sex married couples the option of deciding who gets taxed on alimony/spousal maintenance; if the payee gets taxed, the payor can claim a deduction. Or the parties can reverse the rule so maintenance would not be considered income of the recipient and not deductible by the payee. Same-sex couples, however, do not have the option of the payor claiming a deduction, or reversing the rule as they decide themselves; as long as DOMA is the law of the land, maintenance or alimony-type support payments by one same-sex partner or spouse to the other in the context of a dissolution cannot exist as a deduction under §215. Arguably, if payments are made in satisfaction of a state-imposed obligation of support, such payments will at least not be considered to be taxable gifts or income.

Transfer of Property: Section 1041 of the IRS code provides that property transfers incident to divorce are tax-free. For same-sex couples, property transferred incident to the dissolution of their marriage may well be treated as a taxable gain; however, if the property is received in exchange for claims to certain otherwise tax-free receipts, it could be argued that the settlement is tax-free. There are a
variety of other tax arguments that might be available to same-sex couples seeking to reduce the tax burden of their dissolution. Again, consulting a professional with expertise in the tax implications of transactions between same-sex couples is recommended. This recommendation is even more important if the parties have disparate financial situations, or if the community estate is particularly complex.

**Children of Same-Sex Relationships**

Same-sex couples face another major legal hurdle when they grow their families. This is another issue additionally complicated by DOMA and other states’ baby DOMAs, despite Washington state’s best efforts to ensure legal equality for these parents. In 2009, Washington’s State Registered Domestic Partnership Law extended all legal marital provisions to state-registered domestic partners, including the presumption of parentage within a state-registered domestic partnership. Then in 2011, the Legislature created further clarification by revising the UPA.

The purpose of the 2011 UPA amendment was to clarify and expand the rights and obligations of state-registered domestic partners and other couples as related to parentage. The components of the 2011 UPA that impact same-sex couples are the presumption of parentage and the so-called “holding out” provisions. The presumed parent provision clarifies that a child born of a state-registered domestic partnership, like a child born of a marriage, is presumed to be the child of the both parents. (RCW 26.26.116(1)). The “holding out” provision creates a presumption of parentage for a person who, for the first two years of the child’s life, resides in the same home with the child and openly held the child out as his or her own. In many ways, it codifies *In re L.B.*, which allowed same-sex couples (as well as unmarried opposite-sex couples who met the criteria) to be established as de facto parents when they found themselves without an established legal relationship with the child they had raised, and in some instances specifically planned for with their partner, at the end of their relationship. A potential problem with the “holding out” presumption is that it requires facts to be established supporting the presumption itself; however, there is not yet any formal adjudication process established for ratifying parentage under the “holding out” provision. Even if such a process is
established, the law provides no possibility for such adjudication within the child's first two years of life — leaving both child and parent vulnerable. If the parents' relationship ends when the child is not yet two years of age, the non-biological parent would be unable to assert the factual basis necessary to have parentage recognized under the “holding out” provision.

In order to create the strongest protections for your same-sex clients with children, the best practice remains advising the non-biological parent to adopt his/her own child. While the advice of legally adopting one's own child may be repugnant to many, this is the only way to ensure protection for the non-biological parent’s parental rights throughout the United States. As of 2010, all 50 states now allow adoption regardless of sexual orientation. Some states may have barriers that effectively ban same-sex couples from adopting within their state, i.e., a law banning unmarried cohabitants from adopting combined with a ban on same-sex marriage. But all states should recognize an adoptive parent’s rights, especially rights established via an adoption from Washington state, where same-sex couples are not prohibited from adopting their partner’s child or from participating in a joint adoption.32

An adjudication of parentage may be an important tool for lesbian married couples who utilize a known sperm donor without the assistance of a doctor. In this situation, all three parties potentially could be a party to an adjudication of parentage, and the rights and responsibilities to the child could be clearly established. This fact pattern could result in a variety of outcomes, and will be largely dependent on the intent of the parties. For example, was the male simply a “donor” whom no one intended to have legal or financial rights to, and responsibilities for, the child? Alternatively, the parties may have envisioned that all three were going to be “parents,” with all the attendant rights and responsibilities toward the child of a parent.

Gay male couples in Washington face an additional hurdle to creating biological families because of the laws around surrogacy. In Washington, a surrogate cannot be paid for surrogacy.33 Costs associated with pregnancy, i.e., medical visits and birthing costs, can be paid for by the intended parents, but surrogates cannot be compensated for the time and service of carrying the child for the intended parents.

Conclusion
With the approval of Referendum 74, many more same-sex couples will access state recognition of their relationships and marry. As a result, there will likely be an increase in the number of same-sex family law cases that attorneys across the state will handle. Regardless of how protective Washington laws are for same-sex couple headed families, federal DOMA and state baby DOMAs create additional layers of complication with regard to taxation issues, and issues of legal recognition of the family outside of the state of Washington. Family law practitioners must take these issues into consideration to competently represent their GLBT clients. The law will continue to evolve rapidly in this area. Unless and until the federal DOMA is repealed and state baby DOMAs are ruled unconstitutional, family law practitioners must remain mindful of the differences in the legal representation of opposite-sex married couples and same-sex married couples, even as we strive to treat all clients with equal respect. NWL
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JENNIE LAIRD has practiced family law for 16 years, and focuses on contested custody, domestic violence, and GLBT family law cases in her work at the Law Offices of Michael W. Bugni & Associates, PLLC. She is the current president of the QLaw Foundation and participated in Legal Voice’s pro bono legal teams representing the petitioner in In re L.B. and the plaintiffs in Andersen v. King County. Jennie is an adjunct professor at the Seattle University School of Law, and is honored to serve as a pro tem Family Law Commissioner for King County Superior Court.

NOTES

1. Laws of 2007, Ch 156, § 1-33. Note: the domestic partnership law also allowed couples, regardless of sex of the couples, to register as long as one member of the couple was over 62. This article does not address these domestic partnerships. The domestic partnership law will continue to exist as an alternative for couples where one person is over 62.


6. Note: This article focuses on same-sex families. Another issue that will come up for family law practitioners is when an opposite-sex marriage ends because of, or at least in part because of, one of the members of the relationship coming out as lesbian, gay, or trans. It is important to note that the law is well settled that sexual orientation cannot be a factor in determining residential time in a parenting plan. Sexual orientation is not a factor in identifying the best interest of the child and should never be cited as a reason for limiting residential time with a child.


8. Laws of 2012, Ch 3 §§ 11. Washington will treat couples with legal unions other than marriage as married, unless the relationship is prohibited 26.05.020 (3)(a) or (2) or the couples become permanent residents of Washington state and do not enter into a marriage within one year after becoming permanent residents. Laws of 2012 Ch 3 §§ 11(3)(a) and (b). It is unclear what the one-year provision means as the next section states a legal union other than a marriage of two persons that was validly formed in another jurisdiction shall be treated the same as a domestic partnership. Laws of 2012, Ch 3, § 12. Domestic partnerships have all the legal rights of marriage.


10. As of May 2012, 30 states have constitutional prohibitions on gay marriage. See “Same-Sex Marriage, Civil Unions, and Domestic Partnerships.” The New York Times. Oct. 19, 2012. Available at www.topics.nytimes.com/top/reference/timestopics/subjects/s/same-sex_marriage/index.html. This does not include states like Washington, that prior to the marriage law did not have a constitutional prohibition, but did have legislation which prohibited same-sex marriages, including Washington’s neighbors to the east and south, Idaho and Oregon. Conversely, some states like Oregon may have a constitutional amendment prohibiting marriage between same-sex partners, but do have domestic-partnership laws.


14. The United States Supreme Court has, for the first time in history, accepted two LGBT rights cases to be heard during the same term. Review has been granted for Hollingsworth v. Perry (the Ninth Circuit ruling regarding California’s Proposition 8) and Windsor v. United States (the New York case challenging the constitutionality of DOMA in relation to recognition of a same sex couple’s valid foreign marriage in the estate tax context). Briefs will be filed in early 2013, with arguments to take place in March, and decisions expected by June 27.


18. See Karen Moulding, Sexual Orientation and the Law, West Publishing, 2012, specifically Ch. 4 for more information. For an example on the tax complications for same-sex couples, in §4.12, the authors note that California, Washington, and Nevada have extended community property to RDPs, and the IRS ruling that income-splitting rules apply, but it is questioned whether income splitting rules must be applied. It does note that because income vests initially in the two partners, there is no “transfer” of property which might otherwise be subject to a gift tax. PLR 201021048 and citing CCA 201021050.


20. Id. (Cain p. 550).


22. Id.

23. Id. citing U.S. v. Davis, 1962-2 C.B. 15, 370 U.S. 65, 82 S.Ct. 1190, 8L. (Holding that property transfers incident to divorce were bargain-for exchanges and taxable on the capital gain inherent in his transfer of property, i.e., gain will be recognized to the person who transfers property with basis below the value of what he received).

24. This article focuses on children born during the marriage or the state-registered domestic partnership. It should go without saying that a parent’s sexual orientation is not a factor in determining his/her residential time, even when a parent was in a previously heterosexual relationship and the children are issue of that relationship. Washington is a no-fault state, and even though there may be a great deal of hurt
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and anger when a marriage ends at least in part due to one parent realizing they are gay, or that despite their best efforts they are unable to suppress their homosexuality, exploring friendships and relationships with members of their same-sex who identify as gay, lesbian, trans, bisexual, or queer is not a factor in parenting.

31. Supra n. 18, V. §1:22, p. 201.
32. Supra n. 18, V. §1:25, pp. 219–227. Several cases are cited through the U.S. where challenges to an adoption by a same-sex parent either as a co/second-parent adoption or a joint adoption were thrown out. One case is cited from North Carolina where the adoption was voided, but she was still awarded joint custody on a best interests test.
Whistleblower Update

Recent Court Decisions Broaden Whistleblower Protections

W ith the reélection of President Obama, it seems likely that the controversial Dodd-Frank Act, with its regulation and enforcement relating to finance and securities, is here to stay. One aspect of Dodd-Frank that will feature prominently in our legal landscape in the coming years is its whistleblower provisions, which provide incentives and protections for people who come forward with information about potential securities laws violations.

Dodd-Frank’s major whistleblower incentive — the whistleblower bounty program, which pays tipsters monetary rewards — has gained momentum in 2012. The Securities and Exchange Commission has now promulgated rules implementing this program, tips have begun rolling in (over 3,000 received in fiscal year 2012), and the SEC has paid out its first whistleblower reward.

Dodd-Frank’s primary whistleblower protection — an anti-retaliation provision that provides employees with a private right of action if employers penalize them for whistleblowing — has received comparatively less attention than the bounty program. But that is likely to change soon: several recent cases have interpreted the anti-retaliation provision broadly, providing causes of action to far more employees than previously expected, and making it easier for these claims to survive dispositive motions.

With Dodd-Frank whistleblower activities picking up steam, and the recent judicial broadening of the anti-retaliation provision, employee lawsuits under the Act are likely to increase exponentially in the coming years. This article seeks to provide an overview of the Dodd-Frank whistleblower bounty program, the anti-retaliation provision, and its expanded scope in light of recent case law.

Overview of the Whistleblower Bounty Program

The Act’s whistleblower bounty program provides cash rewards to people who share information with the SEC or Commodity Futures Trading Commission concerning misconduct that falls within these agencies’ jurisdiction. Under the Act, a “whistleblower” is defined as an individual who provides “information relating to a violation of the securities laws to the Commission, in a manner established, by rule or regulation, by the Commission.” To be eligible for a cash reward, the whistleblower must provide information derived from his or her independent knowledge or analysis and not previously known to the government that leads to actions with monetary sanctions totaling over $1 million. Further, the whistleblower must provide the tip via the SEC’s website or by sending the SEC Office of the Whistleblower a “Form TCR (Tip, Complaint, or Referral).” If the whistleblower’s information meets these criteria, the government can provide the whistleblower between 10 and 30 percent of any resulting monetary sanction against the target company, based on the “significance” of the tip.

The program is now up and running. The SEC has received thousands of tips on a broad array of topics, including corporate disclosures, corporate financials, offering fraud, market manipulation, insider trading, Foreign Corrupt Practices Act violations, unregistered offerings, market events, municipal securities, and public pensions. On Aug. 21, 2012, the SEC made its first whistleblower bounty payment. And the SEC continues to review applications for potential awards related to over 143 eligible enforcement judgments exceeding the statutory $1 million minimum.

The Dodd-Frank Whistleblower Anti-Retaliation Provision

In addition to creating new incentives for whistleblowers, the Act also created new protections for whistleblowing employees. Under the Act, employees have a private cause of action if an employer discharges, demotes, suspends, threatens, or harasses them for any lawful act undertaken by the employee in 1) providing information to the SEC; 2) assisting the SEC in an investigation or action; or 3) making disclosures that are required or protected under the Sarbanes-Oxley Act of 2002, the securities laws, 18 U.S.C. § 1513(e), and any other law, rule, or regulation subject to the jurisdiction of the SEC.

The Dodd-Frank anti-retaliation protections include a number of features that make it far more powerful than previous whistleblower protections. For example, in contrast to the whistleblower protections under Sarbanes-Oxley, Dodd-Frank’s anti-retaliation laws contain the following features:

**Applicable to all companies:** The Act applies to both private and public companies.

**Generous statute of limitations:** The statute of limitations for Dodd-Frank retaliation claims is six years after the violation or three years after the right of action was known or reasonably should have been known by the employee, but in no event longer than 10 years.

**Wide array of available relief:** Employees can receive reinstatement, up to two times back pay with interest, and compensation for costs and fees.

**Access to federal court:** Whistleblowers under Dodd-Frank can go straight to federal court rather than exhausting the administrative process, as required under Sarbanes-Oxley.

All of these aspects of the Act vastly increase the potency of the protections offered to employees under Dodd-Frank.

**by Daniel M. Weiskopf**
The Expanding Scope of the Anti-Retaliation Provision

A line of recent cases, culminating in the District of Connecticut case Kramer v. Trans-Lux Corp., have further broadened the scope of the Dodd-Frank’s anti-retaliation provision. In Kramer, the plaintiff, Richard Kramer, noted several irregularities concerning company procedures and the company’s pension plan. Mr. Kramer complained internally, discussing the issues with his supervisors and sending letters to the company’s board committees, and he complained externally, sending a letter to the SEC. In response to Mr. Kramer’s internal complaints, the company terminated him.

Mr. Kramer brought suit for retaliation against his employer, Trans-Lux, under the Dodd-Frank Act; Trans-Lux moved to dismiss on the basis that Mr. Kramer was not a protected Dodd-Frank whistleblower because he did not provide information to the SEC as required under the Act’s whistleblower bounty program (i.e., Mr. Kramer did not use the SEC website or a Form TCR and instead merely wrote a letter).

The Court held that the anti-retaliation provision and the whistleblower requirements under the bounty program were in conflict and therefore ambiguous. In light of the ambiguity, the Court interpreted the statute by looking to the goal of the Act — “to improve the accountability and transparency of the financial system and create new incentives and protections for whistleblowers” — and found that an SEC rule promulgated to address this ambiguity should govern. Under this SEC rule, the Court found that Mr. Kramer had a viable Dodd-Frank anti-retaliation claim despite the fact that Mr. Kramer would not have been eligible for a monetary reward under the Dodd-Frank whistleblower bounty program.

In its analysis, the Court made two important findings that should reverberate in future Dodd-Frank anti-retaliation litigation.

First, the Court found that employees are protected from retaliation not only if they fail to follow the SEC’s prescribed whistleblower reporting requirements, but even if they make no external reporting at all. In other words, under Kramer and other cases, employees who report securities law violations internally will still receive the powerful anti-retaliation protections of Dodd-Frank.

Second, the Kramer Court noted that the Act’s anti-retaliation provisions incorporated Sarbanes-Oxley’s whistleblower protections, which do not require an actual violation of a securities law; the employee need have only a “reasonable belief” of a securities law violation to be protected. This means that, under Kramer, an employee receives full Dodd-Frank protection for complaining internally about what the employee believes is a securities law violation, even if the employee’s belief is erroneous.

These holdings could profoundly impact any company whose business interacts with the SEC or touches upon the securities laws. Employees could complain internally or to the SEC for what they may reasonably believe is a securities law violation. The employee’s complaints may be unfounded and may not require correction by the company. Yet if the employee perceives retaliation over the next 10 years, the company could still be at risk of substantial claims — and, as a result of Kramer, those claims would have a stronger chance of surviving dispositive motions.
Conclusion
The Dodd-Frank whistleblower program is gaining momentum and the courts have interpreted its anti-retaliation provisions broadly. Companies should take heed and carefully consider how to minimize their risks with vigorous compliance programs and internal mechanisms for handling employee complaints and reports of violations. As always, companies should exercise caution when taking adverse employment actions. But regardless of what steps companies take, Dodd-Frank has changed the landscape for securities law whistleblowers permanently . . . or at least for another four years. NWL

Dan Weiskopf is an attorney at Calfo Harrigan Leyh & Eakes LLP, where he focuses on complex civil litigation. He has had success in whistleblower actions on both sides of the “v,” representing corporations against qui tam and retaliation suits, and bringing whistleblower suits on behalf of individual plaintiffs. Weiskopf graduated from the Yale Law School and can be reached at danw@calfoharrigan.com.

NOTES
4. Id. § 240.21F-9(g).
7. Id. at 8.
8. Id. at 8–9.
9. 18 USC § 1513(e) concerns retaliation for “providing to a law enforcement officer any truthful information relating to the commission or possible commission of any Federal offense.”
11. Id. § 78u-6(h)(1)(B)(ii).
12. Id. § 78u-6(h)(1)(C).
13. Id. § 78u-6(h)(1)(B)(i).
17. Id. at *6.
18. Id.; see also Egan, 2012 WL 1672066, at *5 (for retaliation protection, whistleblower must “either allege that his information was reported to the SEC, or that his disclosures fell under the four categories of disclosures delineated by 15 U.S.C. 78u-6(b)(1)(A)(i)(ii)).
20. Id.
On 20 Jury Trials

by Alexander F. Ransom

“And while I can’t prove it, and each of us may have a different idea, my sort of guesstimate as to the requisite experience is 25 jury trials.”

— Irving Younger, Esq.1

We’ve all felt it: the nagging desire to maximize our potential, and sooner rather than later. That same ambition grind ed us through law school and carried us through the bar exam. Unfortunately, for young trial attorneys, it’s more difficult than ever taking cases to juries. The number of civil trials in the 75 largest counties in the U.S. decreased by approximately 47 percent between 1991–2001.2 The same trend is occurring in criminal law.3 The reasons? Jury trials are becoming more expensive; alternative dispute resolution forums such as ADR, mediation, and arbitration are gaining popularity; and litigants want to avoid paying the high costs of pretrial preparation. Problematically, young attorneys suffer dearly from this change. If the trends continue, it might be the case that a mere handful of future-generation attorneys will be capable of competently conducting trials.

Consequently, trial experience matters. So the question becomes: how much experience is necessary? Why does legendary trial attorney and law professor Irving Younger say that 25 trials separate the experienced from inexperienced attorneys? Having conducted 20 jury trials in my seven-year career, I’m beginning to understand.

Building Good Relationships with Opposing Counsel

Daniel: So, karate’s fighting. You train to fight.
Miyagi: That what you think?

Daniel: [pondering] No.
Miyagi: Then why train?
Daniel: [thinks] … So I won’t have to fight.
Miyagi: [laughs] Miyagi have hope for you.
— The Karate Kid, 1984

Theoretically, trial practice should improve relations with opposing counsel in order to avoid litigating future cases. Case in point: I once conducted a serious felony drug trial against an experienced prosecutor. My client faced cocaine possession and witness intimidation charges. I expected an ugly, bloody war, but unexpectedly, our trial was extremely cordial. As I relaxed, I saw legal openings and heard objectionable testimony that I normally wouldn’t see or hear. The jury acquitted the most serious charges. I parted on a high note with opposing counsel. Undoubtedly, we’ll settle future cases much easier.

Remember, “The supreme excellence is not to win a hundred victories in a hundred battles. The supreme excellence is to subdue the armies of your enemies without having to fight them.”4 Most cases settle without trial. Therefore, use trials as opportunities to build bridges. Even your victories are meaningless if relations fail to improve afterward.

Motions in Limine

Back to the battlefield. Early on, I realized opposing counsel set traps and hobbled my strategies with effective Motions in Limine (MIL) practice. Unfortunately, many attorneys overlook this area. Effective MIL practice forces opposing counsel to control their witnesses, prohibits discussion of suppressed information, and prevents “below the belt” attacks. But remember, MILs apply to all parties. Even if you “accidentally” violate your own MILs, you risk opening the door for opposing counsel to admit evidence/testimony that you successfully suppressed. You also risk getting sanctioned. Watch your mouth and instruct your witnesses to do the same.

Finley and McGuire’s Washington Motions in Limine is an excellent resource providing up-to-date case law for effective MIL practice.5

Voir Dire

Jury selection is hard. At worst, it’s an awkward attempt at conversation verging on meaningless. And there’s little time — usually 30 minutes per side in criminal trials — to pick “good” jurors and eliminate “bad” ones. And yet its importance is monumental. Some experts believe 85 percent of cases are won or lost during voir dire.6

Connect with jurors quickly. If they like and trust you, it gives them permission to like/trust your client. Discuss your case theories. This is perfectly allowable in jury selection; after all, you’re trying to eliminate biased jurors. It also educates the jury pool. Relax when “bad” jurors talk. Instead, watch other jurors’ reactions. Do they agree or disagree? Make “bad” jurors dig themselves into trenches of bias. Excuse them for cause. Finally, don’t focus too much on “good” jurors. Instead, rehabilitate them to withstand challenges for cause.
Envision the jury en masse. Predict how potential jurors interact with each other. Differentiate leaders from followers. Jury forepersons typically have attractive personalities and probably answer your questions clearly/directly. Making these predictions forces you to stay present.

**Opening Statement**

Many attorneys give artful, powerful opening statements designed to advance the strengths of their case and reveal the other side’s weaknesses. Unfortunately, trial could turn out much differently than your opening statement predicts. You can appear “over the top” and lose credibility with an overly optimistic opening statement. Keep it simple. Carve your story from undisputed facts. Isolate the places where the facts may differ. Avoid over-promise. The opening statement is not argument; it’s merely a taste of what’s to come. Leave them wanting more.

Many claim jury trials are won or lost during the opening statement. But I happen to feel otherwise: consider reserving your opening statement if you’re unsure what direction trial will go. Theoretically, prosecutors must quickly win juries over because, as trial proceeds, the defense’s case only gets stronger after the prosecution rests their case-in-chief. Reserving opening statement slides the burden of proof on the prosecutor’s plate a little heavier when trial begins. You’ll also see the State’s case — warts and all — without tipping your own hand.

**Cross-examination**

Avoid using cross-examinations to attack and humiliate witnesses. I once conducted trial on a multi-count felony drug case involving confidential informants. Police investigations were sloppy. My strategy was to “divide and conquer” the counts by exposing their inadequate investigations, raising reasonable doubt as to each one. I once conducted trial on a multi-count felony drug case involving confidential informants. Police investigations were sloppy. My strategy was to “divide and conquer” the counts by exposing their inadequate investigations, raising reasonable doubt as to each one.

**Closing Argument**

Avoid drafting closing arguments too early. It’s very difficult to predict what evidence will get admitted/pressed and how witnesses will testify. Instead, develop your closing argument as trial evolves. This forces you to stay present. Avoid reading closing arguments verbatim from a script. Work from an outline. Look jurors in the eye. Speak from the heart. Avoid permitting the witness to explain his answers. Don’t ask the “one question too many.”

**Expect the Unexpected**

Anything can happen. I once defended a client charged with Malicious Mischief who punched a hole in a wall. For months, I was led to believe no photographs existed. At trial, however, and right after impaneling the jury, the prosecutor provided a damning photograph of a fist-sized hole in the wall. Fortunately, the judge granted my motion to suppress the photograph under CrRLJ 4.7(a)(v) due to discovery violations. Later, the jury acquitted for lack of evidence. Bring your rule book to court. Luck happens when preparation meets opportunity.

A major, quantifiable difference separating young attorneys from experienced attorneys is the number of jury trials conducted by each. Most other facets of practicing law are learned over time and repetition. Therefore, it’s imperative for young attorneys to prioritize and incorporate jury trials into their practice. Becoming effective in trial directly translates into becoming an effective negotiator. You’ll have a greater understanding of your cases and their probable outcomes. Good luck!

**Notes**

4. Sun Tzu, The Art of War, Chapter 3.
The Foreign Corrupt Practices Act

Compliance in the Current Enforcement Environment

BY TODD WILLIAMS AND HUGH HANDEYSIDE

Washington’s exports in 2011 topped $64 billion, the largest share of which went to China, where corruption remains a significant concern. Even if focused elsewhere, Washington companies operating overseas will frequently confront business cultures in which practices that potentially violate U.S. law—such as giving and accepting gifts or sharing expensive meals—are considered routine. Such companies must carefully consider U.S. law.

In November of 2010, the U.S. Department of Justice (DOJ) made clear that it had entered “a new era” in which it intended to pursue violations of the Foreign Corrupt Practices Act (FCPA) more aggressively. Since then, FCPA enforcement actions and penalties have surged. In this new enforcement environment, even small and mid-sized companies, once considered a lower enforcement priority, have found themselves the subjects of government inquiries. The DOJ and SEC signaled that the FCPA would remain a priority when they jointly issued guidance on the law in November 2012. The guidance offers some clarity on issues that had previously proven ambiguous, including the definition of a foreign official and what constitutes an improper gift.

This article provides an overview of the FCPA and includes five practical tips regarding compliance with federal anti-bribery laws.

The FCPA’s Broad Scope

The FCPA was enacted in 1977 following investigations by the SEC into widespread misuse of corporate funds and undisclosed, illegal payments abroad. The United States has encouraged similar legislation among its major trading partners in order to reduce any disadvantage to American companies. The United States and 34 countries have since ratified the Organisation for Economic Co-operation and Development (OECD) anti-bribery convention.

The FCPA applies broadly to “issuers,” “domestic concerns,” and foreign businesses and nationals, as well as officers, directors, employees, agents, and stockholders acting on their behalf. An “issuer” is a corporation that has issued securities registered in the United States or is required to file periodic reports with the SEC. A “domestic concern” is a U.S. citizen or any business which operates principally in the U.S. or is organized under the laws of a U.S. state.

Covered individuals and entities are prohibited from making or offering payments or anything of value to foreign officials for the purpose of influencing an act or securing an improper advantage. A foreign official is defined broadly as any officer, employee, or official of a foreign government, public international organization, or instrumentality thereof.

This expansive definition of a foreign official has led to uncertainty. The SEC and DOJ take the position that state-owned or state-controlled enterprises (SOEs) are instrumentalities of a foreign government. Consequently, all SOE employees are considered foreign officials. This interpretation is vexing for many firms operating internationally, particularly because the question of whether a business entity is an SOE is fact-specific, and foreign governments often influence many facets of the economy. China is a good example; through state-owned or state-controlled firms, the Chinese state is pervasive in the economy, and firms operating with Chinese partners are very likely to encounter “foreign officials.” Recently released guidance from the SEC and DOJ has lent some clarity to this issue by suggesting that if a foreign government controls only a minority stake in an entity, the DOJ and SEC are “unlikely” to consider that entity to be a foreign-government in-
instrumentality, absent a special mechanism of foreign-government control.

Because enforcement actions often hinge on this broad definition, compliance officers typically advise erring on the side of caution. Some clarity regarding who is considered a foreign official under the FCPA may be forthcoming — for the first time, the definition of “instrumentality” is before a circuit court in the Haiti Telco case — but until a ruling is issued, businesses should continue to take care when interacting with SOEs.

The FCPA contains two notable safe harbor exceptions. First, it permits facilitation payments for “routine governmental action.” Second, it allows payments that are lawful under the foreign country’s laws or were reasonable expenses related to product promotion or contract execution. Businesses should be prepared to justify the application of such provisions by providing evidence of custom or the reasonableness of the payment. Because the U.K.’s Bribery Act does not allow facilitation payments, that exception under the FCPA is effectively neutered for companies subject to both laws.

FCPA violations can be costly. Criminal penalties of up to $2 million may be levied against businesses, and individuals face up to $100,000 in fines and five years in prison. Moreover, under the Alternative Fines Act, the penalty may be up to twice the benefit that the defendant sought to obtain. The SEC also frequently seeks civil penalties. In 2011, criminal fines in DOJ enforcement actions ranged from $219 million (JGC Corp.) to $1.2 million (Comverse Technologies). In the same year, the SEC collected $9.6 million in civil penalties and $138.4 million in disgorgement and prejudgment interest.

Third-Party Liability

Critically, the FCPA also prohibits corrupt payments through third parties when the originator knows that the money will go directly or indirectly to a foreign official. The state of mind requirement for “knowing” is rather inclusive, and government investigators generally take the position that firms doing business abroad are responsible for knowing where their funds are going. As a result, due diligence and caution are particularly important when initiating and maintaining relationships abroad.

Enforcement Actions

As noted above, FCPA-related investigations and enforcement actions have increased steadily in recent years. This trend has been reinforced by the increased incentives under the Dodd-Frank financial reforms for whistleblowers to report violations. Although the DOJ has had some notable defeats at trial in recent FCPA cases, the total amount recovered in FCPA settlements remains high. Revelations by The New York Times regarding systematic bribes paid by Walmart in Mexico reflect a new level of media consciousness regarding FCPA enforcement and will likely lead to further investigations.

While it was once thought that government investigators were less likely to focus on small and mid-sized companies, recent bribery investigations, including a coordinated sting of defense-industry executives in early 2010 (the Africa Sting case) have proven otherwise. Thus, there is greater urgency for small and mid-size companies that con-
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Practical Considerations

This new enforcement environment highlights the importance of effective internal controls and policies. While the U.K.’s Bribery Act includes an adequate procedures defense, the FCPA does not. Nonetheless, demonstrating that your company has a robust, good-faith compliance program may positively affect the outcome of any enforcement action. With that in mind, the following are practical steps that businesses can take to mitigate risk.

Conduct a risk assessment — know your markets

Key to developing an effective compliance strategy is conducting a risk assessment of your business activities, including a review of current business activities, due diligence procedures, and internal controls. It should also involve candid conversations with executives and employees in risk-sensitive areas regarding their day-to-day practices. A critical goal of the risk assessment is to determine how policies and procedures are implemented, not just whether they exist.

Develop clear policies and train on them

A compliance program should include clearly articulated policies that are accessible, audience-appropriate, and backed up by consequences. The policies should be easily translatable for use in foreign markets and should be broad enough to encompass the FCPA, U.K.’s Bribery Act, and general anti-corruption principles. Employees and agents should be trained regularly on the policies and should be included in the discussion regarding why compliance with the policies is important.

Promote an ethical corporate culture

Corporate culture may be the most important part of any compliance program. Institutionalizing values that are consistent with ethical behavior can go a long way towards lowering compliance risks. These values should be demonstrated and reinforced often by management, which should discuss compliance programs frequently and integrate ethics-related policies into messaging and training.
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Extend the compliance program to third parties and partners

Third parties have been the subject of numerous enforcement actions in recent years. Compliance programs should therefore include clear due diligence policies for onboarding foreign agents. Such diligence may be outsourced, but it should be appropriately thorough and updated regularly. Agents and partners should be included in compliance training and should agree to follow anti-corruption policies and procedures. In certain circumstances, an audit of the agent’s records may be necessary, and contracts should provide for that option.

Monitor and test compliance policies

Compliance risks are dynamic and require ongoing monitoring. Businesses should periodically observe and test whether policies are understood and effectively implemented by both employees and third parties. Audits should be conducted with a focus on high-risk transactions that may implicate anti-bribery laws. Depending on resources, a business may consider assigning dedicated personnel for monitoring and assessing compliance.

It can be challenging for businesses to allocate the resources required to avoid FCPA violations. But a compliance program need not dominate a corporate budget. A properly risk-focused policy with adequate training and due diligence can efficiently address many corruption concerns. In their recently released guide to the FCPA, the SEC and DOJ identify the hallmarks of strong compliance programs and provide useful analyses of some hypothetical scenarios. In addition to resources available on the SEC and DOJ websites, both the United Nations Office on Drugs and Crime and the OECD offer resources, including a database of company policies. Given the current enforcement environment, reducing risk by implementing appropriate policies may be the most cost-effective option in the long term.

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A recent television advertisement asked this profoundly important question. The commercial features two stern-looking young lawyers working with grim determination as they research in appellate reporters, while a senior lawyer frowns menacingly in the foreground sitting at a large desk, waiting for the answer to this momentous issue. Finally, the harried young lawyers acknowledge the inevitable with the shake of their heads, and, with a look of apologetic resignation, the senior partner conveys the opinion to a group of young diners seated in a popular national chain restaurant: it is legal to just eat appetizers for dinner. The diners cheer as smiling wait staff rush forward to serve a variety of appetizers to the table. Hooray, dinner is not confined to the entrée list!

I also cheered for the precedential value such a ruling will have on society, for it quickly occurred to me that this legal opinion might form the foundation of a legal defense to “bad diet” claims.

The Short History of Appetizers
A very short history lesson about appetizers and dinner is necessary before the legal analysis can begin.

There is no bright line legal definition of “appetizer” in the law. In modern usage, the word “appetizer” means “a snack before a meal,” whereas a “meal” is food served at a fixed time. Logically, this means that a meal is eaten at one of the customary chronological occasions for taking food during the day, such as breakfast, lunch, or dinner, and an appetizer is something we eat before a meal, probably in small portions except for those nights when portion control is abandoned for a mountain-size platter of sliders. Therefore, if an appetizer is food served before a meal, does this mean that appetizers are not considered part of a meal or, as the commercial suggests, that appetizers are a substitute for a meal?

The word “appetizer” is used interchangeably with terms such as hors d’oeuvres (ancient Greek and modern French), starters (ancient Greece and Rome), antipasto (Italian), maza (Arabic), tapas (Spanish), zakusi (Russian), dim sum (Chinese), and smorgasbord (Swedish).

The ancient Athenians are responsible for inventing hors d’oeuvres, a trend that other Greeks did not like. An Athenian diner named Lynceus, the king of Argos, claimed that hors d’oeuvres were an insult to a hungry man. Obviously, ancient Greeks had greater expectations for dinner than a platter of curly fries or spicy chicken wings.

More recently, hors d’oeuvres as used in the French culinary context indicated minor items of food served at the beginning of a meal. As previously noted, other cultures had words for a similar type of food. Tapas are a Spanish tradition of gathering before lunch or dinner for a drink and small portions of food. Maza, as an Arabic tradition, are small dishes served as an indication of what is to come later in the meal. A Swedish smorgasbord is a variety of small foods presented on a common table.

For Americans, it seems that the concept of the appetizer has a more modern definition. Dictionary.com states that “appetizer” means “any small portion that stimulates a desire for more or that indicates more is to follow: The first game was an appetizer to a great football season.”

Yay for “football”; not the round-ball ver-
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sion played overseas but the American brand! Now we have an Americanized definition, with a truly American sports analogy, to justify how we eat appetizers. Truffle fries served “up front” would indicate a small portion of food that stimulates a desire for more (duh), and indicate that more food is to follow (such as a gargantuan-sized burger with tomato, lettuce, and onion).

But I notice that everyone is raising their hands requesting to speak. Professor Kingsfield never had a mob scene in his classroom like this. Okay, I will concede that the legal definition of “appetizer” might be ambiguous and need more context. For example, can a person choose to eat only an appetizer, i.e., a small portion before more food that would naturally follow the appetizer course, or must one, to be in full legal compliance with the definition of eating a meal, eat both an appetizer and additional food that follows? If the latter is true, that a person must eat additional food following an appetizer to eat a meal, then an appetizer alone can never be considered part of a legal meal. I would digress to consider whether a Las Vegas buffet is a meal, rather than a collection of appetizers served before a meal. What a legal enigma! Cauliflower, anyone?

The Law Relating to Appetizers
Fortunately, there is binding legal authority to resolve our legal conundrum. In Bogle v. Magone, the U.S. Supreme Court had the opportunity to consider various gastronomic terms, including the concept of an appetizer.

In that case, the Port of New York sought to collect taxes on imported fish pastes. The importer argued that fish pastes should have been assessed as “fish, prepared or preserved” at a 25 percent ad valorem tax rate. However, the Port assessed the imported fish paste as a “sauce,” which they assessed at a 35 percent ad valorem tax rate.

In discussing the Webster’s Dictionary definition of “sauce” and the common usage of that word, the U.S. Supreme Court found that a sauce is: “a condiment, generally but not always of liquid form, eaten as an addition to and together with a dish of food, to give it flavor and make it more palatable . . . or to stimulate the appetite for other food to be eaten afterwards.”

(Emphasis added.)

Now we understand the magic of the law: clarification of terms that society tends to confuse through its imprecise use of language. No longer can slick advertisements mislead the public into believing that chicken wings, eaten before a meal as an appetizer, are a substitute for dinner. The Supreme Court stated 117 years ago that appetizers are eaten before a meal, and, logically, that gastronomical event cannot be the same as the meal that follows.

The Just Desserts
Appetizers are not legally considered “a meal,” but rather are foods that precede a
meal. Appetizers serve to stimulate an appetite for food served at traditional meals, such as lunch or dinner, but should not be considered the meal itself. The commercial was wrong: it is not legal just to eat appetizers for dinner. Cheesy nachos and fried mozzarella are not food suitable for Sunday dinner, and the scales of justice have not tipped in favor of fat over complex carbohydrates.

All this leads to the real legal dilemma: is the new sub-speciality of practice, defending those accused of eating “bad diets,” a viable area of boutique practice? Should we call the webmasters and forge ahead with a mega-budget to promote the defense of those who have forgotten the distinction between appetizers and dinner?

Actually, maybe a political movement would be better. Forget tea parties—we need a political movement that promotes Parmesan truffle fries as real food, suitable for dinner without broccoli on the side. Imagine the societal chaos when the Supreme Court compares French fries to Brussels sprouts and rules they are both a healthy vegetable, or when the Court rules, 9–0, that deep-fried cheese curds are an acceptable alternative to an apple. Someone other than courtaphiles might actually read a Supreme Court decision.

NOTES
11. 152 U.S. 623; 14 S. Ct. 718; 38 L. Ed. 574 (1894).
13. Id.
14. Id.
15. Id. at 625.
16. Id. at 625 (emphasis added).
The Previous Play Is Under Review

Using Appellate Court Standards of Review to Understand NFL Instant Replay

By Tip Wonhoff

W

We have all been there — watching the last seconds of an exciting football game when a crucial play determines the outcome in our team’s favor. Our team creates a turnover or completes a long touchdown pass to seemingly seal a victory.

But wait! Before we can allow ourselves to celebrate and finally relax after three hours of nail-biting, the officials need to take another look at the play. The referee flips on his microphone and utters those dreaded words: “The previous play is under review.”

Immediately, the television commentators analyze slow-motion replays at every angle. “From this angle, it almost looks like the ball touched the ground before he secured it.” Or, “Whoa, hold on. It looks here as if his knee may be down just before the ball comes loose.”

But what gets lost in this analysis is the standard of review that referees must apply in evaluating these critical plays. Like an appellate court reviewing a trial court’s decision, NFL officials apply a standard of review to determine whether to allow a ruling to stand or not. Sometimes uninformed NFL viewers — like sloppy attorneys — forget about the most important part of an appeal: the applicable standard of review.

In appellate practice, the standard of review is probably the single most critical consideration. There are numerous standards of review depending on the issue on appeal, and some standards demand the appellant to make a more definitive showing than others. In criminal appeals, for example, when an appellant argues that the State presented insufficient evidence for the jury to convict him, appellate courts review the evidence presented at trial in a light most favorable to the State to determine whether any rational finder of fact could have found the crime’s essential elements beyond a reasonable doubt. Moreover, a sufficiency challenge admits the truth of the State’s evidence; the appellate court draws all reasonable inferences from the trial evidence in favor of the State and against the defendant.

So if a jury convicts a defendant for assault, and witnesses offered conflicting accounts at trial, on appeal the appellate court will take the word of the State’s witnesses. Clearly, in this scenario, the appellant must carry a heavy burden to secure a reversal for insufficient evidence.

O

In the course of litigation, one’s tactical decisions can determine the applicable standard of review. If an appellant claims, for example, that a trial court erred in granting summary judgment to her opponent, an appellate court will review that summary judgment order de novo. But if that same appellant — instead of appealing the summary judgment order — moves the trial court to reconsider its summary judgment ruling and then appeals the order on the reconsideration motion, the appellate court will apply an abuse of discretion standard to review the reconsideration order. When an appellate court applies an abuse of discretion standard, it defers to the trial court and will only disturb the trial court’s ruling if the trial court acted on untenable grounds or for untenable reasons. So when the appellant appealed the order on reconsideration rather than the summary judgment order, she made her path to a favorable appellate ruling more difficult.

These tactical litigation decisions, however, do not present themselves in quite the same way on an NFL field, where referees have a much easier time. Rather than having to determine the applicable standard of review, referees analyze all replay reviews under a single standard to evaluate questions of fact — not rule interpretations or questions of rule applicability. Did the ball cross the goal line? Did the receiver get both feet down in bounds? The NFL Rulebook, Rule 15, Section 9, outlines this standard: “A decision will be reversed only when the referee has indisputable visual evidence available to him that warrants the change.” Simple, right?

Similar to the sufficiency of the evidence standard discussed above, the NFL replay standard defers to the initial ruling. Referees cannot go under the hood to watch the replay and perform a do-over of the on-field ruling, in much the same way an appeals court cannot review a trial court’s witness credibility determinations to change a trial court’s findings of fact. Like appellate courts deferring to matters in which the trial court exercises its discretion, replay officials cannot perform a de novo review.

So when a referee rules on the field that a receiver caught and possessed the football before he stepped out of bounds, he exercises his discretion, the same way a trial judge exercises discretion in making a just and equitable property
distribution. To analogize NFL replays and appellate practice: if the appellant, a coach challenging an on-field play, cannot carrying his burden, here, with indisputable visual replay evidence, the initial, on-field ruling, stands and will not be overturned after review.

Knowing what we know about standards of review, let us reflect on Golden Tate’s now-infamous touchdown catch this past season against Green Bay on Monday Night Football. On a last-second play, Seahawks quarterback Russell Wilson threw a “Hail Mary” into the endzone, in which stood a group of Seahawks receivers and Packers defenders. Both Tate and Packers defender M.D. Jennings made a play on the ball, and in real time, many of us could not tell who within the huddled mass of players came down with the ball, if anyone. The on-field officials ruled that Tate and Jennings simultaneously possessed the ball, which, by rule, favors the offensive player and resulted in a touchdown. The Seahawks won the game as a result.

But first, the on-field ruling had to survive appeal on replay review: to overturn the referee’s on-field call of a touchdown catch (a discretionary ruling) replays had to show indisputable visual evidence that Tate and Jennings did not simultaneously possess the ball in the end zone (or that Tate did not otherwise possess the ball). To put it another way, the review would affirm the touchdown, unless officials found no evidence of simultaneous possession or Tate’s possession. They could not do this.

After review, officials let the on-field ruling stand. Presumably, the reviewing official analyzed all the angles, in slow motion, forward and backward, one frame at a time, and could still not find indisputable evidence to overturn the ruling. The replay evidence could not carry the burden required to survive the standard of review and overturn the initial ruling. Seahawks win.

The next time a football fan complains that referees should reverse an on-field ruling, remind that fan to consider the applicable standard of review and the high burden that the instant replay must satisfy. Then, tell that fan to be thankful that referees need only apply one standard of review, instead of the many that attorneys must sort through and consider in their appellate practice. NWL

NOTE

1. (Emphasis added). Also, for college football fans, the NCAA Rulebook, Rule 12, Section 1, Article 2 similarly provides: “The instant replay process operates under the fundamental assumption that the ruling on the field is correct. The replay official may reverse a ruling if and only if the video evidence convinces him beyond all doubt that the ruling was incorrect. Without such indisputable video evidence, the replay official must allow the ruling to stand.”
by Michael Heatherly

BOG Meeting, Nov. 16–17, 2012, Seattle

At its regular meeting in Seattle Nov. 16–17, 2012, the WSBA Board of Governors approved a final set of recommendations to revise the MCLE rules, extended the charter of the Local Rules Task Force, and set the priorities for the 2013 legislative program.

MCLE Rule Revisions

The BOG approved a final set of amendments to the Mandatory Continuing Legal Education (MCLE) rules and regulations, which were passed along to the Supreme Court for consideration and possible enactment. The BOG had debated the rules at its previous meeting on Sept. 20–21, 2012, and asked the MCLE Board to consider additional revisions. The MCLE Board solicited additional comments from stakeholders and discussed their revised proposals at a meeting with representatives from the Board of Governors on Oct. 26, 2012.

The provisions that drew the most discussion throughout the process were those involving CLE credits for pro bono activities and a proposed new category of credits for professional and personal development. Regarding those issues, the final version of the proposed amendments approved by the BOG at the November meeting would do the following:

1) Allow WSBA members to earn up to 25.5 CLE credits for pro bono activities within each of the member’s three-year reporting periods (with up to 22.5 of those credits for service, and three for training). This is an increase from the existing rule, which allows a maximum of 18 pro bono credits (including 12 for service and three for training).
2) Classify pro bono service credits under the “self-study” category of CLE credits.
3) Allow WSBA members to earn up to six CLE credits per reporting period for a new category entitled “development courses,” which would include education in “practice development, professional resilience development, post-retirement pro bono service planning, CLE presentation skills development, and other courses pertaining to the enhancement of a lawyer’s professional and personal skills and well-being.”
4) Allow WSBA members to earn up to six CLE credits per reporting period for “courses designed to develop leadership skills and enhance the leadership performance of lawyers.”

The pro bono and development issues had previously drawn significant debate among BOG and MCLE Board members and stakeholders. Some pro bono advocates had argued for even more credits being available for pro bono activities, in part to encourage greater participation in pro bono work by WSBA members. Other commenters, however, countered that the pro bono allowance represented such a high percentage of the total 45 required credits per reporting period that it diluted the CLE program’s principal purpose of ensuring lawyers remain properly educated about substantive legal areas.

Regarding the proposed new category of development courses, the intent was to educate WSBA members in areas that fall outside the fundamentals of legal advocacy.

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but are necessary for successful and fulfilling careers and lives. As with the pro bono issue, however, opponents argued that allowing credits for such courses dilutes the requirements for credits in substantive areas, and that such education should be sought outside of the CLE system.

WSBA Executive Director Paula Littlewood remarked at the November BOG meeting that the current proposals likely will not be the final, long-term solution to the MCLE issues in any event. The legal profession is changing so rapidly, she said, that a complete overhaul of the MCLE system will be necessary eventually. Attention should now shift to formation of a task force, perhaps in 2013, to consider a long-term solution, she said.

Local Rules Task Force Extension
The BOG voted to extend the charter of the Local Rules Task Force through 2014. The BOG had created the task force in 2006 to comprehensively review the local rules enacted by counties throughout the state and evaluate the rules’ impact on courts, litigants and lawyers. Among the findings of the task force was that the proliferation of local rules in recent years has led to confusion and inefficiency, especially among lawyers who practice in more than one county. The problem was found to be most significant in the practice of family law, where local rules tend to differ widely from county to county.

Two of the major projects of the task force in the ensuing years have involved family law rules and assistance to counties in revision of their local rules. In April 2012, the BOG approved the Revised Family Law Civil Rules, a set of rules drafted by the task force that compile all rules applicable to the practice of family law into a separate section that will apply statewide. The rules are now before the Washington State Supreme Court and subject to a comment period that will run through April 30, 2013.

The BOG voted to extend the task force’s charter primarily for two purposes: so task force members can respond to issues raised in the Supreme Court comment period on the family law rules, and so task force members can continue their outreach to assist counties in revising their local rules.

2012-13 Legislative Program
The BOG approved a list of legislative priorities and voted to sponsor three specific bills expected to be introduced in the 2013 Legislature. The legislative priorities, meant to guide the BOG in deciding what legislation to support or oppose, are similar to those approved the previous year. They are to: 1) support legislative proposals initiated by WSBA Sections that are approved by the BOG, 2) support continued progress on the Justice in Jeopardy Initiative, which includes efforts to improve support and to provide sufficient funding for civil legal aid, indigent criminal defense, and the judicial system, 3) monitor proposals that would increase existing court user fees, 4) support efforts to promote and enhance civics education, 5) monitor proposals that would impose a sales tax on professional services; oppose efforts to impose a sales tax on attorneys’ services, 6) monitor legislation that would alter court rules, and 7) monitor other proposals of significance to the practice of law and administration of justice, and take appropriate positions on legislation.

The specific bills the BOG voted to sponsor involve the following: Higher Education and Military Service — a bill that requires institutions of higher education to provide an opportunity to make up
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Uniform Collaborative Law Act
The BOG voted to have the WSBA Court Rules Committee review on an expedited basis — and revise as necessary — a set of proposed court rules that would help implement a Washington version of the Uniform Collaborative Law Act (UCLA). Collaborative law is meant to resolve disputes out of court whenever possible.

A UCLA bill was introduced at the request of the Uniform Law Commission in the 2012 Legislature. Although the 2012 proposal did not pass, it is expected to be reintroduced in the 2013 Legislature. The BOG opposed the 2012 legislative proposal solely on separation of powers grounds, because it found that several of the proposed statutory provisions should be adopted by court rule, but it did not take a position on the substantive provisions. During the 2012 interim, representatives of the WSBA Family Law and Alternative Dispute Resolution Sections worked with other proponents of the UCLA to address the BOG’s separation of powers concerns and other issues. The result of that work is the set of proposed court rules — intended to complement a collaborative law statutory scheme — presented to the BOG for its consideration. The BOG was asked to forward the proposed set of court rules to the Court for its consideration.

The BOG instructed the Court Rules Committee to “scrub” the proposed rules on an expedited basis so they can be ready for implementation if the Legislature passes the collaborative law act this year.

Washington State Bar Foundation
Washington State Bar Foundation President Judy Massong presented the annual report of the Foundation, which raises funds to support WSBA’s justice, public service and diversity efforts. Massong noted that fiscal year 2012 brought two milestones for the Foundation: a significant rebranding, and addition of a voluntary contribution check-box on the annual WSBA license renewal form.

In 2012, the Foundation supported the WSBA Home Foreclosure Legal Aid Project, the WSBA Moderate Means Program, the First Responder Wills Clinic, and the Washington Leadership Institute.

Washington Leadership Institute
The Washington Leadership Institute Advisory Board member Craig Sims introduced several of the 2012 fellows, who presented a report on their annual community service project. The Institute’s mission is to recruit, train, and develop minority and traditionally underrepresented attorneys for future leadership positions in the Bar and community. Administration of the Institute was shifted in 2012 from WSBA to the University of Washington School of Law. The fellows of the 2012 leadership class presented the BOG with an overview of the year’s community service project: a detailed plan that can be used for a structured attorney-to-attorney mentorship program.

Michael Heatherly is the editor of NWLawyer and can be reached at nwlawyer@wsba.org or 360-312-5156. For more information on the Board of Governors and Board meetings, see www.wsba.org/bog.
Interested in Being Interviewed for Appellate Court Vacancies?  
Feb. 8, 2013, deadline for March 21, 2013, interview  
On March 21, 2013, the WSBA Judicial Recommendation Committee (JRC) will interview attorneys and judges who are interested in being appointed by the governor to fill potential vacancies on the Washington State Supreme Court and Court of Appeals. The JRC’s recommendations are reviewed by the WSBA Board of Governors and forwarded to the governor for consideration when making judicial appointments. If you would like to be interviewed, please complete and submit the questionnaires posted on the JRC webpage at www.wsba.org/jrc by Feb. 8, 2013. Additional interviews will be held on June 21 and Sept. 19. For further information, visit the JRC webpage or contact WSBA staff liaison Pam Inglesby at pami@wsba.org, 206-727-8226, or 800-945-9722, ext. 8226.

Statute Law Committee  
Application deadline: Feb. 11, 2013  
The WSBA Board of Governors is accepting letters of interest and résumés from members interested in serving a two-year term on the Statute Law Committee, beginning April 1, 2013, and ending on March 31, 2015. This 12-member committee seeks to foster accurate publication of laws and agency rules and oversees delivery of the other services of the Code Reviser’s Office in a professional and strictly nonpartisan and cost-effective manner. The Code Reviser’s primary responsibilities are to periodically codify, index, and publish the Revised Code of Washington, the Washington State Register, and the Washington Administrative Code and to provide bill drafting services for the legislature. The committee meets at least twice a year. Further information about the Statute Law Committee can be found at its website at www.leg.wa.gov/codereviser/pages/statute_law_committee.aspx, or by contacting Kyle Thiessen at 360-786-6777. Please submit a letter of interest and résumé to WSBA Communications Department, 1325 Fourth Ave., Ste. 600, Seattle, WA 98101-2539; or email barleaders@wsba.org. A letter of interest and résumé are also required if the incumbent seeks reappointment.

WSBA Committees, Boards, and Panels  
Application deadline: March 11, 2013  
Applications are now being accepted through mywsba.org from members interested in serving on WSBA’s committees, boards, and panels. Committee service gives you a chance to get involved with issues you care about, connect with other lawyers from around the state, and make a contribution to the legal community and your profession. There are openings on the Legislative Committee, the Disciplinary Board, the Court Rules and Procedures Committee, the Professionalism Committee, the Hearing Officer Panel, and many more. Most appointments are for two years and begin Oct. 1, with some exceptions. For more information, see www.tinyurl.com/wsbaVolunteer, email barleaders@wsba.org, or call Pam Inglesby, WSBA member and bar leader relations manager, at 206-727-8226 or 800-945-9722, ext. 8226.

2013 Notice of Board of Governors Election  
Deadline: March 1, 2013  
Four positions on the WSBA Board of Governors will be up for election this year. Three of the positions represent the 2nd, 9th, and 10th congressional districts, and one is an at-large position. The three-year term of office begins Sept. 27, 2013. These positions are currently held by Philip Buri (2nd District), Susan Machler (9th District), and Tracy Flood (at-large position A). As a result of congressional redistricting, the 7th-Central District position currently held by Judy Massong has been eliminated, and the 10th District position is new.

Eligibility: Any active member except one previously elected to the Board of Governors may be nominated or run for the office of governor from the congressional district in which the member is entitled to vote. Any active member may be nominated or run for the at-large governor position.

Becoming a candidate: To run for the Board of Governors or to nominate another WSBA member, you must file a statement of interest and a biographical statement of 100 words or less. The required forms are available on the WSBA website at www.wsba.org/elections or by contacting Pam Inglesby, member and bar leader relations manager, at pami@wsba.org or 206-727-8226. The WSBA executive director must receive the forms for district races by 5 p.m. PST on March 1, 2013. Note: Biographical statements of nominated candidates will be published in the April/May issue of NWLawyer. The deadline to run for the at-large position is 5 p.m. PST on April 19, 2013.

Voting: The three district-based positions are elected by their peers. Generally, a member is entitled to vote in the congressional district in which he or she resides. All out-of-state active WSBA members are eligible to vote in the district of the address of their agent within Washington for the purpose of receiving service of process as required by APR 5(f), or, if specifically designated to the executive director, within the district of their primary Washington practice. Paper ballots for district elections will be mailed on March 15 and must be received by 5 p.m. PDT on April 15. The WSBA will also use an electronic voting system, and members with email addresses on file with the WSBA will not receive a paper ballot unless they request one. Email ballots will also be sent on March 15 and must be received by 5 p.m. PDT on April 15. The at-large governor will be elected by the Board of Governors at its May 31 meeting.

New $25 MCLE Comity Certificate Fee Information  
As a result of the WSBA Board of Governors’ (BOG) and staff’s extensive review over the past few months aimed at ensuring the Bar is operating in the most effective and efficient manner, WSBA began charging a handling fee for comity certificates to cover the processing time and resources required for each. There will be a fee assessed for ordering comity certificates and another fee assessed to submit a comity certificate for MCLE compliance. Ordering comity certificates can be done online or via mail. See http://tinyurl.com/comitycert for more information.

2013 Licensing and MCLE Information  
Deadline was Feb. 1, 2013. If you have not completed all mandatory portions of
your license renewal, including MCLE requirements, if applicable, you are delinquent and are at risk of suspension. You may complete licensing requirements, including MCLE certification, either online at mywsba.org or by using the License Renewal and Mandatory Continuing Legal Education Certification forms. Visit wsba.org/licensing to learn more.

**Judicial Member Licensing.** The deadline was Feb. 1, 2013. If you have not filed your renewal within 60 days of the date of the written notice, your eligibility to transfer to another membership class upon leaving service as a judicial officer will not be preserved. You may complete your renewal either online at mywsba.org or on the Judicial Member License Renewal form. Please note that a 30 percent late fee of $15 was assessed on Feb. 2. Visit wsba.org/licensing to learn more.

**Get More Out of Your Software**

The WSBA offers 30- to 60-minute webinars at noon for members wanting to learn more about what Microsoft Office Outlook and Word, as well as Adobe Acrobat, can do for a lawyer. We also cover online legal research, such as Casemaker and other resources. Are you a total beginner? No problem. The clinic teaches helpful tips you can use immediately. There is no charge and no CLE credit. To reserve your seat and obtain conference call instructions for our webinars, contact Peter Roberts at peter@wsba.org.

- Feb. 4, 2013 — Casemaker and Online Research
- Feb. 11, 2013 — Fee Agreements
- Feb. 18, 2013 — Staff
- Feb. 25, 2013 — Trust Accounts
- March 4, 2013 — Trust Accounts

**Just Starting a Practice?**

Think “outside the box” and consider purchasing “Law Office in a Box®.” For $119, you receive an hour of consultation time plus everything you see here: http://tinyurl.com/3rn75hj. Questions? Contact Peter Roberts at peter@wsba.org, 206-727-8237, or 800-945-9722, ext. 8237.

**Individual Consultation**

The WSBA Lawyers Assistance Program provides individual consultation services for those struggling with depression, work stress, addiction and life transition, among other topics. The initial consultation appointment costs $20, and any additional sessions are on a sliding scale based on your financial situation. Consultations are an opportunity for assessment of the problem(s) you may be facing, identifying useful tools you may utilize to address these issues, and referral resources to find the right resources for you. Our licensed counselors can offer up to six consultation sessions. We also provide consultations with job seeking and can offer informational and referral resources on a range of topics. Contact us at 206-727-8268, 800-945-9722, ext. 8268, lap@wsba.org, or go to www.wsba.org/lap.

**Peer Advisor Training**

Peer advisors are a group of more than 50 attorneys statewide dedicated to supporting attorneys in their careers. The WSBA Lawyers Assistance Program (LAP) often introduces attorneys to peer advisors for support with mental health or addiction issues, although sometimes a peer advisor is helpful for discussing topics such as career transition. LAP will be hosting a training on April 3 from 10:30 a.m. to 1:00 p.m. at the WSBA offices. If you are interested in joining our community of peer advisors or would like to be introduced to one, contact us at lap@wsba.org or 206-727-8268 or 800-945-9722, ext. 8268.

**Weekly and Bi-Monthly Job Search Group**

The Weekly Job Search group provides strategy and support to unemployed attorneys. The group runs for seven weeks...
and is limited to eight to ten attorneys. We provide the comprehensive WSBA job search guide “Getting There: Your Guide to Career Success,” which can also be found online at www.tinyurl.com/8hebb6. For more information about monthly and weekly job group programming or to schedule a career consultation, contact Dan Crystal at danc@wsba.org, 206-727-8267, or 800-945-9722, ext. 8267.

The next offering of the Bi-Monthly Job Search Group will take place on March 13, when the Lawyers Assistance Program welcomes attorney John Clynch, of the University of Washington Federal Tax Clinic. No RSVP is required; the group will meet on the sixth floor of the WSBA offices from noon to 1:30.

Solo/Small Firm Support Group
Starting in February, the Lawyers Assistance Program will be offering a new group service: the Solo/Small Firm Support Group. This is a weekly drop-in group for attorneys wanting to address the major challenges facing professionals in solo or small-firm settings. It will take place on Thursdays, from noon to 1:00 p.m. For questions or more information, contact Heidi Seligman at 206-727-8268, 800-945-9722, ext. 8269, or heidis@wsba.org.

Help for Judges
Judicial Assistance Services (JAS) was created in 2004 by a committee of Washington state judges exploring how to get judicial officers confidential help and intervention when they need it. Because of their unique positions and responsibilities, judges often find themselves with limited avenues for help. JAS is modeled after and affiliated with WSBA’s Lawyers Assistance Program, and offers help from trained peer counselors at no cost and referral to confidential professional help. Telephone or in-person sessions are available on a sliding-scale basis. For more information, call the JAS program coordinator at 206-727-8268 or 800-945-9722, ext. 8268.

Mindful Lawyers Group
A growing number of legal professionals across the nation are applying mindfulness-based skills and training to lawyering. The Washington Contemplative Lawyers group meets on Mondays at the Lawyers Assistance Program from noon to 1:00 p.m. For more information, contact Sevilla Rhoads at srhoads@gslaw.blogspot.com or go to http://wacontemplativelaw.blogspot.com.

Struggling with Alcohol or Drugs?
The Lawyers Assistance Program is closely connected to addictions communities, AA and otherwise, across the state. For instance, there is an “Unbar” AA group for attorneys that meets every Wednesday in downtown Seattle. If you would like someone to walk you to a meeting, or simply need a referral, don’t hesitate to contact us confidentially at 206-727-8268, 800-945-9722, ext. 8268, or lap@wsba.org.

Stress Reduction
Sometimes it’s tempting to reduce stress by overdoing alcohol, prescription drugs, food, sex, gambling — even work. These methods usually provide short-term relief and long-term pain, effectively giving you another problem to cope with down the road. Learn to reduce your stress without self-harm. If you need a hand, call the Lawyers Assistance Program at 206-727-8268 or 800-945-9722, ext. 8268, to schedule a confidential consultation.

Casemaker Online Research
Casemaker is a powerful online research library provided free to WSBA members that can be accessed from the WSBA website at www.wsba.org/resources-and-services/casemaker-and-legal-research. As a WSBA member, you already receive free access to Casemaker. Now, you can enhance that member benefit by upgrading to Casemaker+ with CaseCheck+. Just like Shepard’s and KeyCite, CaseCheck+ tells you instantly whether your case is good law. You can find information about this service on the Casemaker website, or call 877-659-0801 and a Casemaker representative can talk with you about the benefits of switching to their premium product. For help using Casemaker, call the WSBA Service Center at 800-945-WSBA or 206-443-WSBA.

Upcoming Board of Governors Meetings
March 8–9, Vancouver; April 26–27, Spokane; May 31, Seattle
With the exception of the executive session, Board of Governors meetings are open, and all WSBA members are welcome to attend. RSVPs are appreciated but not required. Contact Pamela Wuest at 206-239-2125, 800-945-9722, ext. 2125, or pamela@wsba.org. The complete Board of Governors meeting schedule is available on the WSBA website at www.wsba.org/bog.

Usury Rate
The average coupon equivalent yield from the first auction of 26-week treasury bills in January 2013 was 0.122 percent. Therefore, the maximum allowable usury rate for February is 12 percent.
Kristin Amy Miles

A remembrance by friends and colleagues Paul Olsen, Eric Nelson, Taya Briley, and her colleagues at the University of Washington Division of the Attorney General’s Office.

We mourn the passing of our dear friend and colleague Kristin Miles.

Kristin was an energetic, compassionate, and gifted lawyer whose contributions to her profession and to her friends will be greatly missed. Kristin was born in Bellevue and earned undergraduate and law degrees from the University of Washington. For the past nine years, she served in the UW Division of the Attorney General’s Office as a key member of its healthcare team. The UW healthcare system, and the healthcare community at large, have benefited significantly from her incredible intelligence, hard work, and wise counsel.

Kristin was an active board member of the Washington State Society of Healthcare Attorneys and a contributing author and editor for the Washington Health Law Manual. She was a member of the American Health Lawyers Association and a national speaker on health law topics. Early in her career, with the AG’s DSHS division, Kristin played an instrumental role in developing state regulations for the community public mental health system.

Lawyers, doctors, nurses, professors, and healthcare administrators will miss Kristin’s unique professional contributions. Kristin’s colleagues, family, and friends truly mourn the loss of a joyful and generous person. Kristin was quick, funny, and charismatic. She was an accomplished musician who performed with jazz choirs, the Northwest Girl Choir, and in her office, late at night. She knew all the best music — from Mozart and Verdi to Brandi, Elvis, Pink Martini, and Diana Krall.

Kristin’s tender heart led to a steady love for animals, children, and anyone who was suffering or hurting. She would generously share her whimsical gift collection with anyone — especially with the children of her friends and co-workers. Kristin will be remembered for her commitment to public service, her fireball personality, her unending generosity and goodwill, and her free-spirited sense of humor.

With her intellect, Kristin belonged in conference rooms with the brightest doctors and lawyers in Washington as they worked to resolve nearly intractable problems with healthcare and academic administration. With her love for uninhibited joy, wild schemes, and irreverent fun, she reminded us all not to take ourselves too seriously. We will all miss her dearly.

Kristin Amy Miles was born on Dec. 13, 1962, and died June 23, 2012, at the age of 49.

Lisa Worthington-Brown

A remembrance by friend and associate Shannon Kraft.

Lisa Worthington-Brown made the decision
early in life that she wanted to impact the world in a positive way. She grew up in Yakima and went to Northwest Nazarene College in Nampa, Idaho. There she met the love of her life, Michael “Gessner” Brown — her soul mate, who happened to have been born with cystic fibrosis (CF). In January 1999, Lisa committed her life to his, and began their much too brief time together.

Lisa and Gessner began married life in Winston-Salem, NC, where she worked as a paralegal with Womble Carlyle Sandridge & Rice. Lisa’s interest in becoming a lawyer bloomed, and she was accepted by the University of North Carolina Law School in Chapel Hill. Lisa graduated with honors. She and Gessner, with their beloved beagle, Beauty, returned to Seattle. She was admitted to the WSBA in November 2003 and started her career as a clerk for the Honorable H. Joseph Coleman in Division I of the Court of Appeals. Lisa continued her work as an associate with Dionne & Rorick in Seattle, then with Geiersbach & Kraft in Bonney Lake. While many young lawyers were networking and pursuing partnership dreams, she coordinated doctor appointments, worked from hospital rooms, researched treatment options, and advocated zealously for her husband’s right to be treated as a whole person — not merely symptoms. She treasured every moment with Gessner and still, somehow, managed to write, knit, pamper Beauty, train for triathlons, and to be a kind and giving friend.

Lisa devoted hours to educating the world about CF and providing support and encouragement to others living with the disease. Her brutally honest blogs chronicled her life with Gessner and their struggle to live every day with love and joy, even as CF progressively and violently invaded their life together. While caring for her husband, nurturing her friends, and pursuing her career, she made time to travel around the country offering hugs and encouragement to CF patients and their families. Gessner lost his fight with CF in 2010; Lisa was soon diagnosed with an aggressive type of breast cancer in April 2011 and passed away only 16 months later.

After losing Gessner, Lisa struggled to stay positive, focusing her energy on building a new life in a new home where CF had never lived. She continued to reach out to the world — making the positive impact she had dreamed about as a young girl — blogging about her own struggles as a young widow with cancer, offering love and support and encouragement to everyone fortunate enough to hear her voice, read her words, and see her smile. She fought the cancer with the same passion and zeal with which she fought for her husband and advocated for her clients.

Lisa was brilliant, creative, and fiercely loyal. She had a positive impact on the world, and we are all better friends, better lawyers, and better people for having known her.

Lisa Worthington-Brown died at the age of 34 on Aug. 1, 2012. NWL.

These notices of imposition of disciplinary sanctions and actions are published pursuant to Rule 3.5(d) of the Washington State Supreme Court Rules for Enforcement of Lawyer Conduct, and pursuant to the Feb. 18, 1995, policy statement of the WSBA Board of Governors. For a complete copy of any disciplinary decision, call the Washington State Disciplinary Board or 206-733-5926, leaving the case name, and your name and address.

**NOTE:** Approximately 30,000 persons are eligible to practice law in Washington state. Some of them share the same or similar names. NWLawyer strives to include clarification whenever an attorney listed in the Disciplinary Notices has the same name as another WSBA member; however, all disciplinary notices should be read carefully for names, cities, and bar numbers.

**Suspended**

William R. Allen (WSBA No. 7167, admitted 1976), of Burlington, was suspended from the practice of law in Washington state for a period of two years, effective Oct. 17, 2012, by order of the Washington State Supreme Court following approval of a stipulation. This discipline is based on conduct involving failure to act with due diligence, failure to communicate, and failure to safeguard property.

**Matter 1:** In 2007, Client A hired Mr. Allen to probate and assist with his father’s estate. On or about Oct. 15, 2008, Mr. Allen gave Client A an invoice showing that Client A owed Mr. Allen $1,219. That same day, Client A gave Mr. Allen a $2,000 check. Mr. Allen deposited these funds into his general business account, but at the time, Mr. Allen had not yet earned at least $781 of the funds. On Oct. 22, 2008, Mr. Allen obtained Letters Testamentary to give Client A authority to act as personal representative. Client A accessed a safety deposit box which held annuity policies and letters showing that Client A’s father owned stock in various companies. Client A gave these documents and other documents to Mr. Allen for safekeeping. From October 2008 through May 2011, Mr. Allen failed to appropriately safeguard the original documents and refused to respond to Client A’s multiple requests for their return. Mr. Allen took no further action to complete the probate proceedings. Over the next two years, Client A made multiple attempts to contact Mr. Allen in order to gain information about his case, but Mr. Allen did not respond.

In July 2010, Client A filed a grievance against Mr. Allen with the Association. Mr. Allen did not respond. In September 2010,
Disciplinary Notices

the Association issued a subpoena duces tecum requiring Mr. Allen to appear for a non-cooperation deposition and to produce his file for Client A’s probate. Mr. Allen provided his files but did not produce Client A’s original documents, stating he could not find them. In January 2011, the Association wrote to Mr. Allen requesting that he inform the Association of the search he had conducted for the documents. Mr. Allen did not respond. The Association issued a second subpoena duces tecum requiring Mr. Allen to appear and produce all original documents received from Client A. In July 2011, Mr. Allen informed the Association that he had found the documents in a tote bag in his house. Mr. Allen produced the documents to the Association at his subsequent deposition.

Matter 2: In 2009, Client B hired Mr. Allen to probate and assist with his father’s estate. Client B paid Mr. Allen $1,500 in advance fees. Mr. Allen deposited this money into his general account prior to earning any fees. On July 9, 2009, the Will was admitted to probate and Client B was appointed as personal representative. After July 2009, Client B made repeated attempts to contact Mr. Allen to gain information about the probate but Mr. Allen had no further communication with Client B and did nothing further to advance the probate. In May 2010, Client B hired another lawyer to complete the administration of the estate, who wrote to Mr. Allen and asked him to sign a Substitution of Counsel; Mr. Allen did not respond. The lawyer filed a grievance against Mr. Allen. Mr. Allen did not respond, requiring the Association to set a non-cooperation deposition. The lawyer made a motion to remove Mr. Allen as attorney of record in the probate proceedings. Mr. Allen filed a Notice of Substitution of Counsel the day before the scheduled hearing but failed to deliver his client file to the new lawyer until August 2010, despite repeated requests.

Mr. Allen’s conduct violated RPC 1.3, requiring a lawyer to act with reasonable diligence and promptness in representing a client; RPC 1.4(a)(3), requiring a lawyer to keep the client reasonably informed about the status of the matter; RPC 1.4(a)(4), requiring a lawyer to promptly comply with reasonable requests for information; RPC 1.15A(c)(2), requiring a lawyer to deposit into a trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred; RPC 1.15A(c)(3), requiring a lawyer to identify, label and appropriately safeguard any property of clients or third persons other than funds and keep records of such property and identify the property, the client or third person, the date of receipt and the location of safekeeping; and RPC 1.15A(f), requiring a lawyer to promptly pay or deliver to the client or third person the property which the client or third person is entitled to receive.

Francesca D’Angelo represented the Bar Association. Mr. Allen represented himself.

Reprimanded

Sam K. Eck (WSBA No. 13111, admitted 1983), of Bellevue, was ordered to receive two reprimands following approval of a stipulation by the Disciplinary Board on Sept. 19, 2012. This discipline is based on conduct involving failure to prevent conflicts of interest and sharing legal fees with a non-lawyer.

Mr. Eck is a solo practitioner whose practice emphasizes estate planning. From 1992–2012, Mr. Eck has been associated with EP, a company that markets estate planning packages. From 2007 through 2010, Mr. Eck was also associated with PG, which also marketed estate planning packages in Washington. Mr. Eck obtained several thousand clients through EP and 60 clients through PG. EP and PG used or used salespersons to sell the estate planning packages to clients in the clients’ homes. The salespersons would recommend that clients purchase the “living trust” package offered by the companies, so as to avoid probate. During these visits, the salespersons would collect data from the clients regarding their financial assets and their plans for disposing of the assets after death, which they entered into an estate planning “workbook.” During the home visits, the salespersons presented clients with Mr. Eck’s “retainer agreement” for legal services (agreement) and had the clients sign the agreement. The agreement stated the client was hiring Mr. Eck for representation “in the preparation of my Revocable Living Trust and accompanying documents.” Mr. Eck would receive a summary of the “workbook” and contact the clients by telephone. In some cases, the clients would meet with Mr. Eck in his office. Mr. Eck would then prepare the trust documents, based on the workbook and his conversations with the clients. In his communications with his clients, Mr. Eck operated on the assumption that the clients wanted to purchase a living trust-based estate plan rather than a will-based estate plan, and did not always advise his clients whether other estate planning options, such as a traditional will, would be more appropriate and/or economical for them. The cost of the PG living trust-based estate plan was approximately $2,200, while the cost of the will-based estate plan was approximately $700.

Mr. Eck did not disclose to his clients that he had a continuing business relationship with the living trust company whereby the living trust company would obtain clients for him, and did not disclose that his own interest in maintaining his business relationship with the living trust company could affect his independent judgment in advising his clients as to their estate planning options. Mr. Eck did not obtain informed consent, confirmed in writing, to his conflicts of interest.

In 2007, Mr. Eck established a financial planning company M&E with a financial planner and investment advisor. Mr. Eck and the financial planner each owned a 50 percent share in M&E. Client A was an estate planning client. Mr. Eck obtained through his association with PG. When Mr. Eck contacted Client A regarding the purchase of a living trust, Client A mentioned that he was not happy with his financial advisor. Mr. Eck referred him to M&E. Client A hired M&E as his financial advisor. Mr. Eck failed to disclose to Client A in writing that he had a financial interest in M&E, did not advise Client A in writing of the desirability of seeking independent counsel before hiring M&E, and did not obtain Client A’s informed consent when Mr. Eck referred him to M&E.

The vast majority of the clients Mr. Eck obtained through PG purchased living trust-based estate plans priced at $2,195. Clients paid the fee by check made out to Mr. Eck. The PG salesperson would collect the check from the client and give it to Mr. Eck, who would cash the check and pay PG a set fee of $1,495 for its services. On October 14, 2008, Client B executed living trust documents at her home in the presence of a PG salesperson and paid the $2,195. In 2009, Client B wrote to Mr. Eck saying she no longer needed the trust, and requested a full refund. Client B informed Mr. Eck that she had talked to the Washington State Attorney General’s office regarding its investigation of PG. Mr. Eck wrote to Client B stating that because she signed the retainer agreement and executed the trust documents, she was not eligible for a refund.

On July 22, 2010, PG entered into a consent decree with the Attorney General’s office to settle charges of deceptive marketing claims. PG did not admit any wrongdoing. The settlement required PG to establish a restitution fund for consumers who purchased living trusts from the company. Client B applied for and received restitution from PG in the amount of $789, under a pro-rata system of restitution established by the Attorney General. On June 22, 2012, Mr. Eck refunded Client B $1,407, which represents the balance of the $2,195 she paid for the living trust.

Mr. Eck’s conduct violated RPC 1.7(a)(2), prohibiting a lawyer from representing one or more clients when there is a significant risk the representation will be materially limited by the lawyer’s responsibilities to another client, a former client or a third person or by a personal interest of the lawyer; RPC 1.7(b)(4), requiring a lawyer to receive informed consent to conflicts of interest, confirmed in
writing by each affected client; RPC 1.8(g), prohibiting a lawyer from entering into a business transaction with a client or knowingly acquiring an ownership, possessory, security or other pecuniary interest adverse to a client; and RPC 5.4, prohibiting a lawyer from sharing legal fees with a nonlawyer.

Kevin M. Bank represented the Bar Association. Thomas M. Fitzpatrick represented Mr. Eck.

Reprimanded

Philip M. Kleinsmith (WSBA No. 23517, admitted 1994), of Colorado Springs, Colorado, was reprimanded, effective Oct. 15, 2012, by order of the Washington State Supreme Court imposing reciprocal discipline in accordance with an order of the Supreme Court of the State of Arizona.

For more information, see www.azbar.org/findalawyer?name=philip+kleinsmith.

Mr. Kleinsmith’s conduct violated Arizona RPC ER 1.1, requiring a lawyer to provide competent representation to a client; Arizona RPC ER 1.3, requiring a lawyer to act with reasonable diligence and promptness in representing a client; Arizona RPC ER 1.4, requiring a lawyer to communicate with a client; Arizona RPC ER 1.5, prohibiting a lawyer from making an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses; Arizona RPC ER 1.16, prohibiting a lawyer from representing a client or, where representation has commenced, shall withdraw from the representation of a client; Arizona RPC ER 5.3, requiring a lawyer to make reasonable efforts to ensure that the nonlawyer’s conduct is compatible with the professional obligations of the lawyer; and Arizona RPC ER 8.4(d), prohibiting a lawyer from engaging in conduct that is prejudicial to the administration of justice.

Joanne S. Abelson represented the Bar Association. Mr. Kleinsmith represented himself.

Reprimanded

Richard L. Pope Jr. (WSBA No. 21118, admitted 1991), of Bellevue, was ordered to receive a reprimand following approval of a stipulation by the Chief Hearing Officer on May 30, 2012. This discipline is based on conduct involving failure to communicate with a client as to the client’s continued desire to file a lawsuit, and failure to keep the client reasonably informed about the status of the matter.

In 2003, Mr. Pope undertook to file a lawsuit against his client’s former employer for violation of the Fair Credit Reporting Act. Thereafter, Mr. Pope had a conversation in which his client indicated he might be looking for another lawyer to pursue the action. Mr. Pope did not hear back from his client about whether he had found another lawyer.

As the statute of limitations approached, Mr. Pope did not contact his client to ascertain whether his client still wanted Mr. Pope to file the lawsuit on his behalf. Instead, Mr. Pope checked the court dockets to see if some other lawyer had filed the lawsuit. When Mr. Pope did not find that any other lawyer had filed the lawsuit, he advanced the filing fee and filed the lawsuit in Federal Court on Oct. 4, 2004.

During 2005, on two occasions, the Federal Court issued orders to show cause why the lawsuit should not be dismissed because of Mr. Pope’s failure to comply with the Court’s orders as to filing a joint status report. On another occasion in 2005, the Federal Court issued an order to show cause why the lawsuit should not be dismissed for failure to serve a summons within 120 days of filing the complaint. In September 2005, the Court ordered Mr. Pope to withdraw from the representation. When Mr. Pope failed to withdraw, the Court issued an order in January 2006 removing Mr. Pope as counsel of record. Although Mr. Pope responded to the Court’s orders to show cause and prevented the lawsuit from being dismissed, Mr. Pope did not communicate with his client at all during 2005, and did not advise his client of any of the orders to show cause or the order directing Mr. Pope to withdraw.

Mr. Pope’s conduct violated RPC 1.2(g), requiring a lawyer to abide by a client’s decisions concerning the objectives of representation and, as required by Rules, to consult with the client as to the means by which they are to be pursued; and RPC 1.4, requiring a lawyer to keep the client reasonably informed about the status of the matter.

Randy V. Beitel represented the Bar Association. Stephen C. Smith represented Mr. Pope. Joseph Nappi Jr., is the chief hearing officer.

Admonished

William E. Pierson Jr. (WSBA No. 13619, admitted 1983), of Seattle, was ordered to receive an admonition following approval of a stipulation by the Disciplinary Board, on Sept. 20, 2012. This discipline is based on conduct involving failure to safeguard client property and comply with the rules regarding trust accounts.

Between 2008 and 2010, Mr. Pierson:

• Failed to keep an accurate balance on his trust accounts and wrote one or more checks exceeding the balance in his trust account; the overdraft resulted when Mr. Pierson explained that he had earlier received a release and settlement statement on behalf of a client, a commercial entity, but the client did not timely sign the statement because the company had been sold to another entity after the settlement had been reached. By the time this was done, the original settlement check, a bank draft, had expired and was rejected as void when it was deposited to Mr. Pierson’s trust account; as a result, the checks Mr. Pierson wrote to distribute the settlement did not clear. Mr. Pierson notified counsel for the settlement payor and asked for another check to be issued in place of the rejected one;

• Failed to promptly withdraw his portion of earned fees out of his trust account. By doing so, Mr. Pierson commingled his own funds with funds belonging to his clients, thereby leaving the trust account vulnerable to attachment by his creditors and placing the client funds at risk;

• Failed at times to make timely and/or complete disbursements of client settlement funds;

• Failed to keep sufficient funds in his trust account. In June 2009, Mr. Pierson drew a check for $92,401.6 from his trust account on behalf of a certain client at a time when that client had insufficient funds remaining in the trust account to cover the check, causing a shortage in his account. In doing so, Mr. Pierson improperly invaded the funds being held in trust for other clients;

• Failed to reconcile his trust account check register to the monthly bank statements for that account, and to regularly reconcile the balance to his client ledgers.

Mr. Pierson’s conduct violated RPC 1.15A(c), requiring a lawyer to hold property of clients and third persons separate from the lawyer’s own property; RPC 1.15A(f), requiring a lawyer to promptly pay or deliver to the client or third person the property which the client or third person is entitled to receive; RPC 1.15A(g), requiring a lawyer to promptly distribute all undisputed portions of the property; RPC 1.15A(h)(1), prohibiting a lawyer from depositing or retaining funds belonging to the lawyer in a trust account; RPC 1.15A(h)(6), requiring a lawyer to reconcile the check register balance to the bank statement balance and reconcile the check register balance to the combined total of all client ledger records; RPC 1.15A(h)(7), prohibiting a lawyer from disbursing funds from a trust account until deposits have cleared the banking process and been collected; and RPC 1.15A(h)(8), requiring that disbursements on behalf of client or third person not exceed the funds of that person on deposit and that the funds of a client or third person not be used on behalf of anyone else.

Natalea Skvir represented the Bar Association. Mr. Pierson represented himself.
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THE GOSANKO LAW FIRM
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Nicholas J. Lepore
has joined the firm as an associate as of
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Mr. Lepore graduated with honors from Seattle University
School of Law in 2010. He received a B.A. in Political Science
from Suffolk University in 2004. He is a member of both the
Georgia and Washington State Bar associations.

Prior to joining our firm, he was most recently an associate
at The Keenan Law Firm in Atlanta, Georgia, from 2010 to
2012, where his practice included representing plaintiffs
in personal injury matters. He will continue to focus his
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BUCKLIN EVENS PLLC
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Dawn Sydney, JD, MPA
has joined the firm as of counsel.

Dawn will continue her family law practice, including
intricate financial matters and contested parenting
cases. Prior to practicing family law, Dawn spent 10
years in public policy focused on social justice at the
state and federal levels.

Dawn graduated from Washington University School
of Law (St. Louis) in 1991 and received her Masters of
Public Administration from Seattle University in 2012.

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Feb. 5 — Seattle and webcast. 7 CLE credits. By the WSBA Creditor Debtor Rights Section and WSBA-CLE; 800-945-WSBA or 206-443-WSBA; www.wsbaCLE.org.

**Immigration and Employment Law: I-9 Form Update**  
Feb. 8 — Seattle and webcast. 1.75 CLE credits. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA; www.wsbaCLE.org.

**Immigration Law — Ethics Issues**  
Feb. 8 — Seattle and webcast. 1.5 CLE ethics credits. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA; www.wsbaCLE.org.

**2nd Annual M&A Tax Issues: Life of an M&A Deal from a Tax Accounting Perspective**  
Feb. 8 — Seattle. 6.5 CLE credits. By The Seminar Group; 800-574-4852 or 206-463-4400; www.theseminargroup.net/seminar.lasso?seminar=13.taxwa.

**20th Annual Endangered Species Act**  
Feb. 24 and 25 — Seattle and webcast. 11.25 CLE credits, including 1 ethics. By The Seminar Group; 800-574-4852 or 206-463-4400; www.theseminargroup.net/seminar.lasso?seminar=13.esawa.

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**March**

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March 1 — Seattle and webcast. 6.5 CLE credits. By the WSBA Elder Law Section and WSBA-CLE; 800-945-WSBA or 206-443-WSBA; www.wsbaCLE.org.

**Annual Intellectual Property Institute**  
March 8 — Seattle and webcast. 6 CLE credits. By the WSBA Intellectual Property Section and WSBA-CLE; 800-945-WSBA or 206-443-WSBA; www.wsbaCLE.org.

**Marijuana and Real Estate**  
March 15 — Seattle. CLE credits pending. By Law Seminars International; 800-945-9722, ext. 8268; www.wsba.org/lawyers/services/lap.

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58 NWLawyer | FEB 2013
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Like any conscientious human being, I’ve regretted plenty of things I’ve done over the years. Like Ol’ Blue.

Eyes, I’ve just tried not to drag too many of my mistakes around with me. But a few of my decisions haunt me to this day. Maybe the worst involved, of all things, the death of a goat.

Years ago, my then-wife and I owned a 10-acre place in semi-rural Whatcom County, where we raised our two kids and a menagerie of dogs, cats, indoor and outdoor fish, and two pygmy goats: JJ and Java. Pygmy goats are hilariously entertaining. Although they’re about two feet tall and 60 pounds, they all think they’re mountain goats or big-horn sheep. We built ours a platform to climb on, and they spent half the day trying to knock each other off with dramatic ram-like collisions. They would rear up on their hind legs, bow their necks, and clank their de-horned skulls into each other like a scene from a 1960s Yellowstone Park documentary.

Our goats and dogs lived in separate quarters at opposite ends of a large shed. Each species also had a separate outside pen, separated by wire fencing. One weekend my wife agreed to board a one-year-old husky, Tui, belonging to a friend of hers who was going out of town. Tui had gone on walks with our dogs and they all got along fine, so we anticipated no problems. I thought nothing of it that Friday night when our friend dropped off Tui, and my wife put him in the pen with our dogs.

Saturday morning, I was startled by a pounding on the back door. I opened it to find my wife in near-hysterics, which was entirely out of character for her. “It’s JJ,” she stammered tearfully. “He’s on the ground. His tongue is hanging out. I think he’s dying.”

We both knew immediately what had happened. We had forgotten that over the years a hole had developed in the fence between the dog and goat pens, allowing the dogs to wander into the goat area. Our dogs had been neighbors with the goats for so long that the predator-prey instinct had been extinguished. Other than the dogs annoying the goats occasionally by barking at them playfully, there were never any incidents. Of course, for young Tui, who knew no better, the goats would have been perfect targets for canine terror. JJ wasn’t bitten, but he apparently fell off his sleeping platform or perhaps simply succumbed to shock while being chased by the lanky, rambunctious pup.

Quantum physics has the concept of the multiverse: a set of universes, one representing everything that has happened in the universe of which we are currently aware, with the others representing each of the innumerable alternative possibilities. Every time something can go one way or another (the theory holds), a universe splits into two, one corresponding to each of the possible outcomes.

At least once a month or so, I find myself hoping that before I run out of time in this universe, some genius will figure out how to transport me to the universe in which I am still about to respond to the goat crisis. Because the choice I made the first time was horrible.

Instead of going out to the shed with my wife and helping to render whatever aid I could to poor JJ, or at least comforting him in his final moments, I instead berated my wife for taking in her friend’s dog while knowing about the hole in the fence. Never mind that I knew about the hole as well, and never mind that my wife and JJ needed support from me, regardless of who was at fault. I just bailed out.

I knew why I did it, although I didn’t admit it at the time. I simply lacked the courage to enter that shed and cradle our four-legged friend as the life ran out of him. I left it for my wife to do on her own.

Karma caught up to me an hour or so later, when I had to lift JJ’s lifeless body into our pickup truck so we could drive him to the veterinary clinic for cremation. I’ll never forget the contrast between his sprightly, frolicking nature in life and the heavy stillness of his frame as I loaded him away.

Yeah, regrets — I have a few.

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NWLawyer Editor MICHAEL HEATHERLY practices in Bellingham. He can be reached at 360-312-5156 or nwlawyer@wsba.org. Read more of his work at nwsidebar.wsba.org.
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