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ON THE COVER: Orcas and the spirits of the lost. Orca artwork by Anthony Jones. Cover design by Terri Sharp.
FEDERAL PROSECUTION

Two articles in the November and April 2016 NWLawyer discuss the Sally Yates federal memorandum for prosecuting corporations [“Federal Prosecution Trends in Washington,” by Patrick Preston and Jack Guthrie. NOV 2016 NWLawyer. “White Collar Reform” by Patrick Preston. APR–MAY 2016 NWLawyer]. Prosecutors are to extort management to investigate for the federal government and render all possible defendants for prosecution, in exchange for which the government will give the company “cooperation credit.” The terrifying impact on corporate people is easily imagined, and everyone, including counsel, can be a suspect. It’s like having moray eels eat a person’s insides until they drop over dead, or here, until they drop over willing to do anything the government wants. Prosecution should be public, not secret, and administered by accountable government, not victims. Perhaps it’s also an unconstitutional deprivation of life, liberty or property without due process of law to compel people by threats to work for the government. Most of the offenses are political, not “real” crimes such as corporations being punished for business practices.

Andrew N. Becker, Port Orchard

POLICE DOGS

I was dismayed by your publication of a puff piece regarding police dogs (“Police Dogs: Best Practices for Law Enforcement,” by Bremerton Police Chief Steve Strachan. NOV 2016 NWLawyer). Police dogs are regularly trained and utilized to intimidate, terrorize, and sometimes injure vulnerable suspects. The jaws of a German shepherd can exert a bite force of 1,500 psi. Putting aside the BPD’s history in regard to excessive force in its treatment of criminal suspects, the article was neither scholarly, fact-based, or descriptive of “best practices.”

Let us hear from you! We welcome letters to the editor on issues presented in the magazine. Email letters to nwlawyer@wsba.org. NWLawyer reserves the right to edit letters. NWLawyer does not print anonymous letters, or more than one submission per month from the same contributor.
as stealing. The result is intimidation of all corporations so that they will kneel to the government’s will, most likely on issues such as global warming. All speculative, but pick any administration. Perhaps it’s also an unconstitutional deprivation of life, liberty or property without due process of law to compel people by threats to work for the government.

Roger Ley, Svensen, Oregon

NOT A LADY

My enthusiastic thanks to Robin Haynes for bringing feminism front and center in the discourse for Washington state lawyers. I heartily agree with Robin’s perspective that feminism is for everyone who strives for equity, fairness, and mutual respect in society. And like Ms. Haynes, I am also not a lady.

Tera Schreiber, Seattle, WA

“I am not a lady,” declares our new WSBA president—in response to friendly advice from a senior male colleague to “just be a lady” as she accepts the reins of leadership [“I Am Not a Lady,” by Robin Haynes. NOV NWLawyer]. She then goes on to decry the label “lady” as indicative of “implicit bias” against women. What if a female colleague had advised our former male WSBA president to “just be a gentleman” when he took over? Would he have justifiably assumed that to be indicative of “implicit bias” against men? Unlike.

But our new “youngish woman in a professional leadership position” doesn’t stop with criticizing the term lady as someone who “behaves in a polite way [and] is demure, soft and often silent,” she goes on to claim that such descriptions are “antonyms to terms associated with leaders—bold, strong, articulate.” Isn’t it possible to be polite and demure and still be strong and articulate? Who says those qualities must be mutually exclusive?

I frankly believe this admittedly young woman who professes to represent the entire Washington State Bar Association has much to learn about leadership. If she wants to lead an entire state of lawyers, that of necessity includes all the men as well as all the women, older as well as younger. Her quote that “women are better leaders because ‘women are necessarily efficient’ [at balancing professional and family life while] men cannot operate a vacuum,” is not only disingenuous but underscores her own “implicit bias” against the men she presumes to represent. In her prejudicial view of the world, women are obviously superior to men. What an “us vs. them” mentality! Just what we want in a leader of intelligent professional men and women.

I have known many outstanding “lady lawyers”—women who not only represented their clients with skill and devotion, but who were polite and civil. And I might add, I’ve known many outstanding “gentleman lawyers” who demonstrated those same qualities. I am convinced that people of either gender whose attitude and conduct reflect true professionalism can and do reach the top of their organizations. Statistics alone do not explain why some do not!

Brian L. McCoy, Riverton, Utah

Our new president has made it abundantly clear that she is NOT a lady. [“I Am Not a Lady,” by Robin Haynes. NOV NWLawyer]. Methinks she doth protest too much.

In the interests of parity, would she take exception as well to the use of the term “gentleman” as being unduly Victorian? In our increasingly coarse society, I think mutual respect is badly lacking. In my view, we have been well served by the terms she decries. Robin, you have a broad palette offered to you as president to advance so many worthwhile initiatives to enhance the interface between the client population and the legal community. Resist the temptation to become a one-note wonder. We expect and look forward to so much more from you.

Wishing you the best as you enter your term as president.

Robert E. Repp, Marylhurst, Oregon

In the President’s November 2016 column [“I Am Not a Lady,” by WSBA President Robin Haynes. NOV NWLawyer], Ms. Haynes objects to the advice given her as she entered the WSBA presidency as (her own words) “a youngish woman.” The advice was, “Just be a lady, kiddo.”

I wonder if a youngish man entering a similar leadership position should be offended if advice is given him by an older woman stating, “Just be a gentleman, son.”

I am trying to parse the difference.

Marc Bond, Anchorage, Alaska

RESPONSE FROM THE AUTHOR: I am sorry that you disagree with my choice to discuss openly the implicit and explicit biases, institutionalized sexism, and privilege that has affected women in our profession. The statistics support and reinforce the anecdotal stories that have been and will continue to be shared. I have received literally hundreds of positive responses in the form of emails, phone calls, cards, and social media responses about this article from women and men saying that it’s about time the WSBA talks about this openly. I wish that in 2017 it didn’t need to be discussed, but continuing to not prioritize it does not interest me. I am sorry that this platform does not speak to you personally.

WSBA President Robin Haynes, Spokane

CORRECTION: In “How to Earn CLE Credit for Pro Bono Service,” [DEC-JAN 2017 NWLawyer] the article stated that there are two prerequisites for earning credit—completing two hours of pro bono training and giving a minimum of four hours of service. However, there are currently no training or minimum hours requirements for earning MCLE credit through pro bono service. The only requirement is that the pro bono legal services “are rendered through a qualified legal services provider as defined in APR 8(e).” (APR 11 (e)(7)). Up to 24 MCLE credits may be earned by providing pro bono legal services. See wsba.org/mcle for more information or contact mcle@wsba.org.
Judge Heller is available to provide mediation, arbitration, special master and related services.
Once in a Lifetime

There is a children’s book that I’ve read to my twins many times called Granny’s Clan: A Tale of Wild Orcas by Sally Hodson. In it, we learned about a killer whale named J2 Granny—a member of Washington’s local orca population. Granny was believed to be over 100 years old. She was the matriarch of the critically endangered southern resident killer whale subspecies that lives right here in our Northwest waters. In the book, Granny is a leader, guiding her family through life and death, patiently imparting the survival skills she has learned over her long life in the Northwest.

After this introduction to J2 Granny, my family became curious about the lives of the other local orcas—my kids now proudly share their knowledge of the J, K, and L pods, calling them by the whimsical adopted names that researchers have given them, like Oreo, Cookie, Alki, and DoubleStuf. We have never visited a marine amusement park, but my children have learned to respect that in Washington, they live alongside beings that have identities, needs, and families of their own. So much of that is thanks to J2 Granny.

As we were preparing this issue of NWLawyer, J2 Granny and J34 DoubleStuf died, leaving behind just 78 of their population remaining. It is now possible that my children are fascinated by a species that will disappear in their lifetimes. The thought of that is chilling for me as a mother. At the same time, I am hopeful that the power of advocacy will bring positive change, as it so often does because of the dedicated and unwavering commitment to justice of the courageous members of this legal community.

NWLawyer’s February cover story is a timely article on Northwest orcas and the law, exploring many complex legal issues currently surrounding our endangered southern resident killer whale population. Our orca cover art is an original work in collaboration with Native American artist and attorney Anthony Jones, a member of the Port Gamble S’Klallam tribe and an attorney with the Tulalip Tribes Office of Reservation Attorney. He writes about the killer whale’s place in Coast Salish beliefs and history as part of this issue. And if you love the sea as much as many of our members do, we have an informative practice area introduction to maritime law, a body of law that stretches back thousands of years, with important considerations for many practitioners today.

This issue is full of other great articles, including a wonderful account of the very first days of opening a law office. The author shares her diary of the highs and lows of hanging her shingle in a shared office space, and tells us what resources and services worked for her, including some from the WSBA. If you can offer some advice to her and others about how to open a law office, please send it our way.

We also have articles on productivity tips for busy practitioners, web marketing ideas to help small firms, and advice about how to avoid burnout for high-achieving attorneys. The latter is by the WSBA’s Lawyer Assistance Program (LAP) manager, psychologist Dan Crystal. And we have an explanation of tax indemnity provisions by long-time Forbes columnist and tax attorney Robert W. Wood.

And as always, we welcome your comments. Send your letters to the editor and article ideas to us at nwlawyer@wsba.org.

Linda Jenkins
NWLawyer Editor

Linda Jenkins is the editor of NWLawyer and can be reached at nwlawyer@wsba.org.
THE DIALOGUE CONTINUES

with Robin L. Haynes, WSBA President

In December 2016, the WSBA Board of Governors (BOG) and Executive Management Team held a series of phone calls and an online chat with members in order to listen to you, and in particular to learn what services and benefits are most important to you. In September 2016, the Board had voted to set the active license fee for attorneys at $449, $453, and $458 for the years 2018-2020. This decision was the culmination of receiving member feedback and working with WSBA volunteers over the last several years in order to maintain and enhance the programs and services that members value, while keeping fees as low as possible for as long as possible by making program cuts, reducing staff and our programming footprint, renegotiating our lease and strategically using reserves.

In the wake of the Board’s September 2016 decision on license fees, a petition was circulated among the membership that, if passed, would have kept license fees at the 2017 level and tied any future increases to the Seattle-area consumer price index (CPI). Under the WSBA Bylaws, such a petition must be signed by 5% of the active membership in order to require a vote on the petition. While the requisite number of signatures was received and certified, the Supreme Court, acting under its plenary authority and explicitly under GR 12.1(b)(22), issued an order on Jan. 5, 2017, stating that the fees set by the Board for 2018-2020 were reasonable, and that the fees that would be set if the petition were to pass were not reasonable nor was tying future fee increases to the CPI reasonable.

The Court acted in its administrative capacity, as the Court has sole and exclusive authority over the regulation of the practice of law in the state as well as over the WSBA, both in relation to its regulatory work and other ancillary functions (see “What’s the Supreme Court Have to Do With It?” Sep 2016 NW-Lawyer). GR 12 specifically describes the Court’s authority to conduct a reasonableness review over license fees; however, the order did not address whether under the WSBA Bylaws the vote should still be held on the petition.

At its January 26-27 meeting, the Board considered this issue and voted to not hold a referendum vote on the license fee petition filed with the WSBA in December 2016. The Board, after discussion and consideration of various options, found that the petition did not qualify under GR 12, as required by the WSBA Bylaws on referenda, because of the Court’s order finding the fees set by the Board to be reasonable and finding the fee that would be set if the petition were to pass to be unreasonable. The Board further concluded that any vote would be fiscally unsound and futile given the Court’s order and that the outcome potentially could be in violation of a Supreme Court order.
While this procedural recitation of the affirmation of the 2018-2020 license fees is hopefully helpful, the important point we would like to stress is that none of the above means that we are not listening to our members. In the coming months, we look forward to hearing more feedback and input about what services are valuable to you and how best we can support our members as we work to ensure that competent and qualified legal professionals are serving the public. We value your ideas, and are always interested in learning how best to communicate with you.

In the coming months, Board members will be reaching out in their districts and through county and other bar associations to facilitate this dialogue. We are committed to additional town halls and online chats where members can provide continuing feedback. As has been outlined over the last several years, the profession and our members are in a hugely changing landscape. The Board and staff endeavor to keep abreast of these shifts by continuously reviewing and enhancing programming, but the services and benefits are only as good as they are informed by all of you.

We hope you all will keep talking. We are listening. NWL

Paula Littlewood is the WSBA executive director and can be reached at paulal@wsba.org.

WSBA President Robin Haynes can be reached at robini@giantlegal.net.

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The 2016 year-end financial statement audit results

At the end of each year, the WSBA engages an independent certified public accounting firm to audit our financial statements. In addition to verifying financial statement accuracy, the auditors review, analyze, and test internal controls over reporting, management oversight, and various systems related to the WSBA’s finances and overall operations of the organization.

The Budget and Audit Committee reviewed the fiscal year 2016 year-end financial results at its January 2017 meeting. As in prior years, the WSBA received an “unmodified opinion” for the fiscal year ended Sept. 30, 2016. No adjustments were made, no material weaknesses were noted, and no management letter was issued.

The results of this very positive audit indicate that the WSBA’s finances are accurate in all material aspects. For more information, the audit report and audited financial statements can be viewed at www.wsba.org/About-WSBA/Financial-Info/Financial-Statements.
RESOLUTION RE: A DAY OF REMEMBRANCE

WHEREAS, WSBA’s mission is to serve the public and its members, ensure the integrity of the profession, and to champion justice, and its Guiding Principles include advancing and promoting: access to the justice system; diversity, equality, and cultural understanding throughout the legal community; the public’s understanding of the rule of law and its confidence in the legal system; a fair and impartial judiciary; and the ethics, civility, professionalism, and competence of the Bar;

WHEREAS, during World War II the United States government imposed curfews, removal, and incarceration of more than 120,000 Japanese Americans, including U.S. citizens, residing in Washington and other western states, citing military necessity, following President Franklin D. Roosevelt’s Executive Order 9066 issued on February 19, 1942, and prosecuted those that did not comply;

WHEREAS, lawyers and courts in Washington played a role in both the imposition and enforcement of these actions, and in the efforts 40 years later to vacate the convictions and obtain judgments of governmental misconduct in the legal cases;

NOW, THEREFORE, BE IT RESOLVED:
That WSBA recognizes February 19, 2017, the 75th anniversary of Executive Order 9066, "A Day of Remembrance," as an opportunity to reaffirm WSBA’s mission and Guiding Principles, review the lessons of the past for present and future generations of legal professionals and the public, and express its gratitude to the legal professionals and members of the public that stood up to champion justice for Japanese Americans during World War II and after, and to all legal professionals and members of the public that today continue to seek access to justice, integrity of the profession, and a fair and impartial judiciary committed to equity in the treatment of all persons.


Paula C. Littlewood
___________________________________
Paula C. Littlewood
Executive Director
Get involved!
By joining a WSBA committee, board, or panel.

UPCOMING CONFERENCES AROUND THE STATE

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<td>September 2017</td>
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<td>[Seattle-area venue to be determined.]</td>
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Mark Johnson is pleased to introduce Michael Sprangers as an owner of Johnson Flora Sprangers PLLC.

If you contact Michael to congratulate him, please don’t mention that he is now also obligated on the firm’s line of credit.
As I mentioned in my last column, I think we cannot address issues of sexism and bias without the support of the men in our profession. No fight is won without the support of allies, and I want to praise allies and help them in their work. I asked former WSBA Governor Phil Brady to write a piece about being an ally. I have personally seen him speak up about bias, and I hope he can open the conversation on the importance of allies.

— Robin Haynes

ALLIES IN THE LAW
Supporting Each Other and Holding Ourselves Accountable

by Phil Brady

I want to offer my perspective on what it means to engage in ally behavior. First, a caveat. I’m hardly an expert on ally behaviors, and I don’t have an academic background in diversity or allyship. What I do have is the perspective of someone who has been in the legal profession for nearly 10 years, and I’ve served in WSBA leadership for the last three years. In that time, I’ve met many effective, dedicated allies among our membership, but I’ve also seen places where we fall short of what we should expect of ourselves.

What are Ally Behaviors?
At its heart, I think of ally behavior as actions that support our colleagues who happen to be women, people of color, people with disabilities, members of the LGBTQ community, or members of other disadvantaged groups. This is particularly important when people from these groups encounter situations where they are treated differently or are subject to negative behavior based on those statuses. Ally behaviors take many forms, from the largely superficial to the more meaningful, and vary in terms of their reach—some forms of ally behavior support an individual, while others may support an entire group. Each has their time and place. Ally behavior is something all of us can and should do, regardless of our background or membership in various disadvantaged or dominant power groups.¹

Going Beyond Minimum Viable Allyship
For people from dominant power groups like myself, it is easy to fall into the trap of what John Porter² refers to as “minimum viable allyship.” These are the public but not terribly meaningful activities that many of us engage in—changing Facebook statuses or profile pictures, posting statuses to social media indicating that you are at a particular protest to “confuse” law enforcement, or other things that involve little or no risk to us. These behaviors provide minimal benefit to the intended audience beyond a vague expression of support. Minimally viable allyship is not inherently bad, but it is not all we have to do.

It is important that we as a dominant power group go beyond these minimally viable allyship behaviors. It’s not enough to just say that we’re against racism or sexism or homophobia or ableism. We have to act, and be willing to act. This likely entails actual risk, be it physical, emotional, or career related. No one wants to be the person telling their colleagues that their actions are inappropri-
We’ve seen a lot of negative reaction to WSBA President Robin Haynes for speaking up about the sexism present in our profession.

If you hear someone make a sexist joke, ask him what he meant. If someone tells you a transphobic or ableist joke, ask her why she liked it or thought it was funny, and if she’d considered the impact the joke might have on a transgender individual or a person with a disability. This kind of intervention doesn’t have to be traumatic or dramatic—most people don’t intentionally set out to harm or offend, and many times they just haven’t thought through what they said or did. Pointing out the troubling behavior may be enough to make the speaker consider their actions more carefully. As an example, if someone is referring to an attorney as a “great woman leader” or a “good lady lawyer,” you can respond with “she’s a great leader” or “she’s a good lawyer.”

This kind of behavior doesn’t go away when members of disadvantaged groups aren’t present—if anything, it’s likely to be less restrained and more prevalent within a solely dominant group. Calling attention to such statements isn’t ever easy, and it’s even harder (yet arguably more important) to do when the group you’re standing up for isn’t present. There is a tendency in our culture (and particularly in the legal profession) to accept some kinds of sexist behavior from certain groups, particularly from the older white men who still make up the majority of equity partners in private law firms. I don’t know any women in private practice in Washington who haven’t experienced some form of demeaning behavior from male lawyers, whether it was someone assuming they were para-legals, calling them names like kiddo or sweetheart, or commenting on their physical appearance or dress. Similarly, I don’t know any attorneys of color in Washington who don’t have a story or 10 about clients assuming that they were janitors or assistants, or judges questioning their dress or demeanor in court.

I can’t tell you how many times I’ve had other attorneys walk up to me and make inappropriate comments about a female colleague’s appearance or the “surprising eloquence” of an attorney of color. It’s sometimes difficult for me to step up and say something, particularly as a younger attorney whose career could be damaged by irritating the wrong person. Sometimes I’ve failed, and relied on others to do the hard work. But just like situations where one member of a marginalized group needs support from people of the dominant group, it’s also important among dominant groups that we support and back each other up when one of us addresses inappropriate conduct.

## Creating Safe Spaces

It is disheartening to see the recent decision directed towards the important concept of a safe space. While it can be taken to extremes, fundamentally a safe space is about an environment where everyone can participate fully. It doesn’t mean shouting down or suppressing dissenting viewpoints, but it does mean being thoughtful in our words and being mindful of the potential impact on the people hearing them. People sometimes call this being “overly politically correct.” I see it more as caring about how I impact others. We have the right in this country to say deeply offensive and hurtful things, but having the right to do so doesn’t mean we should. Creating safer spaces means being aware of our privileges and those of the people around us, and understanding how that informs our actions and our conduct. It’s about empathy, and creating access for people who might not otherwise have access. Inclusion and acceptance are great, but they are irrelevant without access and equity.

## A Few Concrete Steps

I’ve offered a few big picture thoughts about what I think it means to engage in ally behaviors. Here are a few specific things we can focus on:
Listen to members of marginalized groups and to others speaking in their support.

Believe their experiences and the reasons they attribute to them, rather than saying, “well maybe it wasn’t because of your race.” It’s easy to rationalize hurtful behavior, but doing so doesn’t help the impacted individual in the moment.

Empathy, not sympathy. Members of marginalized groups don’t need our pity or our grief. They need us to do our best to understand where they are coming from and to support them.

Learn about ally behaviors, because being an ally for disadvantaged groups is a constant learning process. These behaviors aren’t static, nor are they universal.

Speak when and where appropriate. It is important to act where we can, and part of that action is speaking out when we see troubling behavior. But it is also important that we do not drown out the voices we’re trying to support. This is part of building safe spaces.

Take responsibility for privilege. While we can engage in ally behaviors in all aspects of our lives, our responsibility increases when dealing with members of our own dominant groups.

Take responsibility for failures. Trying to behave as an ally is hard, and we will inevitably fail at times. When someone points out your own problematic behavior, be humble, receptive, and thoughtful. Accepting responsibility, apologizing, and correcting your behavior goes a long way.

This is not about you. Being an ally is supporting the marginalized groups you are working to support. If you engage in ally behavior to look good or to get credit or accolades, you’re doing it for the wrong reasons.

It’s okay to enjoy problematic media, as long as you engage with it. It’s okay to enjoy movies or music with troubling aspects—such as caricatures of particular groups, inappropriate jokes, or stereotyping—but be aware of those troubling aspects and view them with a critical eye. You might also talk about these troubling aspects with others so that they can engage critically as well.

**Additional Resources**

- **Teaching Tolerance**
  www.tolerance.org

- **The Movement for Black Lives**
  policy.m4bl.org

- **How to Confront Sexism at Work**
  www.govloop.com/confront-sexism-work/

- **Five Tips for Being an Ally**
  www.youtube.com/watch?v=_dg86g-QlM0

- **WSBA Diversity and Inclusion Program**
  can provide training on what ally behavior looks like, along with a variety of other diversity training. More information is available to www.wsba.org/about-wsba/diversity or by contacting diversity@wsba.org.

**Notes**

1. In general, when I refer to dominant power group I’m referring to groups that have historically been favored or more powerful than other groups. This includes, among many others: men, people of European descent, wealthy people, cis-gendered, and heterosexual individuals. Membership in one dominant power group does not preclude membership in disadvantaged groups—in fact, most of us are members of both kinds of groups.

2. Mr. Porter is a Ph.D. candidate in the Human Centered Design & Engineering program at the University of Washington, and an advocate for people with disabilities. You can find more information about him here: www.jrp3.com.

3. For a fascinating article on how women in the Obama White House used a strategy they called “amplification” to empower each other, see www.washingtonpost.com/news/powerpost/wp/2016/10/25/how-a-white-house-womens-office-strategy-went-viral/
Pacific Northwest

ORCAS

and the Law

The Modern-Day Complexities of Saving a Northwest Icon from Extinction

by Claire Tonry
ACIFIC NORTHWEST ORCAS are in the unique position of being both highly endangered and highly economically valuable when alive and well in the wild. The National Marine Fisheries Service (NMFS) has identified our local orca population, the southern resident killer whales (SRKW), as a spotlight species—one of eight species whose recovery it gives top priority. The reasons for the honor are bittersweet: it means their extinction is almost certain in the immediate future, while the threats they face are well understood. The needed management actions are known and, if enacted, have a high probability of success.

Recent legal developments indicate that we already have the sharp legal tools necessary to address some of the major threats to Pacific Northwest orcas. Whale advocates have had a measure of success in the courts in recent years, but that success has not translated to any sustained growth in the orca population. Southern residents remain at such a low population that the loss of even a single whale reduces the likelihood of their survival and recovery. Whale advocates, and in some cases the courts, are now questioning whether federal agencies and the public have the will to take bolder actions to recover these orcas.
What is an orca?

Despite the moniker “killer whale,” orcas are technically the largest member of the dolphin family. SRKW are a distinct population segment of the far-ranging orca species. Southern residents are distinguished by their limited range and diet. They tend to stay in the Salish Sea and coastal waters from British Columbia to northern California, where they forage almost exclusively on salmon. These apex predators are connoisseurs—seeking out the biggest, fattest chinook.

Orcas are also majestic megafauna and eternal Pacific Northwest cultural icons. That charisma has had a huge downside: the capture of 50 southern residents for amusement parks in the late 1960s to early 1970s decimated the population, especially its younger demographic. Live capture in our waters ended in the 1970s, and today’s wild orcas are huge drivers of the region’s ecotourism industry. In our state alone, whale-watching companies generate about $65 million in sales each year.

In 2005, NMFS officially listed SRKW as endangered under the Endangered Species Act (ESA). The listing came after the SRKW population declined from a historic population of at least 140 individuals, to 98 individuals in 1998, and then to 80 in 2001. Since live capture ended, the major ongoing threats to the population’s survival are prey availability, pollution and contaminants, and effects from vessels and sound.

Following ESA listing, the population has fluctuated between 80 and 88. The baby boom that had so many excited in late 2015 to mid-2016 was sadly followed by several infant and adult orca deaths. As of the time of writing, there were just 78 SRKW in the wild. Compare this to NMFS’s interim recovery goal of 113 southern residents by 2015, and 155 by 2029 for a full recovery, and it’s clear that southern residents are not on the path to de-listing.

In addition, the current demographics continue to be a cause for concern. Most calves born in the last few years are male, and the number of reproductive-age females is dwindling.

Dam Removal and Salmon Population

Orca advocates have identified removal of four dams on the Lower Snake River as a top priority in the effort to revive the chinook populations that orcas depend on. The movement gained more momentum last spring, when U.S. District Court Judge Michael H. Simon issued the latest in a series of orders finding efforts short of dam removal insufficient to save ESA-listed salmon from extinction. The case concerns a 21-year history of challenges to NMFS’s ESA plans (“biological opinions”) for the continued operation of the Federal Columbia River Power System, which includes the four dams on the Snake River between the Tri-Cities and the Idaho border.

The latest court opinion emphasizes that two prior federal judges had declared the last four such plans deficient, and called for a major overhaul of the plans with consideration to breaching one or more of the Lower Snake River dams. For more than 20 years, federal agencies have ignored the district court’s calls for more aggressive efforts, instead spending billions of dollars on minimizing hydro mitigation efforts and maximizing habitat restoration, which continues to fail to bring endangered salmon out of peril. While not explicitly adopting his predecessor’s specific admonishments to remove the dams, Judge Simon found that the power system still needs a “new approach” if “wild Pacific salmon and steelhead . . . are to have any reasonable chance of surviving their encounter with modern man.” The
court expressed hope that the comprehensive Environmental Impact Statement (EIS) he ordered the federal defendants to prepare would bring about that new approach.

Despite the federal court’s repeated calls for it, dam removal remains uncertain. Part of the answer will come in 2018, when a revised ESA document for the dam system is due. “It will be up to the people of the Northwest to keep a close eye on both the new biological opinion and the comprehensive EIS process to ensure that the federal defendants heed Judge Simon’s order to reconsider the status quo in the Columbia River hydrosystem – especially continued reliance on obsolete Snake River dams,” said Dan Rohlf, an attorney at Earthrise Law Center. Along with Earthjustice, Rohlf has represented the plaintiff environmental and fishing organizations in Columbia Basin salmon litigation for over two decades.

As for SRKW, Judge Simon held that the dams have no effect on them. How could dams have disastrous impacts on salmon but no impact on southern residents who eat salmon exclusively? Hatchery salmon, the court found, more than make up for the dams’ impacts on orca populations. The court also deferred to NMFS’s opinion that the relationship between SRKW and chinook populations may not be as linear as it was earlier believed. Thus, if the federal government does get serious about dam removal in response to this litigation saga, the needs of the orcas will not be the driving factor.

Toxic Blubber and the Lower Duwamish

Pollution has long been recognized as a factor in southern residents’ perilous state. Generally it is thought to be a cumulative problem that takes its toll especially when whales are already stressed from lack of food. Contaminant sources include contaminated prey, wastewater treatment plants, and pesticides. Persistent, bioaccumulative toxics that build up in the tissue of top predators have received particular attention. These toxins, which include polychlorinated biphenyls (PCBs), are passed onto new calves when nursing mothers metabolize fat reserves that contain pollutants. By their nature, persistent bioaccumulative and toxic substances (PBTs) are generally toxic at low levels, and result in special environmental and regulatory problems.

Though they were banned in the 1970s, PCBs are very much an ongoing concern for the Puget Sound. The Lower Duwamish Waterway is one of the most contaminated sites in the nation largely due to legacy PCB contamination in the estuary’s sediments. Consequently, resident fish and shellfish are unsafe to eat. EPA issued its final Superfund cleanup plan for the Lower Duwamish in late 2014; cleanup is expected to cost hundreds of millions of dollars. While significant in many respects, it is doubtful that the Duwamish cleanup will have quantifiable near-term benefits to SRKW.

PCB contamination is not limited to pollution that settled in the riverbed long ago. Recent sampling also shows that PCBs in stream and river flows upstream of the Duwamish Superfund site exceed the existing water quality criteria set to protect human health by limiting the amount of PCBs in the fish we eat. That criterion, along with other toxic critera, just became even more stringent, based on recognition that people in the Northwest, especially members of tribes, eat a lot more fish than earlier standards acknowledged.

The ratcheting down of Washington’s toxics standards came about last August, when federal Judge Barbara Rothstein ordered the EPA to promptly issue more stringent human health standards to replace the state’s standards. In November 2016, the EPA adopted the more stringent aspects of the state’s proposal and also mandated tighter standards for arsenic, mercury, and PCBs. 81 Fed. Reg. 85417 (Nov. 28, 2016).

Whether those standards will be action-forcing for industry and municipal dischargers in the Duwamish River watershed or other toxics-impaired waterways in the state is another question. For one thing, state and federal regulators generally do not require discharge sampling capable of detecting some of these contaminants anywhere near the low levels at which they are present, much less the lower levels of the old and new water quality standards. Essentially, the regulated community is using a magnifying glass to look for something only a microscope can find. This technical detail alone may neutralize the effect of more stringent standards on regulated pollution discharges.

Watching Out for Whale Watchers

Disturbance from vessels and sound are another recognized major threat to SRKW. Vessels impact orcas by “increasing their energy expenditure, possibly reducing the effectiveness of their hunting techniques, and reducing the time they spend foraging.”
according to NMFS. In April 2011 NMFS promulgated regulations prohibiting vessels from approaching SRKW closer than 200 yards, and from intercepting or parking in their path. 76 Fed. Reg. 20870 (April 14, 2011). NMFS is currently assessing data from the last five years to evaluate the regulation’s efficacy.

Conservation organizations proposed additional vessel restrictions late last year in a rulemaking petition to NMFS. The organizations propose establishing a 10 square mile whale protection zone along the west coast of San Juan Island to exclude most motorized vessels. Outside the vessel exclusion zone, there would be a “no wake” speed limit buffer zone. The petitioners’ primary concerns are private recreational vessels and commercial whale watching boats, which appear to be responsible for most of the infractions and poor practices. Accordingly, the petition suggests that an exception for commercial fishing vessels may be appropriate. Interestingly then, the goal appears to be to protect orcas from their human admirers.

NMFS itself proposed a similar summertime vessel exclusion area in 2010. A Federal Register notice catalogued not just motorboat impacts, but also a long list of kayakers behaving badly. Due to strong public opposition to a no-go zone, NMFS deferred that regulation. The agency vowed to further evaluate an exclusion zone “expeditiously because the best available information indicates there would be a significant conservation benefit to the whales if they were free of all vessel disturbance in their core foraging area” off San Juan Island. 76 Fed. Reg. 20870, 20878. This, as well as NMFS’s findings on the efficacy of existing vessel restrictions, and any changes in public opinion over the last six years—for example, due to the documentary Blackfish—are likely to factor into NMFS’s response to the petition.

The Last Southern Resident Orca in Captivity
A legal article on Northwest orcas would be remiss to ignore Lolita, a much litigated 50-year-old orca who was captured in Penn Cove, Whidbey Island, in 1970. Lolita, who was first called Tokitae after her capture, is a 25-foot long female orca that has lived in an 80 foot by 35 foot tank at a Miami aquarium ever since her capture. She lives with only dolphins (and humans) as companions, and without adequate sun protection. Lolita is the only surviving SRKW in captivity.

Legally speaking, Lolita has mostly been an afterthought. When NMFS listed SRKW as endangered in 2005, it explicitly omitted captive animals from the listing. So while orca advocates and animal rights groups have protested Lolita’s continued captivity and conditions in Miami for decades, without the ESA’s citizen enforcement provision, they had few legal options to improve those conditions.

In 2011, orca advocates challenged NMFS’s split listing in Washington federal court, but the suit was dismissed on procedural grounds. The plaintiffs appealed, and shortly thereafter the parties settled on a non-litigation procedure that could accomplish Lolita’s listing. Orca advocates filed a petition for Lolita’s inclusion with the rest of the SRKW on the ESA list in 2013, and in keeping with the settlement, NMFS issued its findings a year later. Specifically, NMFS found that Lolita is indeed a southern resident and that as such, there is no legal basis for excluding her from the ESA’s protections. Citing Alsea Valley Alliance v. Evans, 161 F.Supp.2d 1154 (D. Or. 2001), NMFS affirmed that once it identifies and lists a species, subspecies, or “distinct population segment” as an endangered species, it cannot exclude a subset of those animals, such as captive individuals, from the listing. 79 Fed. Reg. 4313, 4317 (Jan. 27, 2014).

Lolita officially gained ESA protection on May 11, 2015. As expected, People for the Ethical Treatment of Animals (PETA) and Orca Network filed an ESA citizen suit against the Miami aquarium two months later, seeking among other things to have Lolita retired to a sea pen in Washington waters. The suit argued that keeping Lolita in her current location harms and harasses Lolita in violation of the ESA’s prohibition on “take” of individual endangered species. The court found that Lolita suffers from medical issues, at least some of which
are caused by the conditions of her captivity, and that those injuries were within the ordinary meaning of the terms harm and harass. However, the court held that such injuries were not serious enough to constitute “take” under the ESA. Thus, the court announced a new standard for “take” of captive ESA listed species: conduct that gravely threatens the animal’s survival or has the potential to do so.

The plaintiffs appealed the order. “The district court refused to afford Lolita the full protections of the ESA solely because she had the misfortune to be captured. Creating a separate legal status for captive animals flies in the face of the letter and spirit of the law and must be overturned by the court of appeals,” said Delcianna Winders, Academic Fellow of the Harvard Animal Law & Policy Program and lawyer for plaintiffs. The Eleventh Circuit will hear arguments in the case this spring.

Regardless of the legal standard for “take,” the chance of a federal court ordering Lolita to be repatriated to Washington waters seems slim. When listing captive orcas, NMFS explicitly stated that relocating Lolita would be risky and, absent a permit, would itself violate the ESA.

Meanwhile, back in the Northwest, there remains much work to be done for Lolita’s wild orca counterparts—the 78 remaining southern resident killer whales living wild in our waters. Courts will make several big decisions in the near future that will determine whether we can save those orcas from extinction. NWL

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THE ORCA, also referred to as blackfish or killer whale, is an important figure in the oral history and cultural traditions of many Northwest and Coast Salish Native peoples. In the language of the nəx̌wjȽay̓əm people the orca is known as qłúmačən. The pronunciation of this word is similar to “KLOO-ma-chin.”

PROTECTORS OF THE PEOPLE

Orcas from a Northwest Tribal Perspective

By Anthony Jones, attorney and artist

Orca and border art courtesy Anthony Jones
The nəxʷsƛ̕ay̓əm people are a Coast Salish tribe that has inhabited the Strait of Juan de Fuca area and surrounding areas since time immemorial, and comprise the present-day Port Gamble S’Klallam, Jamestown S’Klallam, and Lower Elwha Klallam tribes of Western Washington. These tribes are signatories to the 1855 Treaty of Point No Point with the United States government, by which the tribes reserved certain inherent sovereign rights, including the right to harvest fish and shellfish at their usual and accustomed grounds and stations. These treaty-reserved rights were recognized some 119 years later through the federal court case captioned United States v. Washington, commonly known as the Boldt Decision, 384 F. Supp. 312 (W.D. Wash. 1974), aff’d, 520 F.2d 676 (9th Cir. 1975).

In the oral tradition of the nəxʷsƛ̕ay̓əm people, the killer whale is regarded as a helper and protector of the people. The qłuməcan appears in many traditional stories, including the story of the epic battle between Killer Whale and the supernatural Thunderbird, which caused a great tumult on the land and sea. Different versions of this story are told by native peoples around the Salish Sea. Modern scientists now regard these stories as historic evidence of seismic activity within the Cascadia Subduction Zone.

According to the Klallam dictionary, Klallam elders told of an underground portal or cave called qłuməcanáwtxʷ which was located under present-day Discovery Bay on the Olympic Peninsula. Qłuməcanáwtxʷ was the home of the orcas, or the orca road. When an orca died, it was said to return to this place and emerge at the site of an inland pond or lake, where it would transform into a human being.

Port Gamble S’Klallam Elder Mike Jones Sr. recalls hearing stories of an ancestor with a special spiritual connection to the orcas, who could summon orcas to shore with his hand and even ride on the back of an orca. Orcas, says Jones, are believed to have tremendous memories, and will remember this long-passed ancestor if any of his descendants should encounter them. NWL

Anthony Jones is a reservation attorney for the Tulalip Tribes and member of the nəxʷq̓íyt band of the nəxʷsƛ̕ay̓əm people, known as the Port Gamble S’Klallam tribe. Jones is a Coast Salish and Native American artist. He can be reached at ajones@tulaliptribes-nsn.gov.

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After a shaky set of downs, Russell Wilson is never pouting on the sidelines or kicking a Gatorade jug. He’s usually sitting on the bench staring down at a tablet to gain data on the opposing defense—where they’re lining up, how they’re covering receivers, etc. Wilson does this to determine what plays might be working, which ones are garbage, and what changes need to be made to ensure his offense can succeed. In short, data drives his success.

Believe it or not, the same holds true when it comes to sculpting your firm’s online marketing content. You’re the quarterback. Your offensive plays are the types of content you post—be it on your website and blogs, Facebook, LinkedIn, or Twitter. The defense you’re up against is your target audience, or your inability to effectively reach this audience. To succeed, you’ll need to know what past marketing content has worked for you, what has flopped, and some demographic information about the crowd you’re after.

MAKE LIKE RUSSELL WILSON

Use Analytics to Drive Your Law Firm’s Online Marketing Success

By Dustin Reichard
This is where the concept of web analytics comes in. Web analytics are like a quarterback’s tablet. They provide data on the interest generated by a firm’s marketing content, and details of the target audience the firm is trying to reach. This data is easy to obtain for all types of social media outlets—including websites, blogs, Facebook, LinkedIn, and Twitter. Once acquired, the data forms an effective tool to help drive and generate online marketing success.

THE BIG PICTURE: WHAT YOU’RE AFTER, WHERE YOU GET IT, AND WHY IT MATTERS

Webopedia nicely defines web analytics as the study of the impact of a website (or other social media outlet) on its users. Law firms and businesses engage in this study to gather certain information about clients and customers. In particular, the main information gathered includes such data as:

- How many people visit a website or read a specific social media post
- How long a visitor spends on a given social media page
- The demographic details of a given visitor—e.g., level of employment, industry, visitor age, and location

This information is not found in some obscure portion of the Cloud. It’s actually very easy to get and requires just a few clicks. For Facebook, LinkedIn, and Twitter accounts, you can access your analytics simply by visiting the main menu on your specific account. If you host and operate your own website, the site’s dashboard should have an analytics tab. If not, you can download one of numerous analytic tools such as Google Analytics, Clicky, or Kissmetrics. If another party hosts or operates your website, simply ask that party for access to your analytics.

Once you obtain your analytical data, you’ll find it vital for many reasons. It will tell you who is reading your web content and what is resonating with your audience. It will provide an insight into which content is grabbing a reader’s attention and which content is ignored. The end result is that all this information can be used to guide future online marketing content for your law firm.

For example, assume you have a blog and frequently post on a change in the law. Also assume you have been using your Facebook page to post on development of a specific policy. If your analytics inform you that readers are not clicking on your blog posts, stop writing on this topic. It’s not interesting and it’s generating zero client leads.

If, on the other hand, your Facebook analytics inform that your policy posts are generating numerous views, then keep on posting this topic on your blog. It’s helping you achieve the important marketing goal of generating buzz and online followers.

This big picture is definitely enough to get you started. However, you should know that each social media outlet will have a few extra details to consider for true analytics mastery.

WEBSITE AND BLOG ANALYTICS

The top three pieces of analytical data for websites and blogs include views, bounce rates, and times on page. All of these will be clearly provided under a website’s analytics. This means you don’t need to hunt for this data. It will actually present itself to you.

A page view is initiated when any page of your website, such as a specific blog post, is loaded by a site visitor. If 20 different visitors to your site click on a specific blog post, you will have 20 total page views for that post. In general, the more page views a web page or blog generates, the more marketing traction that page or blog generates as well.

A bounce rate essentially measures the number of visitors who come to your site and leave within a few seconds. A high bounce rate is kind of a bad thing since it means your site content is not engaging enough to hold a visitor’s attention. If you’re seeing high bounce rates for a specific web page, consider revising that page’s content to make it more engaging. Similarly, if you’re seeing high bounce rates for a given blog post, consider abandoning that topic.

Time on page is closely associated with bounce rates. This simply refers to the amount of time a visitor spends on a given web page. If you find that visitors are
spending a good deal of time reading a specific blog post, this means the post is a marketing gem. Draft future blog posts on this same topic and include this topic in your other social media marketing.

LinkedIn Analytics
Two excellent features on LinkedIn’s analytics pertain to interactions and followers. You can access both via the main LinkedIn menu bar. This holds true for a company or personal page.

Interactions basically refer to the number of engagements on a given post. Engagements are likes, comments, or shares. Obviously, the more interactions a post creates, the better that post is in generating interest and followers. If you discover certain posts are receiving a high number of interactions, then consider posting on similar topics and including posts on this topic into your other social media platforms.

The followers section of your analytics will provide information on your audience demographics. This will allow you to view their level of employment, industry, company size, age, and location. It’s a good idea to compare the information within this section to your overall marketing plan to ensure you’re actually reaching your intended audience.

Facebook Analytics
Facebook is relatively less formal compared to other social media outlets. This means firms can experiment with incorporating links, videos and images into posts; however, such experiments might be ill-received by a firm’s intended audience.

Your firm can address this concern in minutes via Facebook’s analytics section. The Insights tab on the firm’s main Facebook menu bar houses all of the pertinent analytical information. Once you click on the tab, you’ll have access to how individual posts performed in the past by views, comments, likes, and engagements. You can compare this information to posts that contain content, images, links, and/or videos. If you find that one type of post generates more interest and buzz, then look for ways to duplicate that type. Similarly, if a type of post performs miserably, consider abandoning that type.

Twitter Analytics
Twitter analytics are located in a user’s Twitter analytics dashboard. The dashboard operates much like the menus in a LinkedIn or Facebook account. Two great sections on the dashboard are Tweets and followers.

The Tweets section will provide data on how well individual tweets are...
received. Again, if certain tweets create an especially high interest, retweet on that topic. For poorly received tweets, abandon ship.

The Followers section operates much like LinkedIn’s Followers section. It provides detailed information on audience demographics. Gather this information and compare it to your overall marketing plan. Make certain you’re reaching your intended audience.

**KEEP IT SIMPLE**

The best marketing strategies are those that endure. Your firm’s blog and social media posts are excellent ways to generate new clients and communicate areas of specialty. However, firms often allow these strategies to fall by the wayside, often because of a lack of new topics.

But you shouldn’t have to overthink creating new topics. Keep it simple and just give your readers what they want. Web analytics are the proper tool to find out what they are after. Take the short time to collect some data and discover what your audience likes. Once you do, know that you’re still not Russell Wilson, but you just found your next great blog or post topic, and it’s one that will generate marketing success. NWL

Dustin Reichard is a freelance writer and legal marketing consultant with nearly a decade of professional writing and consulting experience with web content, blog posts, newsletters, marketing materials, white papers, and e-books. He’s also a licensed attorney with over 16 years of legal experience. You can reach him at dustin@dustinreichard.com.
Beginning in law school, attorneys are taught to be self-reliant, perfectionist workaholics. This can lead to achievement: success in law school, a job with a firm, and the respect of others. But it often requires lawyers to postpone their own needs for years at a time in order to fit the mold of the lawyer identity. While the sturdy willpower to achieve may be effective early on, it will usually wear a person out over time. There is another way. By letting go of sacrifice, fueling the engine of well-being, and enlisting multiple supports to harness your career, you can get from Achievement 101 to Achievement 201.

WHAT IS ACHIEVEMENT?
The first principle of achievement is learning how to postpone gratification to get what one wants. Unfortunately this idea is pushed to its limit in many forums, like the high school football coach preaching “no pain, no gain” to his players or the high school junior staying up all night hopped up on Adderall studying for the SAT. The thing about this strategy—I call it Achievement 101—is that it works. It often produces results. Lawyers are very familiar with this method. But it is no guide for living. There is too much sacrificing of oneself. There is another way.

There is no precise moment when a transition in thinking about achievement occurs. Plenty of doctors in residency in their 30s are pushing themselves to the limit, postponing self-care, relationships, etc., for this memorable achievement. Litigators become accustomed to 90-hour work weeks followed by a few weeks of downtime. It can be a dreadful roller coaster. One goes from periods of intense pressure and fear of failure (think law school) to feeling spent, dysregulated, confused, and often depressed about the seeming endlessness of this cycle.
Sometimes this transition in thinking begins in one domain before another. In relationships, for instance, people may realize that they don’t have to always be showing off and seeking to impress their partner. Or they find out that they don’t have to exhaust themselves providing support in certain friendships. Or they discover they don’t have to placate every demand their parents make of them. Yet this transition in thinking about work can take longer, especially among attorneys.

**SEEKING SUPPORT AND ASSISTANCE**

Achievement 201 can be as productive as Achievement 101, but more importantly it is enduring and the process is gratifying. The first principle is that you can’t do it alone. For work tasks it means asking for help. The saying “if you want something done right, do it yourself” may often be true, but it doesn’t have legs. Seeking assistance will often take the form of the helpful paralegal, co-counsel, or associate. Or it may take the form of the supportive mentor attorney, supervisor, colleague, law school classmate, or section member—people for whom you don’t have to hold up a superior image of completeness but can be your flawed, candid, worthy self, unafraid to ask questions.

Professional support is important, but it’s not complete—it really takes an army to harness a career. This can include a personal trainer, psychotherapist, barista, massage therapist, office management consultant, accountant, financial advisor, chiropractor, yoga teacher, waiter, etc. When I see my barber, I spend 20 minutes knowing that he has my back and it means a lot. I feel refueled to fight the good fight.

**HEALTHY SELF-CARE**

Psychologist Philip Zimbardo, in his book "The Time Paradox," looks at present-hedonism not as a selfish orientation but as a healthy element of self-care. Are you engaging in activities that help you feel vital, energetic, and capable of taking on challenges? Whether it is eating out for lunch every so often, or shopping for the clothes that keep you feeling fresh, or maintaining a dedicated bond with your elliptical machine, there is obvious merit in knowing what it takes for you to feel like yourself, “on,” and not a spent, overworked, and confused attorney, wondering when this professional tornado will abate.

The shift is not just towards healthy activities, but is really an adjustment to a different identity, from the one-trick pony who sacrifices wellbeing because you lack insight into what else you could be doing, to the multifaceted professional who is passionate about your work and knows what it takes to fuel your practice.

**WORTH THE SACRIFICE**

I’ve used the word “sacrifice” twice now and there is a point. If you make yourself into a pack mule, all kinds of passive aggression will follow. You might compare the hours you work to that of your colleagues with great precision, proving your sacrifice and your resentment for them. You may become irritated by your clients who do not seem sufficiently appreciative of your efforts. You might resent the family you are working so hard to provide for. You might be annoyed at happy people who seem to have it easy. You may envy street sweepers whose job appears simple.

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Lawyers can be their own worst enemies, always expecting more of themselves. The good news is that the shift is refreshing and does not require a root canal. The keys are to know the advocates in your army and what titles they have. They probably deserve medals for their service. Learn to understand what activities are your sweet spot that help you feel happy to be you. This is a necessary part of the equation; making yourself miserable will not work.

Dan Crystal, Psy.D., is the program manager for the WSBA Lawyers Assistance Program (LAP). For more information about the many services, resources, and information available through LAP, see www.wsba.org/lap or contact lap@wsba.org.
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GTTC is proud to announce that Susannah Carr has been named partner.

Susannah is a commercial litigator and experienced trial lawyer. Her practice focuses on insurance recovery, representing businesses, public entities, and individuals in high-stakes coverage disputes.

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Wednesday, September 7, 2016
WHAT A DAY!

Today I opened the doors to my solo practice in downtown Bellevue. After working as a deputy prosecuting attorney for Island County for the past two and a half years, I made the leap into private practice with an initial focus on estate planning. I am excited, but terrified. I am entering a world full of legal issues I haven’t touched since the bar exam. The good news is I know I killed civil procedure on the bar exam. The bad news is I’m not entirely sure how to file a civil lawsuit.

Thankfully, I am office sharing with two older attorneys with a combined 96 years’ experience. Tack on my own three years, and I feel confident about rounding the number up to an even 100. Maybe that can be my slogan: “Slogging through a century’s worth of legal history so you don’t have to.”

I still have to make a lot of decisions. I have yet to commit to a case management program or any accounting software. I literally brought nothing to the office today but my laptop and my cheery disposition. However, I figure I can get away with waiting to make my decision about technology until I have an idea of what my needs will be. It will be somewhat easy in the beginning as most of my work will be contract work for one of the attorneys, who is also—full disclosure, Diary—my dad. Even though I don’t know how much money I will be making, part of me is relieved that the contract work should ensure prompt payment, provided there is enough work for me to do.

That said, I’m a little worried about working with my dad. Growing up, when I got frustrated with his coaching on the basketball court, I had a tendency to chuck the ball at his head. I’m pretty sure I can’t do the same with a stapler in the office, especially in front of clients. I will have to learn how to have a professional relationship with my father.

Also, what do I call him in front of clients? Do I call him Dad or do I call him Jack? I’d better go with Jack. That seems more professional, and might be a good icebreaker.

All these questions came up today, Diary, because on my very first day in the office, my dad and I went out to lunch with clients. Even better, those same clients brought me cookies because they knew it was my first day! That will definitely be something to get used to: people happy to see me. It was rare anyone was happy to see me as a prosecutor. And I would never have accepted cookies from strangers.

Anyway, all in all, today was a good day. I had some issues with connecting to the printer in the office, but I think I got everything ironed out. Can’t wait for day two!
Friday, September 16, 2016

I left my jaw on the floor of our conference room today. It dropped as I listened to the ease with which my father navigated the meeting I had with my potential workers’ compensation client. My jaw finally dropped to the carpet when I realized I could not have learned any of the questions my dad asked from the mountains of research I conducted prior to meeting with the client. No, my father was pulling from over 40 years of experience as he reviewed the potential client’s independent medical exam. Dad recognized the name of the IME examiner and even had an opinion about the guy’s work, which I won’t repeat here. Dad was able to explain to the potential client what the workers’ compensation process looked like, what she could expect to get out of the whole thing, and he even talked at length about some sort of concrete that is especially hard on the knees. Now my dad has never laid a foot of concrete in his life, yet there he was, ruminating on the stuff like an old construction hand. Is there no end to his knowledge?

Today was a hard day, Diary. I know nothing. I have to learn more, and faster. I also have to figure out how to fix our printer.

Friday, September 30, 2016

I think I have to quit and go back to being a prosecutor. I went to a CLE today and I am absolutely certain I am going to be sued for malpractice. I mean, I don’t think I am currently doing anything wrong, but there is just so much I’m not sure I am missing or doing right. As a prosecutor, I would come out of CLEs with a handy binder of knowledge and thankful for the latest update from the Department of Licensing. Now, I am pretty sure I will commit malpractice if I fail to advise clients about that one thing. Which of course I can’t remember because I got bored.

Also, I have my receipt from parking at the Convention Center. I don’t really know what to do with it. I think it will be easy to remember and record, I’m just not sure where, or how. I don’t have too much to keep track of yet—I got my first check yesterday! I think I can hold out on the accounting software for a while.
Well, I said I needed to learn different areas of the law faster, and I think I got my wish. Tonight, I had my first meeting in Seattle with the King County Bar Association’s Family Law Program. And tomorrow I go down to Kent to shadow an attorney at the Housing Justice Project.

The Family Law Program is fantastic. All I had to do was sign up and agree to represent a family law client pro bono, and suddenly I had access to all these free CLEs and documents that are essentially a step-by-step guide on how to practice family law. Even better, I have an attorney mentor who is available to answer any questions I might have, and I was given a binder with templates for a lot of the forms I will need. Aside from the warm fuzzy feeling I get from putting my law degree to good use, who knew volunteering would also be a great way to wade into a new area of law? Plus, I have the time to volunteer since I am still building my own client base, and I might as well use that time to figure out if I even like family law and landlord-tenant law.

In fact, Diary, that was one of the best pieces of advice I got from an established estate planning attorney before opening my own practice: He said I should give myself at least two years to figure out my niche. I appreciated his advice because I was feeling a lot of pressure to pigeon-hole myself into an area of law immediately after opening my practice. I also felt a lot of pressure to immediately brand myself as an attorney who does a certain area of law right out of the gate, so I could make a website and buy a domain name and do everything else to market my services to the general public. But I don’t have the luxury of knowing a niche area of law right now and I didn’t bring with me a set of clients with a particular set of legal issues to sustain myself in these first few months of solo practice. Which means, Diary, I have to be patient as I figure out my niche. I have to hurry up and wait and see and do. Which I am terrible at, even though I know it must be done.

Patience, Diary. That should help. Especially because I now can’t print at all to the big copier.

Wednesday, October 19, 2016

This morning I attended my very first Bellevue Chamber of Commerce breakfast meeting and it was great! But I am never doing that again.

Let me explain. A retired attorney in Bellevue suggested I join the Chamber of Commerce as a means of networking and marketing myself at their breakfast meetings, which occur every Wednesday at 7:30 a.m.

Now, Diary, I am not a morning person. I don’t truly wake up until about 9 a.m., and I am rarely pleasant to be around before 10 a.m. However, I thought I could suck it up for the sake of my business. So I showed up at the breakfast meeting with a smile and some business cards and prepared to participate.

There are many things I can do at 7:30 in the morning, but selling myself is not one of them. Nor is meeting new people and remembering names and being sociable. The longer the meeting went on, the more I wanted to use my rolling chair to bang a hole in the wall so I could make myself a nest of insulation and drywall and go back to sleep. Early morning marketing is not for me.

But Diary, the best part is, I don’t have to do it. As a solo practitioner, I get to choose what to do and how to do it, and to me that means playing to my strengths. I am not good at pasting a smile on my face at 7:30 am, but I am good at networking with attorneys whose work I find interesting or funny. For example, over three years ago I emailed one of the writers for NWLawyer after her article about her cat and the Supreme Court left me laughing so hard my boyfriend almost called 911 because he thought I was having a seizure. We met for lunch in Kirkland, and ever since, she has been a great sounding board as well as just an all-around cool person. That’s how I like connecting with people. I don’t like to force it over bad coffee before 8 in the morning.

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Thursday, October 27, 2016

I AM A GENIUS. I have just figured out what might be the best marketing tool ever: listservs.

One of the first things I did when I entered solo practice was to sign up for a few different organizations with different listservs. For example, I joined the WSBA solo/small practice listserv, and the KCBA estate planning listserv. Ever since, I have been inundated with hundreds of emails a day with everything from requests for referrals to questions about probate.

Even though emails can be a pain to get through, I make a point to at least glance through all of them, as I found I learn a lot about different areas of law just from different questions posed and answers offered. After lurking for a while, I noticed the names of a handful of attorneys kept popping up, usually with helpful responses. I thought nothing of this until a client asked if I knew of an attorney with experience suing auto repair shops. Immediately, thanks to his participation on the listserv, the name of an attorney sprang to mind, and I offered the client the name without a second thought. Only after I hung up did I realize that attorney had benefited from his thoughtful, well-written participation on the listserv. Why couldn’t I do the same?

So my new goal, Diary, is to participate as much as possible on the listservs of which I am a member. Unfortunately, in the beginning, this is not likely to be a lot. However, I have occasionally responded with an answer or two where appropriate. I like to think it will help in the long run.

Tuesday, November 8, 2016

I AM GOING TO KILL THE PRINTER. WHY WON’T IT JUST WORK?

Wednesday, November 30, 2016

We got a new printer yesterday. I wept tears of joy. I wish we had upgraded sooner as the amount of time I wasted trying to fix it far outstripped the cost of its replacement.

I also wish I had set up my accounting software sooner with help from a consultant. About a month ago, after a lot of research on my own and speaking with other attorneys, I downloaded Quick Books Online—and immediately felt overwhelmed. I had no idea what I was doing, and when I linked my accounts to QuickBooks, it grabbed my personal checking account information to make it look like my business had more equity than it did in real life. Plus, I still had all these receipts floating around and I had no idea what to do with them.

So yesterday, after getting a recommendation from a different writer for NWLawyer, I sat down with a consultant to talk about how to use QuickBooks Online to my advantage. The consultant had my personal checking account unlinked in a heartbeat, and was able to pinpoint why my expense account was not reconciling. She gave me a list of things to do in my own time to bring my accounts up to speed, and helped me figure out how to proceed in the future. “Be consistent,” she said, as she handed me a piece of paper with suggested descriptors for my expenses.

While I still have yet to commit to a case management software, I wish I had sat down with a professional to help set up my books when I first started my solo practice. I had no idea what I was doing, and no idea how to run a small business. The only saving grace is that I have not had too many business transactions to categorize and reconcile. Had I waited until the new year to set my accounts in order, I likely would have been extra frazzled, especially with tax season looming.

Why can’t I just listen to my own advice? Play to your strengths, I said. Bookkeeping is not one of them. Why gnash my teeth in frustration when it is well worth my time and peace of mind to pay someone to help me? Solo practice is a constant cost-benefit analysis. I have to remember that.

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How to Have a Productive Day: Three Easy Tips for Lawyers

by Anne-Marie Sargent

The law is a profession full of stresses—deadlines, interruptions, demands from clients and opposing attorneys, case schedules, court filings, contracts, and motions with endless attachments. If you run your own practice or you are part of a smaller practice, administrative and managerial tasks are also added to an often overwhelming day. I have always been organized and loved systems, and I’ve looked for ways to maintain efficient productivity while keeping my sanity. Here are three easy ways to maintain focus during your day.

**Keep a Daily Four-Item To-Do List.**

One of the secrets of getting more done: make a to-do list, keep it visible, and use it as you go through the day. — Jean De La Fontaine

We all want to feel good about our time at work, serve our clients well, be a good team member, and feel prepared for the tasks and filings we know are coming. I find a to-do list essential in these endeavors. How can we get there if we don’t know where we are going?

Since becoming a lawyer nearly 20 years ago, I have maintained a typed list of all cases and tasks so that everything in my work life is contained in one document. I regularly update and revise this list, usually after staff meetings. Before, for years I made the mistake of using this as my daily to-do list as well. Running through the next four months of work without prioritization not only did not help structure the day, it also stressed me out before I even started.

A few years ago I heard that the CEO of a large local company prepared a four-item to-do list every day. This changed my daily expectations dramatically—if that was good enough for the CEO of this major tech company, why not good enough for me in my humble law practice?

I started keeping a daily four-item list, in addition to the comprehensive list. If the tasks are large, like “start draft of brief,” I may include only two. At the end of the day, I have accomplished the items I set out to accomplish, completed them with my full attention, and continued to keep our cases and managerial tasks on track.

Here is how it looks: I come into the office and take a look at the long-term to-do list and the papers on my desk to see what is pending. I write my four-item list and keep it near the phone so I see it throughout the day. If there is an urgent request, I may not complete all four items. Incomplete items stay on the list. The next day, there is no need to waste time wondering what to do, stressing about priorities, or worse yet, browsing the internet to put off starting work—the list from the night before guides the day, and I am productive as soon as I begin the day.

**Give It 10 Minutes.**

The secret to getting ahead is getting started. — Mark Twain

I have played this trick since college for anything I am resisting. Ten minutes is a short enough time to exert some discipline. We regularly spend 10 minutes watching commercials or getting lost on Facebook. Why not take the same amount of time to complete, or at least start, something pressing on our minds? I am repeatedly amazed at how many of the tasks I avoid for days could have been completed in around 10 minutes.

Try giving 10 minutes of your undivided attention to a project you are avoiding. Turn off email, close the internet, and put the phone on silent. Put a pen and pad near you so that if you think of other things, you can jot them down and return to the task at hand. Set a timer on your phone—if you want to be done when the timer goes off, you are. After 10 minutes, one of two things happens: 1) you are engaged in the task, and ignore the timer, continue for a longer period of time or to completion, or 2) you stop working when the timer goes off, but at the least you have a start.

Neuroscience research shows that our brains are activated by motion—starting a task, even briefly, communicates to the brain that action is happening. Our brains then start thinking about the project, coming up with ideas and solutions during lulls (such as time in the shower), and are able to return to the project with strategies, rather than wasting time. Ten minutes is not enough to write a brief or complete a declaration for summary judgment, but getting started on a task—particularly one we are avoiding—is more than half the battle.

The timer trick also works to make time for things that relax you. Try setting a timer for something that will rejuvenate you. Don’t let your mind worry about what you are not doing—give your activity your full attention. Let yourself be unavailable for 10 glorious minutes to read a book, garden, or dance to ‘80s tunes. It doesn’t have to be much. The timer will ring to a different person than the one who started.
Legal professionals can have a lot of “frogs” to eat throughout the day. I get big payoff in energy and efficiency by eating the biggest one first. Recently, I was avoiding a call with a client, needing to amend my initial legal advice based on further legal and factual development. I finally put the call on my four-item to-do list, although I wanted to put it off until the afternoon. But heeding Mr. Twain’s advice, I scheduled the call for the morning. The call only lasted 15 minutes, after which the client was informed and satisfied, and I was immediately freed up. The rest of the day went smoothly, ticking through the remaining items on the to-do list, because I was energized by eating the biggest frog first.

And remember that frogs are not always work-related. Sometimes the biggest frog is a phone call to a family member we do not want to return, or a commitment to exercise so that we can release tension. Whatever is getting you stuck, do it first and be done with it.

— Mark Twain

Anne-Marie Sargent is a partner with Connor & Sargent PLLC. She primarily represents employees in severance negotiation, discrimination, and class action lawsuits. She is a mediator of employment and other disputes, and a co-chair of the Federal Bar Association’s ADR committee. When not practicing law, she is often painting or outside with her dogs. She can be reached at aes@cslawfirm.net.

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Anne-Marie Sargent

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Questions?
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Maritime or admiralty law is the law of waterborne commerce. It governs ships, boats, and other nautical craft, as well as their crews, passengers, transport, and trade. Rules and customs dating back four millennia combine with national and international laws—substantive and procedural, legislative and judicial. In Washington, the coverage of maritime law includes the inland salt waters from Blaine to Olympia and west to Neah Bay, the ocean coastal waters and ports of Grays Harbor and Willapa Bay, and the inland, interstate waters from Cape Disappointment to Clarkson. Age-old principles anchor contemporary maritime law, merged by the timeless hazards and bounties in seafaring.

Ancient Customs and Modern Laws Define This Unique Practice Area

by Tom Waller

IN ANCIENT TIMES

“If a man hire a sailor, he shall pay him six gur of corn per year.” So said Hammurabi in about 1760 B.C., one thousand years before the Iliad. Earlier, ancient Sumerian law decreed: “If an upstream-boat sinks a downstream-boat, [the owner of the upstream-boat] shall replace the lost boat.” Writing in A.D. 529, Roman Emperor Justinian I defined a “ship” as any vessel, even a raft, “navigating the sea, rivers, or lakes.”

The sailors of Babylonia, Sumer, and the Byzantine Empire would find parallels in our present-day maritime law. The sustenance of sailors is still mandated, though measured today in calories, not gur. 46 U.S.C. § 10301 (three meals, 3,100 calories per day). Our river-borne navigation laws reflect the Sumerian principle of legal right-of-way. 33 C.F.R § 83.09(a)(ii) (Rule 9) (“vessel operating in narrow channels. . . and proceeding downbound with a following current shall have the right-of-way over an upbound vessel.”). And Justinian I seemed as qualified then as the Supreme Court today in defining what is, and what is not, a “ship.” See Lozman v. City of Riviera Beach, Fla., 133 S. Ct. 735 (2013)(“[A] wooden washtub, a plastic dishpan, . . . a door taken off its hinges, or Pinocchio (when inside the whale) are not “vessels[.]”).
MODERN LAW

Maritime law, like other specialized bodies of law, includes statutes, regulations, and case precedents designed to stabilize relationships, both personal and property. The relationships, all linked to navigable waters and commerce, involve contracts, torts, administrative activities, and to a lesser extent, criminal acts.

In the United States, maritime legislation is enacted by Congress under its constitutional authority to regulate commerce with foreign countries and between the states. Maritime common law is created in the state and federal courts. On the latter point, cases in which maritime law applies are heard in federal court, following Article III, Section 2 of the U.S. Constitution. State courts have concurrent jurisdiction of most maritime claims, employing federal maritime law. 28 USC § 1333.

“Navigable waters” are the avenues of maritime commerce, dividing land-based and maritime law. Navigable waters generally include bodies of water capable of being used for interstate or foreign commerce. The Columbia River is “navigable” and therefore subject to maritime jurisdiction and governed by maritime law. The Skookumchuck River is not. Lake Washington, historically nonnavigable, is now an avenue of interstate commerce. Lake Whatcom and Moses Lake are not deemed navigable, or subject to maritime law; it is not now, nor has it ever been, possible for a vessel to travel between either lake and another state. The distinction between navigable and nonnavigable waters allows for maritime law to govern injuries aboard a helicopter—serving as an offshore “ferry”—crashing in coastal waters, but for Washington state law to govern a passenger injury aboard the LADY OF THE LAKE, a 65-foot ferry, on Lake Chelan.

As federal law, maritime law is defended by uniformity, supremacy, and federal preemption. The laws of the states yield in most instances to maritime principles: “[P]lainly, we think, [no state’s] legislation is valid if it . . . works material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony and uniformity of that law in its international and interstate relations.” Southern Pacific Company v. Jensen, 244 U.S. 205, 215-16, 37 S. Ct. 524, 528-29 (1917). State laws may fill gaps where national uniformity is not vital, such as issues involving marine insurance, employment, and pollution of state waters.

FOCUS ON TRADE

The focus on trade, with historical undercurrent, is reflected also in the jurisdictional prerequisites for both admiralty contract and tort jurisdiction. For claims in tort, courts consider whether an incident has a potential disruptive impact on maritime commerce and whether the incident had a substantial relationship with traditional maritime activity. The lines are not easily drawn: a kiteboard injury off the Maryland coast has been deemed to have such a relationship, while a white-water rafting injury on a navigable river in West Virginia was deemed to have no such link.

For contracts, the test for admiralty jurisdiction generally requires a link to maritime commerce, navigation, or employment. Justice Potter Stewart’s test for hard-core pornography, “I know it when I see it,” is useful here; the borders of maritime contract law are not well lit. Contracts for repair, service, or sale of a ship are maritime. Contracts for ship construction are not.

As with other discrete areas of law, maritime law has subtlety, nuance, and, occasionally, abstraction. One of the unique aspects of the law is its mechanism for prejudgment security, as well as postjudgment execution. In the United States, like other common-law countries, the action in rem is the basic procedure on which creditors rely for prejudgment security and postjudgment enforcement. Prejudgment security procedures are especially important to maritime lien holders, including holders of ship mortgages; an insolvent or unscrupulous debtor might otherwise simply disappear over the horizon with the debtor’s principal asset, the ship. The arrest by a U.S. marshal of the ship or other res (e.g., cargo or freight) in an action in rem creates admiralty jurisdiction by putting the res under judicial detention pending adjudication of the claim. Similarly, the availability of postjudgment execution, by way of the federal judicial sale of the arrested vessel, serves to protect maritime creditors and lienholders concerned about the solvency of their debtors. The maritime lien itself is a nonpossessory security right in the ship, its freight or cargo. It may arise from statute or bodily
injury, nonpayment of seamen’s wages, salvage, collision, contract, or other specified maritime-related activity. The lien is enforced by the arrest of the ship, cargo or freight.

Other unique aspects of admiralty law include limitation of liability, salvage, and recovery for injuries and death to seamen. The Limitation of Liability Act, 46 U.C.S. § 30505, may allow a vessel owner to limit its liability to the post-incident value of the vessel (which may be on the seafloor) and its pending freight, so long as the incident occurs without the “privity” or knowledge of the owner. In marine salvage, the rescuer (salvor) is entitled to a reward for taking the risks necessary to conduct the salvage. The size of the reward, if not predetermined by contract, is decided based on factors such as the value of the property and the degree of risk involved.

For injuries and death to seamen, employer liability under maritime law also differs markedly from the common law and legislatively created workers’ compensations systems. Under maritime common law dating back centuries, the shipowner owes to the seamen aboard its ship repatriation costs, wages to the end of the “voyage,” medical expenses (“cure”) linked to shipboard injury or illness, and a daily stipend (“maintenance”) during the period of recovery. Separately, the shipowner is liable under maritime common law for damages, including past and future wage losses and general damages, for “unseaworthy” conditions aboard its vessel. Under the Jones Act, a federal statute related to both coastwise trade (cabotage) and bodily injury, a seaman injured (or killed) in the course of employment may recover similar, but not duplicate, damages against the employer based on neutered principles of negligence. 46 U.S.C. § 30104.

PRACTICE IN WASHINGTON
Here in Washington, maritime law substantially governs the rights and
commercial interests of tens of thousands of land-based and at-sea workers, directly and from induced impacts. The interests include commercial fishing, vessel repair and maintenance, cargo handling and logistics, commercial diving, passenger vessel and ferry operations, recreational boating, and sport fishing. Support industries, including marine technology, education, training and safety programs, and marine finance are also involved and may invoke maritime law.

Waterborne trade—both domestic and international—moves goods and passengers across oceans, along coastlines, and on inland rivers. Innovation and technology bring change to industry and advances in governing maritime law. Opportunity, risk, and reward in the maritime trades are guided now, as for centuries, by ageless custom and evolving maritime laws. NWL

Notes
1. “Admiralty” is generally used interchangeably with “maritime” law, though in a strict sense admiralty law refers to jurisdiction and procedures originating in England’s office of Admiralty.

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A tax indemnity provision in a legal document generally states that one party will cover certain taxes, or will cover tax problems if they arise. Tax indemnity provisions are common. They appear in many variations, and can show up across a wide variety of contracts and agreements.

One recurring context is in settlement agreements that resolve legal disputes. The issue and need for the provision might arise something like this: You agree in principle to settle a case for your client, and you are trying to get the deal inked. But there are potential taxes or potential tax risks.

Whether you represent plaintiffs or defendants, your client probably has tax issues, whether they know it or not. The defendant is paying money and probably hoping to deduct it. The defendant may face other tax issues, such as withholding on wages, or the need to issue IRS information returns, such as Forms 1099.

Some defendants figure that any such tax concerns can be deferred and dealt with later. Some defendants know that any deal about tax withholding or tax reporting usually should be struck then, not later. Besides, the plaintiff is likely to ask for tax provisions in the settlement agreement.

Most plaintiffs in litigation are more worried than defendants about taxes. Plaintiffs are receiving money, so hope to position payments as best they can from a tax viewpoint. The plaintiff may be worried if it is taxable, ordinary income or capital gain, and may also have concerns about withholding, Forms 1099, etc. There are usually attorney fees that also raise tax issues.

**Attorney Fees**
The plaintiff will hope that only his net recovery is taxed (after legal fees and costs). The U.S. Supreme Court in *Banks* held that plaintiffs generally must report gross recoveries, even if the contingent fee lawyers are paid directly by the defendant. For tax purposes, the fees are considered first paid to the plaintiff.

Reporting the income on a gross basis means that the plaintiff must consider whether, how, and where to deduct the legal fees. Depending on the type of case and whether it arises in the plaintiff’s business, the plaintiff may not be able to deduct all of the legal fees. In short, there are often latent tax issues that make tax indemnity provisions common. But the meaning and importance of the indemnity provision is another matter.

**Discussing Indemnity**
The first sign of a tax issue may be a draft settlement agreement that says something about tax withholding, the issuance of IRS Forms 1099, or tax indemnity. There may be tax advisers on one or both sides, or there may be no tax advisers in sight until long after the case is resolved. Some lawyers insist that the client hire a tax professional, but many lawyers try to muddle through the tax issues themselves.

Curiously, many non-tax lawyers seem comfortable handling tax indemnity provisions. They may recognize that indemnity may be needed in case there is a tax problem, such as failure to withhold, failure to issue forms, or failure of the plaintiff to pay taxes. It might seem that a tax indemnity provision serves to obviate the tax issues. If you get a solid tax indemnity for your client, there might seem to be no need to understand the size, scope, or impact of the tax issues.

But that can be a mistake. Suppose the defendant is settling all claims and paying the plaintiff $X for a complete release. The settlement agreement may say that the defendant has given no tax advice, the plaintiff agrees to pay his own taxes, and that the defendant will issue an IRS Form 1099 reporting the payment.

The settlement agreement might also say that if the defendant incurs any tax problem on these funds, the...
plaintiff will indemnify the defendant. Is this a good idea? Does the defendant even need any tax advice in this case?

The tax indemnity provision seems to put the liability on someone else. If so, the reasoning may go, there is no need to worry about the size or scope of the tax problems. Such thinking can be shortsighted for several reasons.

Pursuing Third Parties
First, an indemnification obligation does not prevent a tax problem, nor does it bind the IRS or state tax authorities. If you are the taxpayer, you have the problem, even if you can go after someone else to try to cover your loss. An indemnification obligation is a third-party arrangement between contracting parties.

Thus, it is only as good as the credit-worthiness of the indemnifying party. Moreover, it says nothing about the primary liability that the party to be indemnified has to the IRS or to state taxing authorities. For example, consider the question of tax withholding.

Tax withholding is required on wages and on some other payments (such as some payments to non-U.S. plaintiffs). Where withholding is required, the payor is a withholding agent and fails to withhold at its peril. Failure to withhold liability can be significant, involving liability for the payments themselves, interest, and potentially steep penalties.

The fact that someone else (typically the settling plaintiff) has agreed to step in and repair the tax damage does not mean they will actually step in. Even if they do, they may not have the financial ability to repair the tax damage. Suppose that a wrongful termination of employment case is settling for $1 million, with the client receiving $600,000 and the lawyer receiving $400,000.

Assume that the plaintiff receives a Form 1099, agrees to pay any tax due, and agrees to indemnify the defendant for taxes. But what if the IRS claims the $600,000 was wages subject to withholding? The employer has the liability for failure to withhold, which could amount to $300,000 or so.

The IRS will not agree to go after the plaintiff. The defendant can try to get the plaintiff to step in, but how likely is that? By the time the tax issues are examined and contested, the plaintiff may be out of funds.

Besides, even if the plaintiff could pay, he or she will probably fight it. It is highly unlikely that the plaintiff will agree that the indemnity obligation he or she signed actually covers failure-to-withhold liability of the defendant. Many general indemnity provisions are unlikely to be read broadly enough to actually cover the employer’s failure-to-withhold liability.

As this withholding example suggests, there is also no guarantee that the tax damage will be small. In that sense, a tax indemnity provision may lull you into a sense of complacency. A common comment is that, “we have indemnity from the other side for taxes, so we are covered.”

Despite a tax indemnity provision, you should understand the risks, tax dollars, penalties, interest, and counsel fees you are trying to guard against. But aside from these cautions, are tax indemnity provisions a bad idea?

Types of Indemnity
Some lawyers worry that a tax indemnity provision is a red flag to the IRS. Some suggest that a tax indemnity provision is an admission to the IRS that there is a tax game afoot. It is hard to see how. Tax indemnity provisions are common in numerous types of agreements, and are unlikely to be viewed as red flags by the IRS.

In that sense, a tax indemnity provision probably cannot hurt. Nevertheless, it may not help either. Such provisions are of limited utility in many types of legal settlement agreements, especially in settling employment litigation.

For example, if the defendant is a business and the plaintiff is an injured person or former employee, the prospect that the defendant will actually pursue the plaintiff on the tax indemnity provision does not mean they will actually step in and repair the tax damage does not mean they will actually step in. Even if they do, they may not have the financial ability to repair the tax damage. Suppose that a wrongful termination of employment case is settling for $1 million, with the client receiving $600,000 and the lawyer receiving $400,000.

Assume that the plaintiff receives a Form 1099, agrees to pay any tax due, and agrees to indemnify the defendant for taxes. But what if the IRS claims the $600,000 was wages subject to withholding? The employer has the liability for failure to withhold, which could amount to $300,000 or so.
ty provision is remote. There is usually little for the defendant to benefit, and there are usually reasons not to try. It is also clear that the indemnity provision may not accomplish what the defendant thinks it will.

Again, what if some or all of the settlement payment to the plaintiff is really wages? Suppose that the defendant issues a gross check and reports the settlement figure on a Form 1099. Later, the IRS claims that some (or all) of the settlement is wages subject to withholding.

In virtually every employment case, at least some of the settlement payment should be wages subject to withholding. Not all of the money may be wages, but failing to consider wage exposure would be a mistake. And plainly, if there is any failure to withhold liability, it resides squarely with the defendant employer. The IRS will pursue the defendant for all the withholding money, interest, and penalties.

As a matter of contract law, the defendant can demand indemnity, and then can try to go after the plaintiff for that. But unless the indemnification agreement is explicit that it covers failure-to-withhold liability, it may be very hard to enforce. Besides, the IRS certainly will not release its hold on the defendant employer, whatever the indemnity provision may say.

There is also an enormous practical barrier. Trying to enforce an indemnity provision (at least against a former employee) is almost always a mistake. Most lawyers will advise the defendant not to even try to pursue the plaintiff, since the indemnity litigation can backfire. If the defendant thinks that some or all of the settlement money is wages, the defendant should withhold.

Most often, the money in an employment case should be allocated into several categories. Reasonable minds can differ on whether 10 percent or 90 percent is wages, or something in between. But a portion is probably wages. An indemnity provision does not hurt anything, but it probably does not help much either.

This is not to say that the defendant cannot take a calculated risk that withholding is required, yet still settle and not withhold, reporting the entire payment on a Form 1099. It happens, frequently in fact. Employers sometimes settle a case that (from a business perspective) must be settled, where the plaintiff insists that if there is any withholding, the plaintiff will not settle.

In an ideal world, perhaps the defendant should offer more money to settle. That way, the defendant can withhold if required, and the plaintiff can still collect a net payment that the plaintiff finds acceptable. But in the
real world, the defendant may agree to run the tax risk.

The defendant’s general counsel may say to the tax adviser, “we are managing risks, and the litigation risk with this case is vastly greater than the tax risk.” Businesses must weigh these risks. What seems silly, though, is if the defendant is convinced that there is no tax risk because there is an indemnity provision.

Non-Employee Litigation
What about tax indemnities outside of employment litigation? Tax indemnity provisions can often be more helpful in other contexts. For example, suppose the defendant agrees not to issue an IRS Form 1099, because the plaintiff claims the payment is for personal physical injuries or sickness that is tax-free under Section 104 of the tax code?

The defendant may believe that the settlement payment is really a payment for emotional distress, and therefore taxable. The defendant might say that in order not to issue a Form 1099, the defendant requires a tax opinion from the plaintiff, and a tax indemnity. Here, the indemnity would presumably cover penalties for failure to issue a Form 1099.

The main penalty for failure to issue a Form 1099 is only $260, unless the defendant is found to have been willful. In that case, the penalty could be much more serious—10 percent of the settlement payment. In practice, though, such 10 percent penalty assertions are rare.

The penalty for intentional failure to issue a Form 1099 seems to be reserved for situations where it was clear the payor knew there was a reporting obligation, and ignored it. In any event, indemnity provisions in such situations may make more sense than where wages and withholding are involved.

Tax Indemnities in Acquisitions
Tax indemnity provisions are also common in acquisition agreements. A purchase of one company by another can be handled in many different ways. Often, there are tax issues that will remain debatable even post-closing.

There may be income tax, sales and use tax, property tax, and foreign tax issues. Whatever the issues, it is appropriate to allocate the risks. And unlike in the context of litigation settlements, enforcement may be a factor.

For example, unlike litigation settlements, escrows or hold-backs are common in such transactions. Often, they may not extend for the entire statute of limitations period that could bracket the time of potential tax risks. Nevertheless, an escrow or holdback may materially help and can put real teeth in the indemnity provision.

Lawyer Risks
Lawyers are trained to ask for indemnity and to cover as many risks for their clients as they can. Tax indemnity provisions are often written and debated by non-tax lawyers. That is to be expected. Everyone is a little afraid of taxes and tax liabilities.

And like confidentiality provisions, indemnity provisions—even about taxes—may seem pretty straightforward. After all, a tax indemnity may seem to reduce or even obviate the tax risks. However, whenever possible, get some tax advice even if you have a strong indemnity provision.

There is a big difference between: (1) feeling comfortable that a small penalty will be covered by the plaintiff if it materializes; and (2) believing that a tax bill for 40 percent of the settlement for failure to withhold taxes will be adequately addressed via an indemnity that may never be collectible. One can still ask for indemnity. But understanding the type, scope, and amount of the potential tax problems is a good idea.

Tax indemnity provisions are not one-size-fits-all. No matter how tightly you write a tax indemnity provision, there may be ambiguities. Even if the scope and meaning of the indemnity provision is clear, there may be big questions (then or later) on whether the indemnifying plaintiff will have any assets to pursue.

If you tell your clients the indemnity provision protects them, it can be upsetting to have your client complain several years later that an indemnity provision you wrote or recommended did not protect them. And that may mean the lawyer who said, “Don’t worry, we’ve got indemnity” might end up being asked to pay.
Indemnity Payments as Income
What happens if you get hit with a tax bill from the IRS, and the other party indemnifies you for it? Is the indemnity payment income? If so, can you require the indemnifying party to “gross up” any payment for taxes?

There is often confusion surrounding the taxation of indemnity payments, but the IRS usually views them as income. The IRS has frequently asserted the payment of another person’s income tax (directly or indirectly) is gross income to that person. Taxpayers often argue otherwise, citing Clark v. Commissioner for the proposition that tax indemnity payments are excludable from gross income.

As to whether a gross up for taxes is required, that is a drafting issue. Many parties will not even think of it, and if they do, they may not want to explicitly raise it. A provision that says the plaintiff will indemnify the defendant for all tax consequences of a settlement may be inartful and not specific. But it may be more likely to be signed than one that is long, and that says the plaintiff must even gross up any required taxes on the indemnity payment itself.

Conclusion
As with many other common and useful clauses in legal documents, tax indemnity provisions are a drafting staple. They are often a good idea, and they can be adapted for a variety of purposes. Even so, one should not assume that they fix all tax problems.

Robert W. Wood practices law with Wood LLP in San Francisco. He is the author of numerous tax books including Taxation of Damage Awards and Settlement Payments ([www.TaxInstitute.com](http://www.TaxInstitute.com)). He is a member of many state bars, a certified tax specialist, and a frequent expert witness. He is a tax columnist for Forbes and for Tax Notes. He can be reached at wood@woodllp.com.

This discussion is not intended as legal advice.

Notes
MEET OUR STAFF

IN 2016, THE WSBA SERVICE CENTER received 17,970 emails and 35,828 phone calls. If you were one of those callers, you most likely spoke with Steve Carroll, a service center representative with 14 years of experience at the WSBA. Steve’s calm and helpful demeanor, along with his extensive knowledge of the WSBA, make him an important member of our staff. NWL

STEVE CARROLL
Service Center Representative

How do you help our members?
My job, and the jobs of my colleagues in the Service Center, is to be the first point of contact for members and the public. When I get a call, I try to answer the question or find someone who can. In the Service Center, we answer all kinds of calls from members who want to register for a seminar, change their address, or ask a question about their membership. I try to take the next step when I help someone. For example, when I change an address, I’ll try to see if it is their turn to report their continuing legal education credits so they aren’t caught by surprise at the end of the year. The public calls are more varied and you never know what someone will ask. We sometimes get callers from back East who think they are talking to the District of Columbia.

What is a typical day for you?
My typical day starts early. I arrive before the WSBA office opens at 8 a.m., to get things set up so I’m ready to answer calls when we turn on the phones. I look at the WSBA website and the seminar calendar so I know what’s going on and how to
direct visitors. Then, in between calls, I answer emails and complete paperwork. The biggest challenge is shifting gears, going from registering someone to attend a seminar to answering a question from the public who wants to find a lawyer. During the day I have different roles, but my favorite is teacher. I like to find ways to explain things in a way that each individual caller can understand.

Tell us more about yourself.
I am originally from back East. I grew up in Western Massachusetts and went to school in Northern Vermont. I studied biology, but after working for a biological supply company for a few years, I realized it wasn’t for me. I found a job in a hotel, doing odd jobs and learning the hospitality business from the ground up. A friend of mine invited me to move to San Francisco to take the next step in my career and I got a job at the Stanford Court, a five-star hotel on Nob Hill. I worked for Howard Storm, a charter member of the American branch of Les Clefs d’Or, the society of concierges. When the hotel was sold, I moved back East again. After a few winters there, I realized I missed the West Coast. My wife’s uncle invited us to move to Seattle about 17 years ago, and 14 years ago I took a job with the WSBA. In my free time I work with my son on his merit badges and I enjoy woodworking.
We are grateful to the many legal professionals who have already made generous donations to the Washington State Bar Foundation this licensing season.

Your donations support the Washington State Bar Association’s Moderate Means Program, Call to Duty, and Diversity & Inclusion programs.

If you haven’t given already (or if someone else handles your license renewal) you can still make a tax-deductible donation online.

www.WSBA.ORG/FOUNDATION
Bitter is the Wind
by Jim McDermott
2016, Cune Press

Reviewed by
Renee McFarland

Bitter is the Wind, a novel by Portland-based litigator Jim McDermott, brings to life a family drama set against the backdrop of the struggles facing the working class. Is the American dream alive and well? What changes the trajectory of a blue-collar life? The story traces the coming of age of George Jr. in the wake of family tragedy and follows him to early adulthood. The relationship between George Jr. and his father George Sr. is the core of the story.

McDermott paints a vivid and realistic picture of working class life in the late 1970s and early 1980s in two rural but connected Hudson Valley communities. Still suffering from the loss of his mother and sister in a car accident, George Jr. acts out in junior high despite being highly intelligent and creative.

While dealing with his own grief, his dad tries his best to raise his son well. He works diligently to propel George Jr. to a more prosperous life than his own. One of many life lessons he imparts to his son is the experience of running a large rabbit business. This endeavor showcases the rustic setting and the tough work for extra income. George Jr. quickly tires of the claustrophobic barn and working amid the pungent odor of rabbit droppings.

Despite being a gifted athlete, the elder George had been forced by life circumstances to take a dead-end factory line job in the anchor corporation of the area, Woo Labs. George Sr. wonders if he will ever advance in his company and expresses frustration with his lot in life. An exceptional student, young George starts on a path to escape his father’s fate. He recognizes the transformative value of education but has several obstacles to overcome along the way. In addition to his supportive dad, George receives guidance from a wise widow who is always there for him.

Both father and son question the ethics of people in power, from the leadership at Woo Labs to government leaders. Historical events like Watergate and the Rev. Sun Myung Moon mass wedding provide a backdrop for discussions about values between father and son. The Catholic Church also plays a large role, as George Jr. sorts out his beliefs and his father grapples with disillusionment. As he works to fulfill his dreams, George Jr. ultimately has to decide what being successful in life means to him.

This book takes a nostalgic look at the time period from a male perspective. Baseball figures prominently, both as a vehicle to escape working-class life and as a pastime shared by father and son. In high school, George Jr. starts his working life at a gas station and spends time in the local disco, sporting long hair, and driving a gold Duster. He has a trusted dog and good friends, as he navigates adolescence in a time when kids generally had more freedom. This book will resonate with people who grew up in the 1970s, and with those who are concerned about the plight of the American working class.

As the middle class shrinks and income inequality grows, many people wonder if their children will have more opportunities than they did. Bitter is the Wind explores themes of social mobility, parenthood, freedom, and how, in many ways, you never really leave your hometown. NWL
Opportunity for Service

Interested in running for Board of Governors?

**Nomination/Application Deadline for District positions is Feb. 15.**

Five positions on the WSBA Board of Governors are up for election in 2017. The open positions represent the following congressional districts and one at-large seat:

- **District 3**
- **District 6**
- **District 8**
- **District 7-North**

**At-large position**

The three-year term of office begins Oct. 1, 2017. These positions are currently held by Jill Karmy (District 3), Keith Black (District 6), Ann Danieli (District 7-North), Andrea Jarmon (District 8) and Mario Cava (At-Large).

**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.

**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 form is available on the WSBA website at [www.wsba.org/elections](http://www.wsba.org/elections) or by contacting Pam Inglesby at pam@wsba.org or 206-727-8226. The WSBA executive director must receive the forms for district races by 5 p.m. on Feb. 15. 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. on April 20, 2017.

**Voting:**

The four 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. The WSBA will use an electronic voting system, and members will not receive a paper ballot unless they request one. Email ballots will be sent on March 15 and must be received by 5 p.m. on April 1. The at-large governor will be elected by the Board of Governors at its May 18-19 meeting.

**BOG Candidate Forum:**

A candidate forum is scheduled for Wednesday evening, March 1. All candidates for the four district seats are strongly encouraged to participate. The forum will be held at the WSBA Conference Center in Seattle beginning at 5:30 p.m. Members are encouraged to attend and bring questions for the candidates. The forum will also be webcast and accessible statewide for live viewing.

**Volunteer or Learn More About the Lawyer Discipline System**

**Application deadline: Feb. 28.**

Apply now to be an adjunct disciplinary counsel (ADC). ADCs assist in carrying out the functions of the lawyer discipline system pursuant to Rule 2.9 of the Rules for Enforcement of Lawyer Conduct (ELC). ADCs may be asked to assist WSBA staff disciplinary counsel with the investigation of a grievance; serve as special disciplinary counsel in the investigation of a grievance or prosecution of a disciplinary case; provide WSBA staff disciplinary counsel with an outside opinion on an area of law; serve as a practice monitor following imposition of a disciplinary sanction or suspension; or consult with a lawyer under the terms of a diversion contract. Prerequisite: ADCs must have been an active or judicial member of the WSBA for at least seven years at the time of appointment. Appointment is for a five-year term. Apply now through myWSBA. To learn more, email theaj@wsba.org.

**Join a WSBA Committee, Board, or Panel**

**Application deadline: March 1.**

Applications are now being accepted from members interested in serving on the WSBA’s committees, boards, and panels. Committee service gives you an opportunity to contribute to the legal community and your profession, a chance to get involved with issues you care about, and a way to connect with other lawyers around the state. There are over 20 committees, boards, and panels seeking new members, including the Court Rules and Procedures Committee, the Judicial Recommendation Committee, the Pro Bono and Public Service Committee, the Character and Fitness Board, and the Hearing Officer Panel. Most positions begin October 1, 2017. Apply at [www.mywsba.org](http://www.mywsba.org). For more information, see [www.wsba.org/Legal-Community/Volunteer-Opportunities/WSBA-Volunteer-Opportunities](http://www.wsba.org/Legal-Community/Volunteer-Opportunities/WSBA-Volunteer-Opportunities). If you have questions, email barleaders@wsba.org or call Pam Inglesby, WSBA Communications Services Operations Manager, at 206-727-8226.

**WSBA News**

**Notice of Hearing on Petition for Reinstatement of Alec Matthew Schwimmer**

**Hearing date: April 14, 2017.**

A petition for reinstatement after disbarment has been filed by Alec Matthew Schwimmer, WSBA No. 22588, who was admitted in 1993 and disbarred in 2005. At the time of Mr. Schwimmer’s disbarment, he lived in Jackson County, Oregon. A hearing on Mr. Schwimmer’s petition will be conducted before the Character and Fitness Board on Friday, April 14, 2017, at 8:30 a.m. Not later than 5 p.m. on Friday, March 24, 2017, anyone may file a written statement with the Character and Fitness Board for or against reinstatement, setting forth factual matters showing that the petitioner does or does not meet the requirements of Admission and Practice.
Rule (APR) 25.5. Except by the Character and Fitness Board’s leave, no person other than the petitioner or petitioner’s counsel shall be heard orally by the Board. Communications to the Character and Fitness Board should be sent to Kevin Bank, Counsel to the Character and Fitness Board, Washington State Bar Association, 1325 Fourth Ave., Suite 600, Seattle, WA 98101-2539, or to kevinb@wsba.org. This notice is published pursuant to APR 25.4.

2017 Northwest Dispute Resolution Conference
The conference is to be held March 23-24 at Gates Hall at the University of Washington. It will offer more than 45 sessions for neutrals and advocates. Local and national speakers will cover styles of mediation, gender, deception and manipulation, art of questioning, difficult personalities, conflict coaching, communications, negotiation theory, ethics, arbitration, stress reduction, early mediation, workplace issues, and family law. Information about the conference, as well as a registration link when it becomes available, can be found at http://wsba-adr.org/page/northwest-dispute-resolution.

Access to Justice Conference
The Access to Justice Board invites you to attend the 19th Access to Justice Conference June 2-4 at the Yakima Convention Center. The conference brings together attorneys, judges, and other advocates and community members working within the civil, criminal, and juvenile justice systems to build collective knowledge, participate in discussion, and work toward identifying and removing barriers to justice. Programming is pending CLE credit. Learn more and register at www.wa-atj.org.

WSBA Board of Governors Meeting
March 9-10 (Olympia).
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 Margaret Shane at 206-727-8244, 800-945-9722, ext. 8244, or margarets@wsba.org. The complete Board of Governors meeting schedule is available on the WSBA website at www.wsba.org/bog.

2017 License Renewal and MCLE Information Deadline was February 1
If you have not completed all mandatory portions of your 2017 license renewal, including MCLE requirements, if applicable, you are delinquent and 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.

Legal Community
K&L Gates Wins Their First Lawyers Basketball League Title
Led by Captain Gordie Verhovek, K&L Gates narrowly defeated Cozen O’Connor to win their first Seattle Lawyers Basketball League (LBL) title.

The 32nd Seattle LBL final kept onlookers glued to the edge of their seats last May at Franklin High School. At half-time, No. 6 seed Cozen O’Connor appeared poised to continue its playoff run, as No. 1 seed K&L Gates lagged far behind. K&L Gates managed to close the gap toward the end of the second half, bolstered by strong offense from Kyle MacTaggart and several key baskets by Doug Logan. Rookie Trevor Gates also gave a strong performance, with a couple of clutch steals late in the game. Phil Decker sank the game-winning basket with seconds remaining for a final score of 48-46.

K&L Gates team members and their respective law schools are: Trevor Gates (Oregon ’15), Ryan Groshong (Seattle U ’11), Zach Hiatt (UW ’06), Jay Christian (Thurgood Marshall ’14), Eric Jay (Columbia ’13), Doug Logan (UW ’15), Kyle MacTaggart (Seattle U ’15), Ben Mayer (Virginia ’12), Porter Sesnon (Seattle U ’12), Phil Decker (George Mason ’10), Reid McEllrath (UW ’15), Matt Teagarden (Seattle U ’14), Gordie Verhovek (Berkeley ’14).

Eighth Annual Indian Law Conference
Feb. 24, Spokane.
Gonzaga University School of Law, Gonzaga Native American Law Students Association, and Spokane County Bar Association Indian Law Section invite you to their 2017 conference on Friday, February 24, in the Barbieri Courtroom at Gonzaga University School of Law. Topics include post-election Indian policy outlook, natural resource damage claims and remediation, and more. Download a registration form at www.spokanebar.org/ils.html or email Shannon@spokanebar.org for more information. Washington State Bar Association CLE approval pending for 6.5 credits, including 1.5 ethics credits.
Need to Know

WSBA Lawyers Assistance Program (LAP)

WSBA Connects Offers Free Counseling
All WSBA members are eligible for three free sessions on a range of topics including work stress, career challenges, addiction, anxiety, and other issues. Call 800-765-0770 to arrange an appointment with a clinician.

Weekly 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 attorneys. Participants receive the comprehensive WSBA job search guide, Getting There: Your Guide to Career Success, which can also be found online at www.tinyurl.com/7xheb8b. To join, schedule a career consultation by contacting Dan Crystal at danc@wsba.org or 206-727-8267.

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 in the WSBA LAP group room from 12:00-12:45. For more information, contact Greg Wolk at greg@rekhiwolk.com

The “Unbar” Alcoholics Anonymous Group
The Unbar, an “open” AA group for attorneys, has been meeting for over 25 years. Meetings are held Wednesdays from noon to 1:30 pm at the Skinner Building at 1326 Fifth Avenue, 7th Floor. Also, if you are seeking a peer advisor to connect with and perhaps walk you to this meeting, the Lawyers Assistance Program can arrange this. Call 206-727-8268.

Blues or Depression?
Many lawyers are depressed but don’t realize it. Symptoms include sadness, loss of pleasure or interest in activities, weight gain or loss, sleep problems, feeling restless or slowed-down, fatigue, trouble thinking or concentrating, and thoughts of death. Untreated, it can cause serious work dysfunction and more. Talk to your doctor about your symptoms, or call 800-765-0770 to arrange an appointment with a clinician.

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We are thankful to our many colleagues throughout the state who have referred clients or associated with us on complex medical negligence cases in 2016, and we look forward to working with you in 2017.

We’re all ears!
Let us hear from you! We welcome letters to the editor on issues presented in the magazine. Email letters to nwlawyer@wsba.org.
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NWLawyer is the only publication that reaches all active WSBA members! The current circulation is over 34,000. Rates start as low as $250. Download the rate card: http://bit.ly/NWLRateCard. For more info: http://bit.ly/NWLawyerAds or email advertisers@wsba.org.

Many lawyers, judges, and law students struggle with depression, stress, addiction, and compulsive disorders, including problem gambling.

The WSBA Lawyers Assistance Program provides confidential help for these issues. Our professional staff and trained volunteers can assist you—whether you need help or are concerned about a colleague or family member who needs assistance.

We have countless success stories, but we do our work quietly, confidentially, and professionally—so the stories stay with us.

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WSBA Lawyers Assistance Program
Washington State Bar Association
Garvey Schubert Barer

is pleased to announce that

Susan A. Kim

of the firm’s Seattle office has been promoted to owner. Susan’s practice focuses on real estate and hospitality. She counsels businesses in a broad range of real estate and hospitality matters, including real estate purchase and sale transactions; office, retail, and restaurant leases; and hotel management agreements. She also has experience in federal income taxation and litigation. Susan’s experience before joining GSB in 2014 includes serving as in-house counsel for Vulcan, Inc. and as an associate in the Los Angeles offices of Sullivan & Cromwell and Morrison & Foerster. Susan received her B.A. from Dartmouth College and her J.D. from Harvard Law School.

Daniel Vecchio

of the firm’s Seattle office has been promoted to owner. Dan’s practice focuses on commercial litigation, bankruptcy, and other debtor/creditor issues. He represents clients in a wide range of matters, including complex litigation, commercial arbitration, regulatory investigations, bankruptcy proceedings, and trust and estate litigation.

Eryn Karpinski Hoerster

of the firm’s Portland office has been promoted to owner. Eryn assists clients involved in complex commercial and regulatory matters, including white collar criminal defense, employment litigation and tax disputes. Eryn serves on the Board of Directors of PHAME and provides pro bono legal services through the U.S. District Court Pro Bono Panel. She attended the University of Chicago’s College and Law School.

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Join the conversation at NWSidebar

The blog for Washington’s legal community
nwsidebar.wsba.org

Washington State Bar Association
These notices of imposition of disciplinary sanctions and actions are published pursuant to Rule 3.5(c) of the Washington Supreme Court Rules for Enforcement of Lawyer Conduct. Active links to directory listings, RPC definitions, and documents related to the disciplinary matter can be found by viewing the online version of NWLawyer at http://nwlawyer.wsba.org or by looking up the respondent in the lawyer directory on the WSBA website (www.wsba.org) and then scrolling down to “Discipline History.” As some WSBA members share the same or similar names, please read all disciplinary notices carefully for names, cities, and bar numbers.

### Disbarred

**Jason M. Gore** (WSBA No. 38264, admitted 2006) of Tualatin, OR, was disbarred effective 10/28/2016, by order of the Washington Supreme Court imposing reciprocal discipline in accordance with an order of the Supreme Court of the State of Oregon. For more information, see https://www.osbar.org/bulletin/issues/2016/2016June/files/44.html. Joanne S. Abelson acted as disciplinary counsel. Allison Rhodes and David Elkaniich represented Respondent. The online version of NWLawyer contains links to the following documents: The Washington Supreme Court Order.

**Carl J. Schwedler** (WSBA No. 41349, admitted 2009) of Sacramento, CA, was disbarred, effective 12/07/2016, by order of the Washington Supreme Court imposing reciprocal discipline in accordance with an order of the Supreme Court of the State of California. For more information, see http://members.calbar.ca.gov/fal/Member/Detail/244189. Joanne S. Abelson acted as disciplinary counsel. Carl J. Schwedler represented himself. The online version of NWLawyer contains a link to the following document: The Washington Supreme Court Order.

**Sarah Whitney** (WSBA No. 35479, admitted 2004) of Lakebay, was disbarred, effective 11/10/2016, by order of the Washington Supreme Court. The lawyer’s conduct violated the following Rules of Professional Conduct: 1.3 (Diligence), 3.4 (Misconduct). Francesca D’Angelo acted as disciplinary counsel. Thomas M. Fitzpatrick represented Respondent. Diana Marie Dearmin was the hearing officer. The online version of NWLawyer contains links to the following documents: Order Approving Stipulation; Stipulation to Suspension; and Washington Supreme Court Order.

### Suspended

**Mark Magnus Larsson** (WSBA No. 42882, admitted 2010) of Mountlake Terrace, was suspended for one year, effective 12/07/2016, by order of the Washington Supreme Court. The lawyer’s conduct violated the following Rules of Professional Conduct: 1.4 (Diligence), 3.4 (Misconduct). Jonathan Burke acted as disciplinary counsel. Mark Magnus Larsson represented himself. The online version of NWLawyer contains links to the following documents: Order Approving Stipulation; Stipulation to Suspension; and Washington Supreme Court Order.

**Frank J. Prohaska** (WSBA No. 27589, admitted 1997) of Seattle, was suspended for six months, effective 12/07/2016, by order of the Washington Supreme Court. The lawyer’s conduct violated the following Rules of Professional Conduct: 8.4 (Misconduct). Kathy Jo Blake acted as disciplinary counsel. Frank J. Prohaska represented himself. James Edward Horne was the hearing officer. The online version of NWLawyer contains links to the following documents: Hearing Officer’s Decision; Disciplinary Board Order Declining Sua Sponte Review; and Washington Supreme Court Order.

**Sabina F. Rosenthal** (WSBA No. 36219, admitted 2005) of Bellevue, was suspended for two years, effective 11/28/2016, by order of the Washington Supreme Court. The lawyer’s conduct violated the following Rules of Professional Conduct: 3.4 (Misconduct). Francesca D’Angelo acted as disciplinary counsel. Thomas M. Fitzpatrick represented Respondent. Diane Marie Dearmin was the hearing officer. Bertha B. Fitz was the settlement hearing officer. The online version of NWLawyer contains links to the following documents: Order Approving Stipulation; Stipulation to Suspension; and Washington Supreme Court Order.

### Reprimand

**George Theodore Hunter** (WSBA No. 14388, admitted 1984) of Seattle, was reprimanded, effective 8/26/2016, by order of the hearing officer. The lawyer’s conduct violated the following Rules of Professional Conduct: 1.3 (Diligence), 1.4 (Communication). Debra Slater and Randy Beitel acted as disciplinary counsel. George Theodore Hunter represented himself. Dana Laverty was the hearing officer. Evan Schwab was the settlement hearing officer. The online version of NWLawyer contains links to the following documents: Order on Stipulation to Reprimand; Stipulation to Reprimand; and Notice of Reprimand.

**D Angus Lee** (WSBA No. 36473, admitted 2005) of Vancouver, was reprimanded, effective 11/04/2016, by order of the Disciplinary Board. The lawyer’s conduct violated the following Rules of Professional Conduct: 1.7 (Conflict of Interest: Current Clients). Scott G. Busby, Christine Gray and Mark Honeywell acted as disciplinary counsel. Leland G. Ripley and Michael McFarland represented Respondent. Terence M. Ryan was the hearing officer. John H. Loeffler was the settlement hearing officer. The online version of NWLawyer contains links to the following documents: Order Approving Stipulation; Stipulation to Suspension; and Washington Supreme Court Order.

Catherine Susan Willmore (WSBA No. 33459, admitted 2006) of Tualatin, OR, was disbarred for 18 months, effective 9/16/2016, by order of the Washington Supreme Court. The lawyer’s conduct violated the following Rules of Professional Conduct: 1.3 (Diligence), 1.4 (Communication), 3.4 (Fairness to Opposing Party and Counsel), 8.4 (Misconduct). Erica Temple acted as disciplinary counsel. Patrick Christopher Sheldon represented Respondent. Donald William Carter was the hearing officer. Douglas Vanscoy was the settlement hearing officer. The online version of NWLawyer contains links to the following documents: Order Approving Stipulation; Stipulation to Suspension; and Washington Supreme Court Order.
Thao Hoang Nguyen (WSBA No. 41882, admitted 2009) of Tukwila, was reprimanded, effective 4/20/2016, by order of the hearing officer. The lawyer’s conduct violated the following Rules of Professional Conduct: 1.4 (Communication), 1.15A (Safeguarding Property), 1.15B (Required Trust Account Records), 5.3 (Responsibilities Regarding Nonlawyer Assistants). Marsha Matsumoto acted as disciplinary counsel. Mark W. Muenster represented Respondent. Noah C. Davis was the hearing officer. David B. Condon was the settlement hearing officer. The online version of NWLawyer contains links to the following documents: Order on Stipulation to Reprimand; Stipulation to Reprimand; and Notice of Reprimand.

Admonition

Christal Olivia Irwin (WSBA No. 43924, admitted 2011) of Colville, was ordered to receive an admonition, effective 9/19/2016, by order of the hearing officer. The lawyer’s conduct violated the following Rules of Professional Conduct: 1.4 (Communication), 1.5 (Fees), 1.15A (Safeguarding Property). Benjamin J. Attanasio and Scott G. Busby acted as disciplinary counsel. Christal Olivia Irwin represented herself. Carl Oreskovitch was the hearing officer. Lisa J. Dickinson was the settlement hearing officer. The online version of NWLawyer contains links to the following documents: Order on Stipulation to Admonition; Stipulation to Admonition; and Admonition.

Kenneth L. Jorgensen (WSBA No. 2751, admitted 1972) of Moses Lake, was ordered to receive an admonition, effective 8/15/2016, by a Review Committee of the Disciplinary Board. The lawyer’s conduct violated the following Rules of Professional Conduct: 5.5 (Unauthorized Practice of Law; Multijurisdictional Practice of Law), 5.8 (Misconduct Involving Disbarred, Suspended, Resigned, and Inactive Lawyers). Sachia Stonefeld Powell acted as disciplinary counsel. Kenneth L. Jorgensen represented himself. The online version of NWLawyer contains links to the following documents: Review Committee Order and Admonition.
**CLE Calendar**

CLE seminars are subject to change. Please check with providers to verify information. To announce a seminar, send information to clecalendar@wsba.org. Information must be received by the first day of the month for placement in the following issue’s calendar.

**GENERAL PRACTICE**

<table>
<thead>
<tr>
<th>Seminar</th>
<th>Date</th>
<th>Location</th>
<th>Credits</th>
<th>Provider</th>
<th>Contact Information</th>
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<tbody>
<tr>
<td>Managing High Conflict Personalities Without Becoming One Yourself</td>
<td>February 3, Yakima</td>
<td>1.5 Other CLE credits</td>
<td>Presented by the WSBA; 800-945-WSBA or 206-443-WSBA</td>
<td><a href="http://www.wsbacle.org">www.wsbacle.org</a></td>
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**IMMIGRATION LAW**

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<tr>
<td>Immigration Law and the New Administration</td>
<td>February 1, webinar</td>
<td>1.5 Law &amp; Legal Procedure CLE credits</td>
<td>Presented by the WSBA; 800-945-WSBA or 206-443-WSBA</td>
<td><a href="http://www.wsbacle.org">www.wsbacle.org</a></td>
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**INTELLECTUAL PROPERTY**

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<tr>
<td>From Panel to Publisher: An In-Depth Look at Transactional Law for Comic Book Creator Clients</td>
<td>March 2, Seattle</td>
<td>3 Law &amp; Legal Procedure CLE credits</td>
<td>Presented by the WSBA; 800-945-WSBA or 206-443-WSBA</td>
<td><a href="http://www.wsbacle.org">www.wsbacle.org</a></td>
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**LEGAL LUNCHBOX SERIES**

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<tr>
<td>From the Printed Page to the Silver Screen: An Overview of Licensing Comic Book Properties to the Film and Television Industries</td>
<td>March 4, Seattle</td>
<td>2 Law &amp; Legal Procedure CLE credits</td>
<td>Presented by the WSBA; 800-945-WSBA or 206-443-WSBA</td>
<td><a href="http://www.wsbacle.org">www.wsbacle.org</a></td>
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**NEW LAWYER EDUCATION**

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<tr>
<td>Introduction to Parenting Plans – Part I &amp; II</td>
<td>February 7 and February 21</td>
<td>4.5 Law &amp; Legal Procedure CLE credits</td>
<td>Presented by the WSBA; 800-945-WSBA or 206-443-WSBA</td>
<td><a href="http://www.wsbacle.org">www.wsbacle.org</a></td>
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**SOLO AND SMALL FIRM PRACTICE**

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<tr>
<td>Solo and Small Firm Practice Annual Seminar</td>
<td>March 14, Seattle and webcast</td>
<td>4.5 Other + 1.75 Ethics CLE credits</td>
<td>Presented by the WSBA in partnership with the WSBA Solo and Small Practice Section</td>
<td>800-945-WSBA or 206-443-WSBA</td>
<td><a href="http://www.wsbacle.org">www.wsbacle.org</a></td>
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City of Seattle v. Menotti,
409 F.3d 1113 (9th Cir. 2005)

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

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

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

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Dear Colleagues,

After decades of building a rewarding solo family law practice, I am delighted to announce my decision to merge my firm with McKinley Irvin, the largest premier family law firm in our region.

This decision came naturally to me, as we share a common set of values and practice philosophy.

I will continue my practice with high asset, high profile dissolution and parenting disputes — now working with McKinley Irvin attorneys, rather than against them.

I look forward to this merger as we work together to protect what our clients value most.

Janet A. George
OF COUNSEL
I became a lawyer because of the movie Liar Liar starring Jim Carrey. The pen is blue.

Before law school, I worked in minor league baseball. I have always loved baseball. If I were faster, had a better arm, and could hit a curveball, I’d probably still be playing today.

My greatest accomplishment as a lawyer is a 12-minute guilty verdict as a prosecuting attorney. The jury had just enough time to read the instructions and walk back to the courtroom. I guess I should tell you about how good it felt to help the multiple families I worked with in the abuse and neglect unit of Legal Services of Southern Missouri. Helping families work toward reunification was extremely fulfilling. But I’m pretty proud of that verdict, too.

In my practice, I work on improving the lives of my clients. The reason I do what I do is to help people get through difficult times. In my practice areas of criminal defense and personal injury, I see people at their worst. It’s my job to make sure that my clients know that someone is in their corner fighting for them and working to get them back to their lives.

The best advice I have for new lawyers is don’t be afraid to jump in. Trust that you are capable of practicing law and you will find success.

During my free time, I injure myself constantly doing Crossfit. I have a hard time understanding that my body is not capable of taking the punishment that it did when I played rugby in college. Perhaps it is those years of helmetless contact that prevents me from understanding my limits. Nonetheless, I enjoy physical fitness and competition. You can often find me on the softball diamond during the dry months.

I absolutely can’t live without St. Louis Cardinals baseball. I grew up in St. Louis and it truly is the best baseball town in America. I have adopted the Mariners, but my heart belongs to the Birds on the Bat.

I have recently tried or want to try learning how to fish for salmon. I’m great with trout, bass, and catfish but I’m lost when it comes to the bread and butter of the Pacific Northwest. I will gladly take you up on any tips.


Nobody would ever suspect that I paint. This is not a declaration that anything that I have ever created is acceptable as art, but I enjoy expressing myself abstractly on a blank canvas. Additionally, it’s a cheap way to decorate the house.

I give back to my community by volunteering at the King County Bar Association Neighborhood Legal Clinic in Seattle and the Housing Justice Project in Kent.

This makes me roll my eyes: grass fed beef. I don’t understand paying more for a steak that tastes worse and costs less to produce. I guess that’s my Midwest upbringing.

This makes me smile: My 100-pound Golden Retriever named Ollie. He is the sweetest animal I have ever met. He is scared of small dogs, loud noises, water, car rides, and he doesn’t play fetch but I couldn’t ask for a better dog.

If I could pick a superpower, it would be invisibility. I might have to re-read the ethics rules if that ever happened. Imagine the possibilities.

My first car was a 1993 Plymouth Acclaim. To this day, I miss having a bench seat in the front of my car. I would love to have my wife slide over next to me and take a long drive down a country road.

If I have learned one thing in life, it is that I don’t know anything. I wish others would learn that same lesson.

My name is TOM VENNEMAN. I moved to Seattle nearly four years ago from St. Louis, MO, where I was a prosecuting attorney. I am very excited to announce that my wife Anna and I welcomed our beautiful baby girl Ila in 2016. I am sole practitioner at Venneman Law P.L.L.C. My areas of practice are personal injury and criminal defense. My contact information can be found at www.vennemanlaw.com.
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