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# BAR BULLETIN

KCBA KING COUNTY BAR ASSOCIATION
*Justice... Professionalism... Service... Since 1886*

THE
*Ten Issue*

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December 2016

# Ten Tips for Navigating the New FLSA Overtime Rules

***By Celeste M. Monroe***

The Fair Labor Standards Act (FLSA) establishes minimum wage, overtime pay, recordkeeping, and child labor standards that affect full-time and part-time workers in the private sector and in federal, state and local governments. Under the FLSA, all covered employees must earn at least $7.25 an hour.

However, employers with employees in Washington must comply with the Washington Minimum Wage Act (MWA) and any minimum wage law imposed by local governments. The minimum wage in Washington is currently $9.47 an hour.[1] Under both the FLSA and MWA, employees are entitled to overtime pay of one and one-half times their regular hourly rate for all hours worked over 40 in a workweek.

These minimum wage and overtime provisions apply generally to all "employees" unless the employees can be classified as "exempt" from the provisions. An exempt employee has virtually no rights under the FLSA overtime rules other than to the full amount of the individual's base salary in any work period during which s/he performs any work (less any permissible deductions). Nothing in the FLSA prohibits an employer from requiring exempt employees to "punch a clock," work a particular schedule or "make up" time lost due to absences. Further, the FLSA does not limit the amount of work time an employer may require or expect from an exempt employee.

Since 1940, the Department of Labor (DOL) regulations have generally required each of three tests to be met to qualify for an exemption:

(1) Salary Basis Test: Employee must be paid a predetermined and fixed salary that is not subject to reduction because of variations in the quality and quantity of work performed.

(2) Salary Level Test: The amount of salary paid must meet a specified minimum amount.

(3) Job Duties Test: The employee's job duties must meet the duties defined in the regulations.

For the past 12 years, the minimum salary level has been $455 a week (or $23,660 annually), exclusive of board, lodging or other facilities. However,

**FLSA OVERTIME RULES**
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# The Top Ten Ways a Lawyer Gets in Trouble

***By Christopher Howard and Allison Krashan***

Lawyers can find themselves in various forms of trouble, including losing clients, lawsuits or grievances. Why? This top 10 list is not scientific, but it draws from many sources, and includes recent apparent trends. The order is somewhat arbitrary, but certain behaviors and practices are consistently more risky for lawyers, justifying their relative ranking. In most cases, these risks can be addressed and mitigated by careful practice.

### 10. Being the Victim of a Trend

"Trends" can be as simple as targeting lawyers in the client trust account scams, usually set up from offshore by scammers who have a better understanding of our banking rules than most lawyers. Other trends can be observed from the lawsuits being filed against law firms. Many suits relate to economic events, such as the blip up when lawyers were sued as the deep pocket of last resort after the widespread real estate crash of the last decade. There appears to be a current upswing in lawsuits related to estate planning as the parents of the Baby Boom generation transition their wealth.

One way to avoid being such a victim is to resist trying to catch the popular wave or fad in legal business, whether that is trying to cash in on the next Dot-Com Boom or on real estate mania. Many lawyers get caught up as defendants in litigation when the bubble bursts. This is compounded by the temptation of a lawyer to dabble in a new popular area.

### 9. Technology, Including E-Discovery

Ever-changing technology presents many risks to lawyers. A lawyer takes a huge risk when he does not fully understand the technology issues necessary to comply with e-discovery requests. The lawyer should take early steps to document advice given to a client for a litigation hold.

Adequately assisting in appropriate discovery responses requires an understanding of the client's technology. Cases around the country have held the lawyer responsible for a client's inadequate e-discovery responses. The lawyer cannot sit back and simply wait for the client to provide its electronic discovery. A lawyer must be proactive and learn the necessary technology to understand the process and guide the client in responding when electronic discovery is appropriate.

Another technology risk occurs when the lawyer does not understand her own tools. A lawyer needs to know and be conversant in the technology she is using (e.g., email, wireless Internet, cloud storage, etc.). RPC 1.1, Comment [8], requires a lawyer to keep abreast of changes in relevant technology as part of competence.

A lawyer should be aware of the risk that data can be intercepted when using a non-encrypted or unsecure public network, or placing confidential client information in the cloud. Lawyers and firms have a responsibility to make reasonable inquiry in this area, including such niches as cloud service providers, or face potential liability.

### 8. Fiduciary Duties

Once a lawyer accepts a client, a fiduciary relationship is established. This may limit the lawyer's freedom of action.

In lawsuits, lawyers frequently get blindsided by assertions of breach of fiduciary duty that were not obvious except in retrospect. A frequent example is representing one's own transactional work in subsequent litigation (e.g., undertaking the litigation

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**President's Page**

*By Kathryn M. Battuello*

# *Stepping up: An Antidote for December's Dark Days*

KCBA members represent a variety of political perspectives. Each member's views on policy issues affecting our community and our country should be treated respectfully and all members should feel welcomed and supported by their professional association.

Wanting to honor our diversity of political thought, I considered devoting this column to subjects that did not involve the outcome of the presidential election. However, given that the outcome portends a sea change on many if not all major policy issues facing our community and country, may have profound implications for all federal courts (and by extension our state courts), and could significantly affect social and economic justice advances that have occurred over the past eight years, it is difficult to find a "safe haven" topic.

So, I've decided to touch on an issue of concern to me that I suspect is on the minds of all KCBA members. For me, the most devastating outcome of this election is the message it sends about voter attitudes on issues of diversity, inclusion, equality and justice.

More than 50 percent of voters (including those who voted for Donald Trump and those who declined to vote for any presidential candidate) either accept or are willing to overlook his bigoted and at times hateful campaign messages about women, racial and ethnic minorities, Muslims, immigrants, the LGBTQ community and refugees.

Post-election reassurance that Trump's campaign rhetoric is not indicative of his actual views is immaterial to those who believe that his election gives them a license to target individuals and groups who should be protected from discrimination, violence and injustice under the laws of our country. We've seen the power of this "license" play out in secondary schools, college campuses and communities across the country over the past several weeks, where blacks and Muslims in particular have been subjected to hate speech, including threats to their personal safety. And, for many, some of Trump's designated advisors and Cabinet appointees underscore a concern that his campaign rhetoric was indeed a mirror into the attitudes and values that will shape his administration's political agenda.

I suspect this analysis concerns all KCBA members because fighting injustice is central to KCBA's mission. Promoting access to justice is what our members do through their generous donation of volunteer hours and financial contributions to support our remarkable network of Pro Bono Legal Services programs and the advocacy work undertaken by our Public Policy Committee. Indeed, as I've come to terms with what this election means for my community and how I am going to respond, I've reflected more than once on the remarkable work that is done by KCBA, its safety-net partners in the access-to-justice community, and our courts.

Many well-known journalists and political commentators have offered advice on how to address this issue. Drawing on what has been written to date, as well as conversations with family, friends and colleagues, I urge KCBA members to consider one or more of the following action items.

1. Hustle like Russell. If you are inclined to withdraw from any civic or political engagement for the next four years, including perhaps turning off NPR, canceling your newspaper subscriptions or leaving the country, stop and think about Russell Wilson.

This season in particular, his performance as quarterback for the Seahawks provides a compelling role model. Faced with injuries that would cause many to sit out the season while turning inward to rehabilitate, he elected to stay in the game and fight. He started off slow, clearly restricted in his ability to move the game forward.

On November 13, he led his team to victory against their archrival, Tom Brady and the New England Patriots. On November 20, while leading his team to victory against the Philadelphia Eagles, Wilson broke personal and league records, including catching a touchdown pass in support of the cause.

The Seahawks are not moving to Canada. If you are concerned about the future for equality, justice and plain old decent civil discourse, stay and fight the good fight.

2. Take every opportunity to use your articulate, well-informed, legally trained voice to fight injustice. Write your elected officials and express your opposition to policies, regulatory changes, appointments and practices that undermine the rule of law, deprive individuals of due process, deny access to health care and interfere with equal access to justice.

Respectfully challenge your friends, family members and colleagues who make degrading comments about or want to "tell a joke" that is offensive toward women, minority groups, LGBTQ members, Muslims, Jews or disabled individuals. Explain why their words are dangerous and how they can lead to injury.

3. Take time to look in the mirror and question whether your efforts to fight injustice and hate speech are undermined by your own intolerance toward voters who disagree with you, simply because they disagree. Does it help advance social justice to be condescending toward folks who live outside the bubble? Is it fair or equitable to look the other way when people stereotype voters who supported Trump as demons, neo-Nazis or dumb****? Strive to always lead by positive example.

4. Remind yourself that with every election cycle there is a risk that the newly elected leadership will not share your political views or promote policies that advance the causes you believe are important for your family or your community. Take heart in the fact that the mid-term elections are only two years away and consider getting more politically involved, by running for office or seeking out incumbents or new candidates to actively support in the next election cycle.

5. Become more actively involved with KCBA and its partners that support the access-to-justice safety net in King County, including Columbia Legal Services and Northwest Justice Project. Expand your efforts to include other groups such as the Northwest Immigrant Rights Project, ACLU, Planned Parenthood and Conservation Northwest that play a critical role in advancing civil rights, women's reproductive rights, social justice and environmental causes.

Don't overlook the important role the Southern Poverty Law Center (SPLC) plays in fighting hate crimes and remember that you can have breakfast with Morris Dees, SPLC co-founder, at the 2017 Breakfast with Champions.

6. If you are inclined toward year-end giving, use the election as a reason to give generously and with purpose, focusing on those agencies, foundations and entities that advance causes in line with your values around tolerance, inclusion, equal opportunity and equal access to justice.

You will feel better during the dark days of December if you actively join KCBA's efforts to fight injustice, in all its forms. Thank you for all that you do to advance KCBA's mission. Happy holidays and best wishes for a peaceful new year. ■

*Kathryn "Kate" Battuello is the president of the King County Bar Association. She works at the University of Washington where she serves as the director of external business relations for the School of Medicine. She can be reached at kbatt@uw.edu or 206-616-5879.*

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**KCBA Mission Statement**
The King County Bar Association provides support to its diverse membership; promotes a just, collegial and accessible legal system and profession; works with the judiciary to achieve excellence in the administration of justice; strives to benefit the community through its own efforts and those of its Foundation; and offers opportunities for public service and input into matters of public policy.



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**King County Bar Association**
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Profile Illustration by Mike Durrant

*From the Desk of the*
**EXECUTIVE DIRECTOR**

# *Wrapping up KCBA's 130th Year: Where Do We Go from Here?*

***By Andrew Prazuch***

The last column of 2016 seems a fitting forum to offer some final reflections on KCBA's 130th year with an eye toward the 131st.

First, I note that the King County Bar Association has witnessed — and participated in — a lot of history during these past many years.

During this century and a third, KCBA has seen 22 U.S. presidents, from Grover Cleveland to Barack Obama, come and go, including some great leaders and some dismal ones. KCBA and the republic have survived and ultimately prospered through each election, even with temporary setbacks.

Our predecessors surely saw many troubling local and national election results in their day, yet the bar remained united to advance its mission of promoting a just, collegial and accessible legal system and profession, and working with the judiciary to achieve excellence in the administration of justice. I have no reason to doubt KCBA will continue to succeed as we have always done.

Second, whenever those challenging times do come to our nation, state and county, KCBA's history tells us we have a record of success.

From our work in 1886 to discipline lawyers who would deny due process to Chinese immigrants, to our leadership in 1938 to establish the first Legal Aid Bureau for the poor, to our vision in 1969 to create a minority law student scholarship program, this bar association has led public opinion and legal analysis to benefit our community.

While it might be easy to rest on our laurels, I'm a strong believer in renewing KCBA's credentials as frequently as opportunities present themselves. And that's what turns this month's 130th anniversary reflection toward the future.

I begin by noting that I come at prognostication as an optimist. I understand why some people have crystal balls with permanent cracks in them that always predict doom and gloom ahead, but for me it's far less depressing and far more inspiring to interpret the images in a positive way. So, while some might interpret data about potential large numbers of seasoned attorney retirements and new technologies for practicing law as signs of the apocalypse for a bar association, I choose to process that information as a sign of opportunity for KCBA.

So, what is ahead for KCBA in our 131st year in 2017? What's coming in 2018, 2019 and 2020? What will King County attorneys need from their bar association? How can the Association best support the judiciary in the administration of justice? Are there ways to position KCBA to have a role in the future legal profession?

It just so happens that the KCBA Board of Trustees has been asking those same questions and identifying more areas of inquiry, as the trustees begin crafting a multi-year strategic plan for the unknown future that lies ahead.

Two simultaneous initiatives should help us identify the path ahead to that future. A "membership future" work group, chaired by Second Vice President Harry Schneider, will be collecting data and ideas from both members and nonmembers about the forces that those attorneys see as challenges and opportunities for the practice of law. We'll be launching an online survey in January to collect this information. Also as part of this effort, the work group will reach out to sister metropolitan bar associations across the country to assess what lessons might be learned from similar experiences of our peers.

The findings from this work group will then flow into the Board's second initiative, a "strategic plan" work group, chaired by First Vice President Andrew Maron. This group will develop a series of recommended (and prioritized) focus areas related to the bar's external and internal programs and operations. The anticipated outcome is that the Board of Trustees will have a long-term (3–5 year) guide for remaining responsive and receptive to the changes ahead for the profession.

With a respectful reflection on where we've been and a careful look to where we are headed, I'm confident the bar's next 130 years will be off to a good start. ■

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


## Continuing Legal Education

### Title 26 Family Law Guardian ad Litem Training

Annually, KCBA offers the 3-day training component required for application and certification to Title 26 Family Law Guardian ad Litem registries. Anyone is welcome to register regardless of intent to apply for appointment to a GAL registry.

**This is NOT:**

- King County Title 11 Guardianship Guardian ad Litem Registry training,
- Professional Guardian Training,
- Title 13 Dependency Guardian ad Litem training, or
- Adoption Guardian ad Litem training.

**Registry Appointment Details:**
All application requirements, professional qualifications, and background checks must be approved in addition to completion of this training prior to appointment to a registry. Please make sure to check with the registry manager in your county to make sure you will likely qualify for appointment before registering for this training

Register online at www.kcba.org/cle

**February 15, 16, 17, 2017**
8:00am-5:00pm

Washington State Convention Center

20.00 General & 1.00 Ethics CLE Credits

# *KCBA Seeks Annual Award and Board Nominations*

Do you know someone who deserves to be recognized for his or her distinguished and meritorious service in the legal profession or the judiciary? If so, we invite you to nominate your colleagues for one of our annual awards.

Each year, KCBA selects award recipients for the following awards: Outstanding Lawyer, Outstanding Judge or the William L. Dwyer Outstanding Jurist, and either the Helen Geisness Award for distinguished service on behalf of the KCBA or the Friend of the Legal Profession award for meritorious service to the legal profession and justice system. Award recipients are honored at the KCBA Annual Awards Dinner, which will be held at the Sheraton Seattle Hotel on Tuesday, June 27.

Nominations must be received by January 20. Submissions should be made in writing to Kathleen Jensen, Associate Executive Director, King County Bar Association, 1200 Fifth Ave., Suite 700, Seattle, WA 98101, or by email to *KathleenJ@KCBA.org*. For information regarding the nomination process, awards categories, qualifications and past recipients, please visit *http://www.kcba.org/aboutkcba/awards.aspx*.

KCBA members are likewise invited to submit their names for nomination to the KCBA Board of Trustees. Positions open in July include second vice president, treasurer and five trustees. For more information, contact KCBA Executive Director Andrew Prazuch by Friday, December 9 via email (*andrewp@kcba.org*) or phone (206-267-7061). ■

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# How the YLD Can Make You 10% Happier

***By Stephanie Lakinski***

Feeling unmoored? We are tribal beings, having evolved from small, hunter-gatherer bands. Our brains developed uniquely to participate in complex social relationships to care for the members of our tribe and ensure each other's mutual survival.

Yet today, modern life can be isolating. Who is our tribe? Certainly members of our own families. Our tribe of friends may be large but far-flung and frequently accessed via social media networks instead of face-to-face quality time. Our neighbors may be mere strangers.

Enter the power of associations — professional, political, neighborhood or otherwise — to create social ties that are often missing from day-to-day life. Associations make possible new connections that may be less binding than the ties of family and close friends, but nonetheless are grounded in a common interest and purpose.

Alexis de Tocqueville, while traveling through North American communities that were springing up on the prairies and in the forests, noted the unique associational nature of American life:

> Americans of all ages, all conditions, and all dispositions, constantly form associations. They have … associations of a thousand kinds, religious, moral, serious, futile, general or restricted, enormous or diminutive. The Americans make associations to give entertainments, to found seminaries, to build inns, to construct churches, to diffuse books, to send missionaries to the antipodes; in this manner they found hospitals, prisons and schools.

De Tocqueville recognized that associations were central to American democracy. While voting, he observed, signifies giving power away to a delegated representative, associations are a means to create communal power, by joining together and deciding as a community what needs doing and how it shall be done. The association becomes a tool to allow its members to produce the future they envision.[1]

I posit to you that this sense of empowerment, of creating a community together and strengthening our social fabric, is central to the human experience and our happiness. We are adrift in its absence. And that is why I suggest to you that joining an association like the King County Bar Association, or the Young Lawyers Division (YLD), or really any other association, can make you 10-percent happier. Associations can help us make a satisfying life of our own choosing.

For those of you looking for community, here is the YLD. Our members are in their first five years of practice or age 36 or younger (whichever occurs later). We aim to help new attorneys navigate the beginning of their professional lives. We help our members build core competencies by hosting monthly CLEs and workshops. We create social bonds through monthly happy hours and group events. We give back to the community by providing legal services at our free walk-in clinic. We clean up parks together and feed the hungry.

There is also more we can do to increase our collective happiness. First, the YLD needs the association of those of you who no longer qualify as a new or young attorney. You are still an essential part of our community and we welcome your interest in our members. In particular, if you are interested in being a mentor to a new attorney or otherwise supporting the efforts of the YLD, I invite you to email me personally so we can make it happen.

Second, the YLD needs the continued vitality and involvement of new and young attorneys. If that's you, we hope you come out to one of our events to meet others like you who have the same interests and concerns. We want to help you create a community that will stay with you for your professional career. We also invite you to help us determine what else the YLD can do and how it should be done. Our association is for you.

At a time when our country feels divided, my sincere hope and belief is that the power of associations can help bring us together and create meaningful connections through shared purpose — a modern-day tribe, if you will. ■

*Stephanie Lakinski is chair of the Young Lawyers Division. She is an associate at Karr Tuttle Campbell and can be reached at slakinski@karrtuttle.com.*

1 *See* McKnight & Block, *The Abundant Community: Awakening the Power of Families and Neighborhoods* (Berrett-Koehler Publishers, 2010).

# Ten Places Useful Data Could Be Hiding in a Computer

***By Bill Roberts***

All of us are familiar with our favorite computer programs and documents, rarely giving thought to the unintentional information that remains without our knowledge. This article will examine several places where information about a computer user's activities can be found and of which the user is completely unaware.

Much has been said about deleted documents not really being deleted. In this respect, think of the library card catalog you might have used 20 or 30 years ago. Deleting a computer file is like discarding a card from the catalog. The book is still on the shelf until another book replaces it, but there is nothing leading to where the book is. In a computer hard drive, forensic software can usually recreate the "card." Even if the "card" can't be recreated, the file or "book" can usually be located.

**One:** Over time, some files on the hard drive become fragmented. Periodically, Windows collects the file fragments into contiguous space and then deletes the original file fragments, but like the example above, deleting the file just eliminates the user's access to the file. Thus, another form of deleted file is created when the computer defragments the drive.

**Two:** Deleted Outlook emails remain longer because they reside intact in the email database until the emails have been "permanently" deleted and the Outlook data files have been compacted. Although invisible to the user, these files remain in plain view of forensic tools until these two deliberate steps have been taken.

**Three:** Windows allows a user or software to "hide" files so that they are not visible to casual viewers. Although there is the ability to tell Windows to show hidden files, some operating system files are hidden from users, no matter what the user does. For example, every Windows folder contains a file called "$I30" that is only visible to Windows and forensic tools. Every file that is or has been in the folder is listed in the "$I30" file even if the file has been deleted and the file sectors overwritten. Although the data may be gone, they could be useful to show that a particular activity has taken place.

**Four:** One convenient feature of Windows is the ability to have multiple windows open and jump between them. When we do this, Windows moves programs and files not in immediate use from memory to an operating system file called "pagefile.sys" on the hard drive, also sometimes called a swap file. When a different window is selected, the contents of the memory and the file on the disk are swapped, allowing near instantaneous changes for the user. This file is hidden from the user, but available for forensic analysis.

**Five:** Both Word and Excel have the ability to track document revisions by keeping a log of changes as a document is developed. If revision tracking has been turned on, everything that has been typed is saved in the document history and remains, out of sight, even if the revision tracking is turned off later. In both cases, revisions are available to forensic tools.

**Six:** Those of us who use the Windows hibernate feature leave a copy of everything we are working on or viewing at the time in another operating system file called " hiberfile.sys" — sometimes called a hibernation file. This information is restored to memory when we return from lunch and if the memory isn't filled, it bounces back and forth between memory and the hibernation file.

**Seven:** Windows keeps track of nearly everything it encounters in the registry to speed up recurrent access. Previously connected external hard drives and thumb drives are included along with the files accessed. In one case, it was possible to determine when an employee moved a competitor's work from the built-in hard drive to an external hard drive and continued to work on it. Frequently the model number and serial number of the external devices are available.

**Eight:** When a laptop connects to a Wi-Fi hotspot, the name of the hotspot and possible other information about the hotspot will be stored in the registry. Although much of the registry is accessible by a typical IT department, many useful areas are only available to forensic tools. Examples are user IDs and passwords for websites and information that have been entered in online forms.

**Nine:** Another inaccessible folder, System Volume Information, stores a snapshot of the registry and "Recycle Bin" every time software is installed, providing additional useful information. Multiple versions of the registry can frequently be found, possibly showing changes over time.

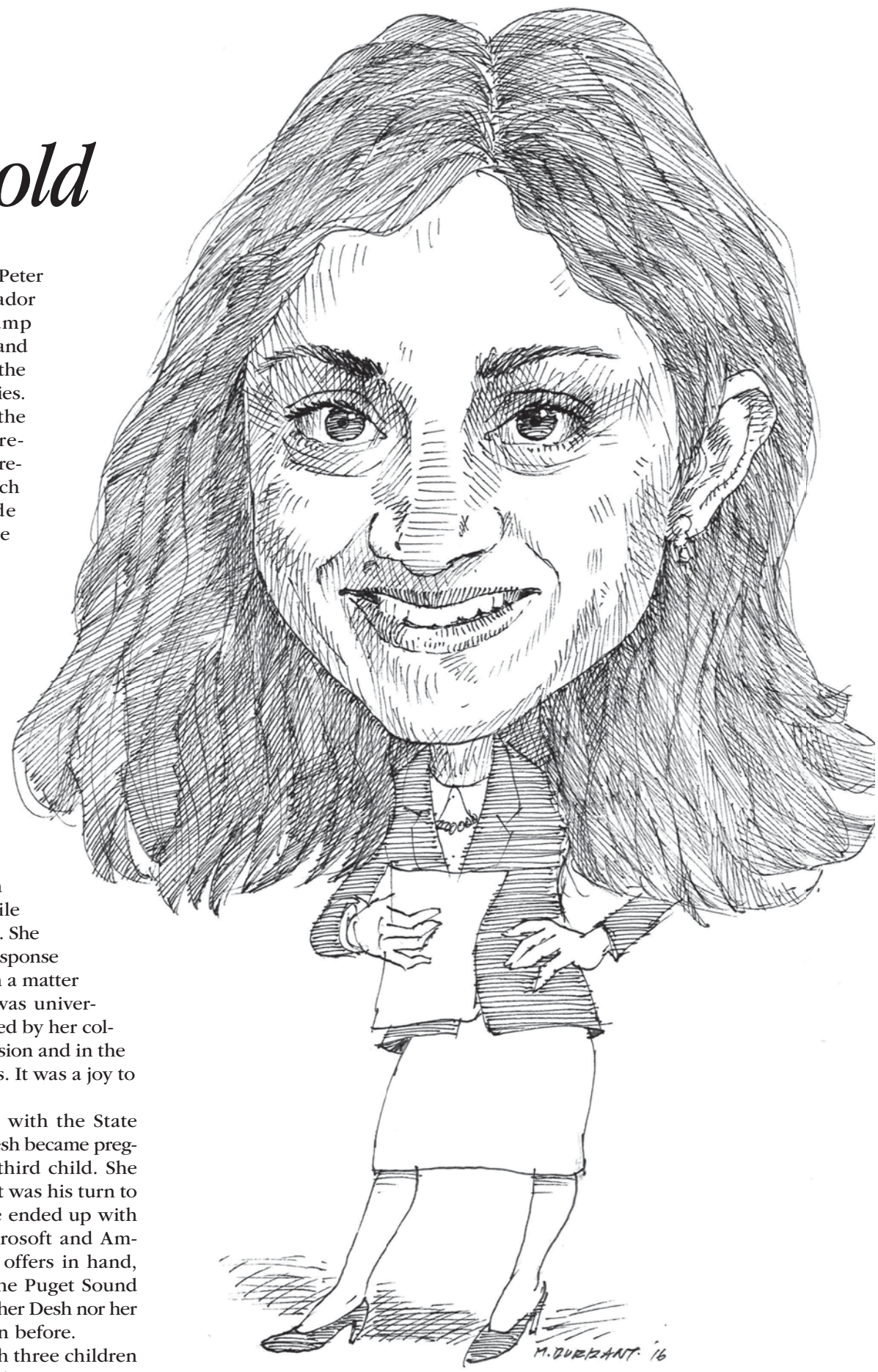
**Ten:** Windows sets aside disk space in blocks of 4,096 bytes, called clusters. If a user file doesn't completely fill the last cluster, the remaining space, called slack space, contains whatever was there previously. This potentially interesting fragment of a file is invisible to the user and most software.

As shown above, there are many places for data to hide in a Windows computer, invisible to the user. All of them are available for examination using forensic tools. ■

*Bill Roberts, PE, CSFA, is a Washington-licensed professional engineer with ClearData Forensics LLC in Renton. He is a CyberSecurity Forensic Analyst and holds a certificate in digital forensics as well as being an occasional contributor to the Bar Bulletin. Comments and questions about this article are welcomed at bill@cleardata-forensics.com.*

## Profile / Pradnya Desh

# *Trading Places; Breaking the Mold*




***By Cynthia Flash***

Pradnya Desh is a true woman of influence — locally, nationally and internationally. Over the past 17 years, Desh has impacted global and national trade and has helped local companies succeed in making their mark on the world.

From her office overlooking evergreen trees in suburban Bellevue, it may be difficult to imagine that Desh was once a CIA analyst. While she didn't work as a spy, she spent years analyzing the economic forces at work in foreign countries to help high-level U.S. government officials (from Cabinet members to presidents Bill Clinton and George W. Bush) understand how this economic data would impact the world. In this role, she helped explain and shape U.S. trade policy.

Then terrorists struck on Sept. 11, 2001. Based at CIA headquarters in Washington, D.C., Desh experienced the horror of those dark days in person. The day of the attack she and her team were evacuated out of the CIA for fear that the building could be a target. The next day she and her co-workers worked 24/7 monitoring the terrorist threat around the world, reporting and making recommendations to the director every few hours.

Their focus eventually shifted away from international trade to instead concentrate on the economy of Iraq. As Congress and President Bush debated whether to invade, Desh served on the team of CIA economic analysts who reviewed the economic impacts of such a decision.

Eventually, Desh tired of working on questions surrounding the war and saw an opportunity to change tacks. As a citizen of the world, Desh is able to communicate well in French, Marathi, Spanish and Russian, in addition to her native English. While attending law school at The Catholic University of America, Columbus School of Law, she took the challenging foreign service exam and became a U.S. State Department diplomat and member of the foreign service stationed in Washington, D.C., and in Geneva.

There she worked as a trade attaché, turning her attention from economic policy to trade regulations and negotiations. While in Geneva, Desh represented the United States' efforts to influence U.S. and foreign trade policies, working with the World Trade Organization (WTO) and United Nations Conference on Trade and Development (UNCTAD) in discussions with foreign government officials to help integrate developing countries into the world trading system.

She worked with Peter Allgeier, U.S. ambassador to the WTO, to revamp trade-related financial and technical assistance to the least developed countries. She also represented the U.S. in trade policy reviews, which are comprehensive reviews of each WTO member's trade policies and compliance with WTO rules.

"Even more than the superior quality of her analytical and written work, I most appreciated Pradnya's attitude," Allgeier wrote. "She was unfailingly upbeat, even in the face of very demanding work requirements. She was totally reliable in meeting deadlines with high quality work while handling multiple tasks. She always had a 'can do' response to requests, even when a matter was new to her. She was universally liked and respected by her colleagues in the U.S. Mission and in the other WTO delegations. It was a joy to work with her."

After four years with the State Department, Desh became pregnant with her third child. She told her husband that it was his turn to put his career first. He ended up with job offers at both Microsoft and Amazon. And with those offers in hand, the family moved to the Puget Sound region, somewhere neither Desh nor her husband had ever been before.

In a new place with three children at home, Desh decided it was time to get back to work. Rather than looking for work at a large established firm, she instead dove right into the private legal profession. She founded Desh International & Business Law in Bellevue in 2011 as a way to bring her international government and business experience to companies.

As managing partner, Desh has grown the company to 10 employees, including nine attorneys who advise companies on business/corporate law, including contracts, employment, regulatory matters, corporate governance, litigation, immigration, intellectual property, international business, and international trade. She and her team help the community by assisting startup to mid-sized companies with legal services.

Having witnessed the impact that trade can have on nations, Desh's goal with her firm is to work with companies that aspire to change the world. She and her team are doing just that by helping clients navigate the global marketplace in areas of trade, international transactions and arbitration, negotiations, and entering new markets.

Desh said she believes in the ability of the market to bring about positive results with solid legal planning, clear goals and effective business practices. As a diplomat and legal adviser to companies, she has focused her career on promoting economic development by helping companies grow. On behalf of clients, she has advised on a range of international trade and business matters, including distribution in China, customs matters in India, anti-competitive practices in Korea, and medical device filing in Brazil.

Desh grew up in Dublin, Georgia, a small town where her parents settled after they were recruited to the United States from India as young physicians. As an Indian woman, Desh has broken the mold of most law firms, building a woman-owned, diverse firm in an industry traditionally dominated by white men.

The firm has grown steadily with year-over-year revenue doubling. Desh has instituted a culture of helping her team members improve themselves so that they can in turn help more people. She leads by example and inspires

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## PROFILE / PRADNYA DESH

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everyone in the firm to work hard while remaining upbeat and positive every day.

"She's very inspirational. She's very creative, always trying to raise the profile of the firm and to think of ways to help us as attorneys and individuals," said Candace Wilkerson, property law senior counsel at Desh. "She wants to make this the best firm possible and believes in the model of helping our firm save the world."

Desh is creative and charismatic. The entire firm this year participated in a Tough Mudder obstacle course competition in Whistler, B.C., not only pushing the lawyers out of their suits and ties, but out of their comfort zones as well. "She's extremely personable and well liked and can accomplish things that more abrasive people may not be able to do," Wilkerson said. "And she's tremendously positive all the time."

Led by Desh, the firm embodies a belief that economic growth and development often result from business collaboration and trade between countries. Desh and her team seek to expand opportunities for people worldwide by actively participating in the liberalization of international markets and by helping businesses succeed in the global marketplace.

Her vast experience and professional reputation serve as inspiration in the industry. She collaborates with cutting-edge companies that want to improve the world, helping them achieve their goals. She is a frequent speaker at various conferences and events around the region, selflessly sharing her knowledge and inspiring others in the industry.

In September 2015, Desh joined Gov. Jay Inslee's nine-day trade mission to Korea and Japan, where she and other delegates met with top-level business and government leaders to deepen economic ties between Washington and the two countries. The group worked to promote trade and collaborate on areas including aerospace, wine, emergency preparedness and climate change.

Three years earlier, Desh had joined Gov. Christine Gregoire's trade mission to India and Korea as well. This is proof of her high standing in the areas of international trade and business, and demonstrates her world view regarding the power of business to promote cooperation and respect between people and cultures.

Although she has lived in the Pacific Northwest for only eight years, Desh has immersed herself in the community, taking on leadership roles that extend beyond the firm. Part of the culture of the firm is to help communities grow and thrive locally and internationally.

Desh also encourages her team to volunteer at the decision-making and service-provider levels of organizations. The firm works on a pro bono basis at local legal clinics for low-income clients, covering a wide range of matters. Firm members tutor at-risk students and many of the attorneys serve on law school alumni committees and nonprofit boards.

Personally, Desh contributes to numerous philanthropic organizations, including serving as a member of the boards of the World Trade Center Tacoma, the Washington Council on International Trade, and Music Works Northwest, as well as previously serving as president of the Seattle Chapter of Upaya Social Ventures. She is active in her church, Bellevue First Presbyterian, and in her children's schools.

She has a huge heart and is always willing to help. She is often approached by parents in the community who want her to inspire their children with her leadership and experience. This demonstrates her reputation as a mentor in the community, which looks to her for inspiration. She leads through example, with charisma that makes others want to follow in her footsteps and improve themselves. She also has a wealth of experience and knowledge that she shares with others freely.

Pradnya Desh simply inspires those she works with, taking the time to offer advice and help them build their practice areas and clients. She also isn't afraid to help with personal matters. And every summer she organizes a team-building retreat for the firm.

"She's very dedicated to helping us find the best methods to help all of us thrive," Wilkerson said. "A lot of people would do that for the sake of making as much money as possible, but she truly seems to care about the people she works with." ■

*Cynthia Flash owns Flash Media Services, a media consulting firm in Bellevue. Desh International & Business Law is her client.*

## FLSA OVERTIME RULES

*continued from page 1*

effective December 1, the weekly salary level increased to $913 a week (or $47,476 annually), exclusive of board, lodging or other facilities. This change has prompted employers to carefully examine employee classifications and has initiated important discussions about how to prepare for the increase.

Here are 10 things employers and their counsel should keep in mind as they navigate the new rules.

1. *An employee who does not meet the job duties test does not qualify as exempt regardless of how much they earn.* An employee may earn well over $913 a week, but if s/he does not perform exempt duties, as defined by law, s/he must be reclassified as non-exempt and will be eligible for overtime pay.

The FLSA provides exemptions for "any employee employed in a bona fide executive, administrative, or professional capacity (including any employee employed in the capacity of academic administrative personnel or a teacher in elementary or secondary schools), or in the capacity of an outside salesman…." It also exempts certain computer systems analysts and programmers. Congress has not defined these terms.

However, the DOL, which enforces the FLSA, has implemented regulations to clarify how employers can determine which employees fit into these exemptions by virtue of their required job duties. The Washington Department of Labor and Industries has implemented similar regulations to clarify the MWA.

Meeting the job duties test is harder than one might think as the exemptions are intended to be limited to employees who perform relatively high-level work. Whether the duties of a particular job qualify as exempt depends on what they are and should be reviewed thoroughly for compliance.

2. *The weekly salary minimum is not adjusted for part-time employees.* Even if you have a part-time employee who meets the job duties test, s/he must be paid the minimum salary level of $913 a week to qualify for exemption. If an employee does not meet the minimum, s/he must be reclassified as non-exempt and is eligible for overtime pay.

3. *Salary levels for some exempt positions are not affected by the new rule.* Although the recent amendments increased the minimum salary level for most administrative, professional and executive employees, it did not affect the pay provisions for certain licensed professionals (e.g., lawyers or doctors), outside salespeople or certain retail employees. The hourly salary for the Computer Professional Exemption is still $27.63.

However, the weekly standard salary amount has increased to at least $913 per week. The final rule also increased the highly compensated employee exemption from $100,000 to $134,004 per year. However, Washington does not recognize the highly compensated exemption, so it cannot be applied in our state.

4. *The new rule allows employers to use non-discretionary bonuses and incentive payments (including commissions) to satisfy up to 10 percent of the new standard salary level.* To qualify, the non-discretionary bonus payments must be paid on a quarterly or more frequent basis. Payments promised to the employee ahead of time and calculated according to a fixed formula would likely qualify as non-discretionary.

Employers may continue to pay non-discretionary bonuses and incentive payments beyond those necessary to satisfy the salary requirement, but such payments may only satisfy up to 10 percent of the new standard salary level.

5. *The new rule establishes a mechanism for automatically updating the salary and compensation levels.* Starting Jan. 1, 2020, the minimum salary levels will automatically update every three years based on the 40th percentile of weekly earnings of full-time salaried workers in the lowest wage census region, currently the South. The DOL will publish a notice of the new updated thresholds in the Federal Register at least 150 days before those updated amounts take effect.

6. *Certain workers are not considered employees for purposes of the Act.* Bona fide interns, volunteers and independent contractors are not considered employees and are therefore not subject to the protections of the FLSA or MWA. In addition, particular jobs may be completely excluded from coverage under the FLSA overtime rules or are governed by other federal labor laws, in which case the FLSA does not apply. For example, most railroad workers are governed by the Railway Labor Act and many truck drivers are governed by the Motor Carriers Act, not the FLSA.

7. *Be careful with independent contractors.* Classic signs of an independent contractor are that the individual has his/her own business ID number, performs work for other clients, invests in and manages his/her own business, does not require training or supervision, and provides services that are tangential — rather than integral — to the customer's business. However, agencies and courts are becoming more demanding in the criteria to establish independent contractor status and misclassification can be very costly.

8. *Review company policies for people working after hours.* Employees often check work emails or take business calls outside work hours. If those employees are exempt, they are not entitled to additional compensation for the time. For non-exempt employees, however, all time worked is compensable, regardless of time or location.

If employees are reclassified as non-exempt after December 1, companies may need to consider a policy prohibiting non-exempt employees from using electronic communication devices for work-related activity after work hours unless required by management.

9. *Know your options.* Employers have several options for responding to the updated standard salary level. For each affected employee newly entitled to overtime pay, employers may:

(a) increase the salary of an employee who meets the duties test to at least the new salary level to retain his or her exempt status;

(b) pay an overtime premium of one and a half times the employee's regular rate of pay for any overtime hours worked;

(c) reduce or eliminate overtime hours;

(d) reduce the amount of pay allocated to base salary (provided that the employee still earns at least the applicable hourly minimum wage) and add pay to account for overtime for hours worked over 40 in the workweek, to hold total weekly pay constant; or

(e) use some combination of these options.

The circumstances of each affected employee will affect how employers respond. Keep in mind that employee morale can be impacted when an employee is reclassified from exempt to non-exempt as many see this as a demotion.

10. *Understand that the cost of noncompliance is significant.* Wage claims add up quickly. The following illustration demonstrates how costly a damage award could be for a claim brought by an employee making $10 per hour:

- $5 per day multiplied by 5 days per week = $25/week;
- $25 per week multiplied by 50 weeks per year = $1,250/year;
- $1,250 per year for 2 years = $2,500;
- $2,500 for 2 years multiplied by 2 as liquidated damages = $5,000;
- $5,000 multiplied by the number of employees in class action = tens or hundreds of thousands; plus
- Attorneys' fees and costs = hundreds of thousands or millions. ■

*Celeste M. Monroe is a shareholder at Karr Tuttle Campbell and a member of the firm's Employment and School Law groups. Monroe advises her clients on all aspects of the employment relationship, including hiring, discipline and termination, as well as on matters such as harassment, discrimination, disability accommodation and wage-and-hour compliance. In addition, Monroe regularly conducts investigations into workplace misconduct.*

1 The passage of I-1433 will further increase the Washington minimum wage.

*Tending to the Children:*

# The Trend Toward Equal Parenting

***By Megan Stanley***

There is a definite trend in King County family court decisions toward 50/50 parenting plans. The question is whether this trend is beneficial for children and whether family law practitioners should advise clients to seek a 50/50 parenting schedule.

RCW § 26.09.187(3)(b) provides:

> Where the limitations of RCW 26.09.191 are not dispositive, the court may order that a child frequently alternate his or her residence between the households of the parents for brief and substantially equal intervals of time if such provision is in the best interests of the child. In determining whether such an arrangement is in the best interests of the child, the court may consider the parties' geographic proximity to the extent necessary to ensure the ability to share performance of the parenting functions.

What's missing from the statute is a requirement that the parties have the ability to cooperate and communicate effectively to ensure that a 50/50 parenting schedule is workable for the children. Parents with a history of effective communication and cooperation are more likely to be able to successfully co-parent in a way that is workable for the children.

All too often, parties seek modifications a few years after the final parenting plan is entered because the 50/50 schedule is not viable, especially in those cases where the parents did not have a good working relationship at the time the initial plan was entered. This also occurs when there has been a pattern of coercive control by one parent, which increases conflict and puts the children at risk.

It is wise for practitioners to review the factors the court considers in RCW § 26.09.187(3)(a)[1] to help clients evaluate whether a 50/50 parenting plan is warranted for their family situation. The statute provides that the court should make residential provisions that are consistent with the child's development and consider the strength and stability of the child's relationship with each parent, each parent's past and potential for future performance of parenting functions, the parents' work schedules, etc. The statute provides that the strength and stability of each parent's relationship with the child should be given the most weight.

Rather than focusing on the fact that your client wants equal parenting, we should ask questions such as how extensive was their involvement in parenting during the marriage? Can they work effectively with the other parent? Do they live close to the other parent and ideally within the child's school district? Are they willing and able to follow a 50/50 parenting schedule given their career and lifestyle?

Another prudent idea is to advise clients to read *The Co-Parents' Handbook* by local parenting coach Karen Bonnell and child specialist Kristin Little, and consider whether they can envision an effective co-parenting relationship with the other parent. The American Academy of Matrimonial Lawyers publishes Child-Centered Residential Guidelines that can help clients develop appropriate parenting schedules.

Parents should also consider the age of the children. With young children, parents should think about creating a phased-in plan where the parent who has not been the primary residential parent gradually increases their time with the child as the child grows older, so that parent develops a greater role in the child's life.

For teenagers, an equal parenting schedule can become increasingly difficult to maintain. Teens need and desire greater control over their schedules. Encourage parents to include a flexibility clause in the parenting plan that allows the child some flexibility in the weekly schedule without letting the child dictate the overall schedule.

Before advocating for an equal parenting schedule, family law practitioners need to counsel clients to look truthfully at their parenting skills, their history of cooperation with the other parent and the likelihood that they can manage an equal parenting schedule. Having a workable and realistic parenting plan that truly serves the children's best interests also serves the parents' interests and reduces the likelihood of a subsequent modification action. ■

*Megan Stanley is an attorney with Integrative Family Law, PLLC.*

1 RCW § 26.09.187:
(3) RESIDENTIAL PROVISIONS.
(a) The court shall make residential provisions for each child which encourage each parent to maintain a loving, stable, and nurturing relationship with the child, consistent with the child's developmental level and the family's social and economic circumstances. The child's residential schedule shall be consistent with RCW 26.09.191. Where the limitations of RCW 26.09.191 are not dispositive of the child's residential schedule, the court shall consider the following factors: (i) The relative strength, nature, and stability of the child's relationship with each parent; (ii) The agreements of the parties, provided they were entered into knowingly and voluntarily; (iii) Each parent's past and potential for future performance of parenting functions as defined in *RCW 26.09.004(3), including whether a parent has taken greater responsibility for performing parenting functions relating to the daily needs of the child; (iv) The emotional needs and developmental level of the child; (v) The child's relationship with siblings and with other significant adults, as well as the child's involvement with his or her physical surroundings, school, or other significant activities; (vi) The wishes of the parents and the wishes of a child who is sufficiently mature to express reasoned and independent preferences as to his or her residential schedule; and (vii) Each parent's employment schedule, and shall make accommodations consistent with those schedules. Factor (i) shall be given the greatest weight.

## LAWYERS IN TROUBLE

*continued from page 1*

to enforce a contract drafted by one's firm). In later litigation, the lawyer will be asked if he disclosed any inherent conflict in a provision (e.g., the firm's incentive to not question the quality or validity of the contract it drafted). The allegation will be that the lawyer put his interest in defending his own work over the client's interest.

Fiduciary issues can also arise with negotiations or renegotiations of billing arrangements, etc. Alleged breaches of fiduciary duty are rarely the reason a lawsuit is started, but they get thrown in and include additional remedies such as disgorgement, often not covered by insurance.

### 7. Conflicts

Conflicts are still getting law firms in trouble. Lawyers, anxious to get new work, may breeze through the conflict process without getting all names or correct names or without completely analyzing the conflict report. This can leave time bombs in the representation. Surprisingly, the person seeking representation may not know the correct corporate identity. This must be clarified before conflicts can be adequately completed.

To further complicate matters, RPC 1.7, Comment [6], suggests conflicts be run before undertaking certain adverse discovery. If there is corporate restructuring or new parties are added in the middle of representation, conflicts often need to be rerun. Most firms have protocols in place for running conflicts when lateral lawyers join, but such protocols should be in place for paralegals and many other staff positions, also. Overlooking any of these steps can get the firm in trouble, conflicted out of representation and even fees disgorged.

### 6. Poor Communication

Cases can be lost by poor communication with the other side, witnesses or the court. Lawsuits against lawyers can also be started because of inadequate communication with one's clients.

Communication includes documenting the conflicts process and any required informed consent; promptly returning calls and responding to emails; and keeping clients informed of the process involved in the representation, including the timelines they should expect for anticipated issues and tasks.

Communication also includes the bills. It is a best practice to communicate in advance about anticipated expenses and costs, and to update that as the representation continues. Good communication tends to encourage client satisfaction.

No one likes bad news. Bad results, unanticipated expenses and inconvenient demands on client time all contribute to client dissatisfaction. As lawyers, we want to help our clients do what they want. If the case does not always go as desired, these are tough conversations to have with our clients and should not be avoided as it does not get any easier.

In fact, avoidance can make matters worse. Lawyers can get themselves in trouble when they fail to accurately or timely advise a client as to the realistic likely outcome. When lawyers fail to manage client expectations, the clients may be disappointed in the result and take it out on the lawyer.

### 5. Inadequate Supervision

A lawyer can do a fine job personally, including communication, and still run into problems for inadequate supervision of others working on the case. RPCs 5.1 and 5.3 deal with the lawyer's responsibility to supervise other lawyers and non-lawyers.

Assuming staff attached the correct exhibits, or sent the filing to the correct courthouse, or that the young associate is ready to handle the specific complex assignment can all be risks, especially where so much is happening so quickly in this world of electronic communication and e-filing.

### 4. Dabbling and Legal Errors

Whether it is because the pressure mounts to bring in new work or because your neighbor needs a favor, practicing outside one's area of knowledge is a high risk for legal errors and for errors from procrastination (presumably because the lawyer was not sure what to do).

RPC 1.1 allows a lawyer to take on a matter in an area in which he does not yet have experience, but it is necessary to achieve the requisite level of competence through preparation (RPC 1.1, Comment [4]) or association of counsel (RPC 1.1, Comment [2]) or by other similar efforts.

Although lawyers can and do pioneer new areas all the time, taking on such work presents greater risk, and new paths should not be undertaken without the commitment to become competent in the area involved.

### 3. Missed Deadlines

Lawyers still miss deadlines. Nationally, this is on the rise. This could be for several reasons, including lack of adequate supervision of staffing; taking on too many matters and juggling too many deadlines; defeating, ignoring or simply not knowing how to use the docketing systems; and failing to understand electronic filing systems.

This should be the most avoidable cause of errors, but it is on the rise. Docket, docket again, and check your docketing to avoid this problem.

### 2. Taking on Bad Clients

It is always clear in retrospect when a client should not have been accepted, but not often so clear at intake. There are many warning signs.

The client appearing to be unscrupulous or having unreasonable expectations at the outset are clear red flags. Another red flag is clients changing lawyers, especially if they will not let you speak with the prior lawyer. Other red flags may be less apparent, such as issues in communication, or by the client being overly effusive, complimentary and/or manipulative in communication. Clients who say at the outset that "price is no object" rarely mean it, will rarely pay the advanced fee deposit, and then will balk at your first bill.

One of the simplest steps to screen out undesirable clients is to require an advanced fee deposit. This may not have to be much, as many of the clients who exhibit one or more of the red flags above will balk at any amount required in advance.

And be wary of taking on matters for family or friends, as they pose an increased risk, especially if the issue is outside of one's practice area (see dabbling, above). Remember, no good deed goes unpunished.

### 1. Suing for Fees

A lawyer resorting to bringing a lawsuit against a former client to collect fees is by far the most common trigger for a lawsuit (or counterclaim) being filed against that lawyer. The act of suing drives the presumably former client to another lawyer and that lawyer's first idea for a defense on the bill is a counterclaim for malpractice.

But there are other reasons these situations lead to more lawsuits. Unpaid fees often correlate to other issues, such as poor attorney-client communication. The classic scenario involves a lawyer not wanting to address with a client what has not gone well in the case, and holding back the bills (as well as maybe the bad news). As the time entries get older, the bill is less likely to be paid, and the client is less likely to be understanding about the bad news. If the result and the time entries are old news when the bill goes out, the likelihood of a problem increases significantly.

The easiest way to reduce this risk is to stay on top of client communication, including billing and accounts receivable. Bad news is best delivered fresh, as are most bills. And, although many lawyers do not like to make calls about accounts receivable, addressing such issues early is a good loss-prevention step. ■

# 10 Tips for Finding the Opinion Leaders During Voir Dire

***By Thomas M. O'Toole and Jill D. Schmid***

There is no denying that "picking" the "perfect" jury is difficult. No matter what anyone says, it is impossible to predict exactly how any one individual is going to decide the case. All one can really do is look for indicators or glimpses into how a potential juror might decide the case.

To do so, some attorneys rely on demographics, some look for behavioral cues, and others use voir dire to explore jurors' case-related attitudes and life experiences. While some methods are more reliable than others, they are all imperfect tools since no one can predict the future.

These imperfections inevitably lead to moments of uncertainty during jury selection. Even when attorneys are confident in their identification of "bad jurors," sometimes there are not enough peremptory strikes to get rid of all of them.

In these tough situations, it's best to look to focus on opinion leadership traits. If there is uncertainty whether a juror is "good" or "bad," remove the opinion leaders. If there are five "bad jurors," but only three peremptory strikes, remove the opinion leaders. Opinion leaders, by definition, are going to exert more influence over the course of deliberations.

This makes the choice a matter of risk reduction. When you are uncertain about how an opinion leader will decide the case, you can be very certain that the consequences of "getting it wrong" by keeping an opinion leader on the jury are significant.

In this article, we identify 10 common signs to look for during voir dire that signal someone will be an opinion leader in jury deliberations.

**1. The prior foreperson.** Consistent with the popular saying that "the best predictor of the future is the past," prior experience as a foreperson is a strong indicator that someone will exert influence in deliberations.

This prior experience establishes that the individual is willing and able to serve in this incredibly important role, and that his or her peers view them as capable. Some studies show that the foreperson accounts for as much as 25 percent of the comments made during deliberations. In our experience, the foreperson's influence extends not only to the amount of time they are speaking, but also to their ability to influence how the discussion proceeds.

**2. The prior juror.** Several studies show that prior experience serving on a jury is the best predictor of who will be elected foreperson. The selection of the foreperson often begins with the question, "Who has done this before?" This deference to the person who is most familiar with the process allows him or her to exert considerable influence over the group as highlighted in the previous point.

**3. The workplace manager.** People who manage groups of people at work have greater experience, comfort and ability to take charge in a small group. Experienced managers know how to deal with disagreement and conflict, which allows them to take on a moderator role. This gives them authority and, consequently, credibility in the eyes of the other jurors.

**4. Strong moral convictions.** Some studies of jury deliberations have shown that the most vocal and influential individuals in deliberations are those who exhibit strong "moral reasoning." In other words, these individuals tend to evoke common principles of right and wrong, in addition to other core human values such as personal responsibility and accountability.

These values and principles are important to them personally, which motivates them to be more vocal advocates in deliberations. During voir dire, the potential juror who evokes right/wrong values when recounting experiences and/or readily makes "judging" types of comments, is likely to use these values to lead during deliberations.

**5. The non-testifying expert.** The non-testifying expert on the jury is the individual who has personal experiences related to the case facts or issues. These experiences connote "expertise" in the minds of other jurors.

For example, a nurse serving as a juror in a medical malpractice case brings his or her own medical expertise to the deliberations and other jurors will rely upon that expertise to fill evidentiary gaps or to resolve areas of confusion or conflict. Non-testifying experts can be particularly dangerous opinion leaders because, absent the presence of other jurors with related expertise, the information they inject into deliberations often goes unchecked.

**6. The educated individual.** Several studies have shown that education is a predictor of who is selected as the presiding juror. Specifically, studies have found that presiding jurors tend to have a stronger educational background than other members on the jury.

For example, a juror with a post-graduate degree is more likely to be elected foreperson than a juror with a GED. There is also some evidence that higher education translates to a better understanding of the jury instructions and general legal framework of the case, which allows the educated members of the jury to exert more control over how the case is decided.

**7. The confident speaker.** Attorneys should look for the person who is comfortable and confident speaking in front of others during voir dire. A courtroom is an intimidating environment for the average person.

When attorneys ask questions, they are asking jurors to engage in an act of public speaking in front of a large group of strangers with the added pressure of being under oath. Public speaking is the No. 1 fear in our country, so it is a strong sign of leadership when someone can comfortably and confidently offer their opinions in voir dire.

**8. The articulate speaker.** In addition to comfort and confidence, the ability to articulate opinions in a simple and compelling fashion indicates strong leadership potential. An articulate person is a credible person. This is a person whose opinions about the case will have greater persuasive force in deliberations due to his or her ability to explain them in a clear, simple and compelling way.

**9. The social butterfly.** The social butterfly is the person who is very comfortable with and seems to enjoy striking up conversations with those sitting around him or her during breaks. Striking up a conversation with one person sitting next to them is one thing, but the person who appears to bring multiple venire members into a casual discussion during breaks and downtime is particularly notable. The social ability to bring people together makes someone likable and naturally places them at the forefront of any discussion.

**10. The volunteer.** People who volunteer their time to local organizations and charities, particularly those who chair or lead in their charitable or social organizations, combine a couple of different traits in this list.

First, they are comfortable in new and unfamiliar situations, which is a common prerequisite for being a volunteer in the first place. Second, they are often driven by strong personal values, which increases the chance that they will find a personal connection to the case that motivates them to take an active role in deliberations. ■

*Thomas M. O'Toole, Ph.D., and Jill D. Schmid, Ph.D., are consultants at Sound Jury Consulting. You can learn more about Sound Jury Consulting at www.soundjuryconsulting.com.*

# "Ten Commandments" for Civil Discovery Practice

**I**

Always conduct yourself recognizing that you have a reputation among the judges (or that if you don't yet have a reputation, you will).

**II**

Respect discovery deadlines and heed the standard warnings in the Civil Case Scheduling Order about completing discovery on time.

**III**

Use principles of proportionality and common sense in framing discovery requests.

**IV**

Do not use overbroad "dragnet" language in interrogatories and requests for production.

**V**

Be mindful of the obligations that *Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 858 P.2d 1054 (1993), imposes upon counsel and upon the court with respect to the discovery process.

**VI**

Seek a protective order *before* answers to discovery requests are due, not after your opposing counsel has filed a motion to compel.

**VII**

When appropriate, consider requesting a Rule 16 pretrial conference.

**VIII**

When appropriate, consider moving for appointment of a special master.

**IX**

Respect page and word guidelines with respect to motions.

**X**

Take your opposing counsel to lunch early on in the case, especially if you haven't worked with that lawyer before, so as to minimize the likelihood of "demonizing" your opposing counsel later on.

**– Judge John Ruhl**

*Presented October 14 at the KCBA CLE "Pretrial Procedures: Good Intentions and Unintended Consequences."*

# 10 Golden Rules To Make Your Client Happy

***By John Remsen, Jr.***

We all know that satisfied existing clients are your best source of future business. They will continue to use your services when they need a lawyer, and they are your best referral source for new clients.

Yet, most clients are unable to appreciate a quality work product because they aren't lawyers. Consequently, they tend to judge the quality of your work based on service-related issues and how they are treated when they deal with you and your firm.

Allow me to use the analogy of the automobile mechanic. If you own a car, you know you need a good, trustworthy mechanic to keep the car running smoothly and to fix problems as they arise. You don't necessarily want to know what's going on under the hood. Your mechanic is supposed to know all that stuff. And you trust him to treat you right.

If you are like me, you assess the quality of your mechanic's work based on the way you are treated and whether or not you trust him. Does he listen to you when you bring the car in for servicing? Does he keep your car running smoothly? Does he provide an estimate before he starts the work? Is his bill reasonable and within estimate? Is your car clean and ready when promised? These are among the factors that most people use to evaluate the quality of his work.

I believe that these are the same kinds of factors that clients apply to lawyers and other professional service providers. They don't necessarily want to know the intricacies of the law. They want a good result. They want to feel like you are taking good care of them. They want to trust you. These factors are especially important when you are dealing with a brand new client.

Here are 10 golden rules to make your new client happy:

1. Send your new client a "Client Welcome Kit."

I am amazed at how few law firms do this. In addition to a well-written cover letter from the managing partner, include your firm brochure, a client service pledge, a current list of contacts with direct dial phone numbers and email addresses, and a nice gift.

2. Seek to understand the big picture.

The best lawyers — the ones who deliver the most value to their clients — take the time to learn about their client's business (and personal) goals and objectives. They ask smart questions and do lots of listening. They understand how the particular legal matter they are being asked to handle fits into the big picture.

It's also a smart idea to understand the dynamics and trends of the industry in which your client competes. Visiting your new client's place of business is also a great way to get things started on the right foot.

3. Establish your client's expectations and then exceed them.

Walk your client through how you propose to handle the matter and what he can expect in terms of results and timelines. Create a reasonable set of expectations and do your best to beat them.

If you discover you are unable to meet your commitments, or the results are not likely to be what you anticipated, share that information with the client as soon as possible. In almost all cases, you will be forgiven.

4. Follow through on your commitments.

Set reasonable deadlines and do your best to follow through as promised. If you promise a draft of the contract in three weeks, deliver it in two. Nothing aggravates a client more than a broken promise. It also has a very serious negative consequence when it comes to building trust.

5. Always promptly return telephone calls.

Nothing upsets clients more than an unreturned phone call. **It's the No. 1 complaint clients have about lawyers.**

You may not think a return phone call is all that important (especially if there is nothing to report), but your client sure does. Adopt a policy to return all your calls on the same day. It's a good habit.

6. Communicate with your client in the manner he prefers.

I'm one of those people who like to talk on the phone. After all, I can talk a lot faster than I can type. And I hate it when I place a phone call to discuss an issue with a vendor and get an email back.

Most clients feel the same way. Ask your new client the method and frequency of communication he prefers and deliver your updates and progress reports accordingly. If you can't be flexible, tell your client up front how you operate. Also, see Rule No. 5.

7. Introduce your client to the team working on his matters.

Take the time to invite your new client to your offices to meet the team who will be working on his matter. And make sure you include the paralegals, legal assistants, receptionist and others he is likely to be talking to on a regular basis.

First, it makes your staff feel part of the team and, in many cases, your client is likely to be interacting with them more often than he does with you.

8. Resist the temptation to "overlawyer" the matter.

Trust me; clients don't want to pay their lawyer more than necessary to have their matter properly handled. Many law firms feel the need to research issues to death and uncover every stone to make sure they are 100% correct.

Yet, most clients are happy with 90%. Worse yet, the pressure to generate billable hours often encourages inefficiency and "overlawyering" to meet performance requirements. Be sensitive to the issue and do what's right for your client.

9. Never send a surprise invoice.

It's good practice to discuss estimated fees and costs up front with your new client. Give him a ball park estimate of what your fee will be and discuss any unforeseen developments that may arise. Talk through the options and seek your client's direction on how to handle them.

Never, ever, send your clients a surprise bill. Beyond failure to communicate, this is one sure way to lose your new client and he's likely to tell others about the experience.

10. Show you client that you appreciate his business.

Be sure to invite your client to your firm's annual client appreciation event, take him to a ball game, play golf and invite him to lunch or dinner on occasion. Invest time in building the relationship. Holiday cards are nice, but not nearly enough.

There is more to practicing law than providing quality legal work. You've got to provide great service, too. If you practice these golden rules consistently, you will end up with loyal, long-term clients and an enjoyable and gratifying legal career. And that's a promise!

*This article was authored by The Remsen Group for the court reporting firm Naegeli Deposition and Trial, and was previously circulated in "Naegeli News" online. © 2015 Naegeli Deposition and Trial.*

# Washington Breaks New Ground with Greenhouse Gas Regulation

***By Sarah Wightman***

On September 15, the Washington State Department of Ecology ("Ecology") adopted its final Clean Air Rule ("Rule") after months of stakeholder meetings and public comment, and over a decade of climate policy discussion.[1]

This rule limits greenhouse gas emissions from the largest producers in the state and represents a unique approach at the state level. The rulemaking is a compromise after comprehensive cap-and-trade legislation failed to gain traction in the Legislature. Even though it will not be coupled with a state carbon tax, on the ballot in November, Washington's approach could become a model for other states hoping to address climate change in lieu of federal action.

## Washington Clean Air Rule

*Overview*

The Clean Air Rule[2] applies only to covered parties, which the Rule defines as: 1) the owners or operators of stationary sources located in Washington; 2) petroleum product producers in Washington or importers to Washington; and 3) natural gas distributers in Washington.[3] Once a covered party exceeds a threshold level of greenhouse gas emissions, it is regulated under the Rule and must reduce its emissions.

The greenhouse gas ("GHG") emissions regulated under the Rule are carbon dioxide ("CO2"), nitrous oxide ("N2O"), methane ("CH4"), hydro fluorocarbons ("HFCs"), perfluorinated compounds ("PFCs"), sulfur hexafluoride ("SF6"), and nitrogen trifluoride ("NF3").[4] The GHGs are measured in metric tons of CO2 or its equivalent, and reductions are measured in emission reduction units ("ERUs"). One ERU equates to one metric ton of CO2 equivalent.[5]

There are two categories of covered parties under the Rule: Category 1 and Category 2. All covered parties with GHG emissions averaging at least 70,000 metric tons per year between 2012 and 2016 are Category 1 parties under the Rule[6] and must notify Ecology of their status as Category 1 parties by January 1, 2017.[7] Category 1 parties that emitted a three-calendar-year rolling average of at least 100,000 metric tons of GHG emissions beginning in 2012 must achieve an annual average GHG reduction of 1.7% of their baseline level of emissions between 2017 and 2019.[8]

This compliance threshold of 100,000 metric tons of GHG emissions lowers by 5,000 metric tons of CO2 every three years, eventually requiring reductions from all Category 1 parties by 2035.[9] Reductions are based on each party's baseline. The baseline for Category 1 parties is calculated by using the average emissions between 2012 and 2016, but may be based on an average calculated with as few as three years if a particular calendar year's emissions were calculated with a different methodology.[10]

Category 2 parties include: 1) covered parties that emitted on average less than 70,000 metric tons of GHGs per year between 2012 and 2016; 2) covered parties that did not operate between 2012 and 2016; 3) voluntary participants; and 4) petroleum product importers.[11] Once a Category 2 party emits an average of at least 70,000 metric tons of GHGs per year for three consecutive years after 2012 or requests to become a voluntary participant under the Rule, Ecology must calculate a baseline emissions value using the average of three years of emissions from the party's required annual GHG reports.[12] If the operation is modified or new, the baseline is set using a benchmarking process that entails studying the facility and its operating processes, as well as using recent emissions data from similar operations.[13]

Businesses and organizations that emit 10,000 metric tons of GHGs per year have been required to report to Ecology annually since 2012.[14] Consequently, Ecology knows the parties likely to be regulated by the Rule and has compiled a list of potentially eligible parties based on that data.[15] This list includes nearly 70 potentially eligible parties, including natural gas distributors; petroleum product producers (i.e., refineries and importers); metal, cement, pulp and paper, and glass manufacturers; power plants; and waste facilities.

While many operations will be required to reduce their GHG emissions under this Rule, especially as the threshold for required reductions lowers, there are many exemptions from regulation, including GHG emissions from: 1) suppliers of coal-based liquid fuels; 2) the industrial combustion of fuel wood; 3) coal-fired, baseload, electric generation facilities in Washington that emitted more than 1 million metric tons of GHGs in any year prior to 2008; and 4) the combustion of certain products by petroleum producers, petroleum importers, and natural gas distributors.[16]

Stationary sources included in EPA's Clean Power Plan will be considered compliant with the Rule for the first compliance period (2017–2019) provided that EPA approves Washington's implementation plan and the approved plan requires greater GHG emissions than otherwise required under the Clean Power Plan.[17]

In addition to these exemptions, covered parties identified in the Rule as energy intensive and trade exposed ("EITE") are not considered Category 1 parties, even if otherwise qualified, until 2020, with GHG reductions first due in 2023.[18] In addition, EITE parties go through a different baseline and reduction calculation process.[19] Examples of EITE parties include manufacturers of frozen fruit, juice or vegetables; animal (except poultry) slaughterers; pulp mills; nitrogenous fertilizer manufacturers; lime manufacturers; iron and steel mills; aircraft manufacturers; and petroleum product importers, among several others.[20]

*Achieving Compliance*

The covered parties that emit GHGs above the threshold for regulation must achieve an annual average GHG reduction of 1.7% of their baseline level of emissions and submit a compliance report demonstrating reductions every three years. There are several ways covered parties can make the required reductions.

First, a party could simply reduce its GHG emissions. While this may be possible for some, the Rule gives covered parties the option to use emission reduction units ("ERUs") instead of requiring GHG reduction. ERUs work as currency under the Rule and can be generated, recorded, banked and exchanged by covered parties.

ERUs are generated by a covered party, including a voluntary party under the Rule, when that party emits fewer GHGs than allowed.[21] ERUs can also be generated by emission reduction projects, programs or activities.[22] The emission reductions from these projects must be real, specific, identifiable, quantifiable, permanent, and located in Washington.[23] The programs must also be enforceable and verifiable, and not double-counting emission reductions with other legal requirements (except the EPA Clean Power Plan and two Washington GHG standards).[24]

Emission reduction projects include increasing transportation efficiency, implementing energy efficiency measures and demand-side management (including renewable energy credits), reducing the use of nitrogen fertilizer in agricultural operations, and reducing GHG emissions from industrial processes.[25] To qualify, each program must meet specific requirements detailed in the Rule.

ERUs also can be generated through GHG markets outside of Washington if: 1) the allowances are issued by an established multisector GHG reduction market; 2) the covered party may purchase allowances from that market; and 3) the allowances are calculated with similar methodologies to those used under Washington rules.[26] Initially covered parties may use out-of-state allowances to account for 100% of their required reduction; however, by 2023 this reduces to 50% and by 2035 the maximum amount of reduction that can be achieved through out-of-state allowances is 5%.[27]

There are also requirements related to the "vintage year" of out-of-state allowances, meaning that all allowances used for compliance in a particular year cannot have that same vintage year (generally the year the allowance was recorded, assigned by the program supplying the allowance).[28]

Once ERUs are generated, they must be recorded in Ecology's registry, which tracks each ERU from generation, transfer between parties, and — ultimately, once used for compliance — retirement.[29] Each covered party must also keep a record of all ERUs generated or obtained for 10 years.[30]

A covered party may bank ERUs for up to 10 years, and when withdrawing an ERU, it must withdraw the oldest vintage year first.[31] Once an ERU is generated and registered, it may be transferred between covered parties. While only covered parties, voluntary parties and Ecology can hold ERUs, other entities such as brokers can facilitate ERU transactions.[32]

To demonstrate compliance, covered parties over the reduction threshold must submit a compliance report every three years demonstrating the party met the required reduction. This report includes the amount of GHGs emitted as well as ERUs generated, ERUs banked, and ERU transactions.[33] The report must also include documentation that a third party verified that the actions described in the report were permanent, enforceable, and sufficient to meet the Rule's obligations.[34] If the report shows that the reduction requirement was not met, the covered party will be required to purchase ERUs equal to the required reduction amount.[35]

Finally, if a covered party operating over the threshold level and complying with reduction and reporting requirements emits less than 50,000 metric tons of GHGs per year for three consecutive years, it does not have to continue complying with the Rule.[36]

*Ecology's Management Role*

To effectively manage the ERU market, Ecology must establish an account of reserve ERUs. Ecology may retire ERUs from the reserve: 1) to ensure consistency with the aggregate cap limit; 2) to account for GHG emissions by covered parties that do not yet have to make reductions; and 3) to promote the viability of voluntary renewable energy programs.[37] Ecology may also withdraw the ERUs from reserve, assigning them to a stationary source restarting operations or to programs that reduce GHG emissions and are consistent with environmental justice principles.[38]

## Carbon Tax Ballot Initiative

This rulemaking is a compromise for Gov. Jay Inslee after his comprehensive cap-and-trade legislation failed to gain traction in the Legislature in 2015. That legislation would have created a market-based system that limited carbon emissions and charged fees on GHG emissions, raising approximately $1 billion in revenue for the state.[39]

The final Clean Air Rule does not charge fees on emissions or generate revenue for the state, but in November Washington voters had the chance to decide whether carbon emissions in the state should be taxed. Had it passed in the November 8 General Election, Initiative Measure No. 732 ("Initiative") would have implemented

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## GREENHOUSE GAS RULE

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the nation's first carbon tax.

The Initiative proposed a carbon tax applicable to fossil fuels sold or used within the state and electricity consumed in the state, including imported electricity and that purchased from the Bonneville Power Administration. The Initiative excluded from taxation fossil fuel brought into Washington in vehicle tanks. The Department of Revenue would have developed through rulemaking the "carbon calculation" for both fossil fuels and electricity, which involved calculating the amount of CO2 emissions in the taxed fossil fuels and electricity.

The Initiative set the tax rate at $15 per metric ton of CO2 starting July 1, 2017, increasing to $25 per metric ton on July 1, 2018. Thereafter, the tax would have increased 3.5% plus inflation every year, not to exceed a rate of $100/metric ton in 2016 dollars.

Some fossil fuel usage was phased into the taxation scheme, including fossil fuels for agricultural uses, public transportation, nonprofit transportation providers, the Washington State Ferries System, and school buses. Fossil fuels for these uses would have been taxed initially at 5% of the normal rate, which is equal to $0.75 per metric ton of CO2. In 2018, the rate would have increased to 10% of the normal rate, which is equal to $2.50 per metric ton of CO2. The rate for these phased-in fossil fuel uses was to increase 5% every two years until it reached the regular tax rate in 2055.

The Initiative was a revenue-neutral proposal, meaning that all revenue obtained from taxing CO2 would be used to reduce taxes such that the Initiative would result in no net change in the state's revenue stream. In addition to implementing the tax on carbon, the Initiative would have reduced the state sales tax by 1% by July 1, 2018; significantly reduce business and occupation taxes on manufacturing; and increase the working families' sales tax exemption for qualifying low-income people.

### Implications

Combined with the defeat of the Initiative, the eventual outcome of the Clean Air Rule is uncertain. Although the Rule is final and took effect October 17, industry groups already have filed lawsuits challenging the Rule.

A group of natural gas utilities filed a lawsuit in the U.S. District Court for the Eastern District of Washington alleging that Ecology unduly burdened interstate commerce and regulated extraterritorially in violation of the interstate commerce clause by restricting how emissions credits and offsets can be transferred to and from other states.[40] That same group of natural gas utilities and eight other industry groups — including pulp and paper mills, truckers, and food processors — filed two separate suits in Thurston County Superior Court, challenging Ecology's authority to impose the Rule without the approval of the Legislature, in addition to procedural claims.[41]

Ultimately, both the Clean Air Rule and the Initiative are unique policies to address climate change. The Initiative would have created the only carbon tax in the nation and the Rule represents a distinctive policy for requiring greenhouse gas reduction for the highest emitters without a complete cap-and-trade program like California's.

This ad hoc strategy has emerged from Washington's own legislative failure to pass a comprehensive cap-and-trade program. Nevertheless, the Rule's implementation will certainly provide lessons for other states hoping to address climate change as federal regulation in the Clean Power Plan remains uncertain and federal climate legislation seems improbable under the new administration.

For more information, please contact Sarah Wightman or one of the other attorneys in the Firm's Climate Change, Energy, or Alternative Energy practice groups. ■

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1 "Split in Washington State Climate Workgroup Recommendations Shows Challenges in Moving Climate Policy Forward," Marten Law Environmental News (January 27, 2014): *http://www.martenlaw.com/newsletter/20140127-washington-state-climate-policy.*

2 *http://www.ecy.wa.gov/laws-rules/wac173442/x1510a.pdf*

3 WAC 173-442-020(1)(k).

4 WAC 173-441-020(1)(g).

5 WAC 173-442-020(1)(n).

6 WAC 173-442-050(1)(a).

7 WAC 173-442-020(1)(m)(ii)(A).

8 WAC 173-442-030(1); WAC 173-442-060(1)(b)(i).

9 WAC 173-442-030(3).

10 WAC 173-442-050(2) and (3).

11 WAC 173-442-050(1)(b).

12 WAC 173-442-050(4).

13 WAC 173-442-050(5).

14 *See* WAC 173-441.

15 Washington Dep't of Ecology, "Clean Air Rule: Potentially Eligible Parties" (June 2016): *http://www.ecy.wa.gov/climatechange/docs/carcoveredparties0516.pdf.*

16 WAC 173-442-040.

17 WAC 173-442-040(4).

18 WAC 173-442-030(2).

19 *See* WAC 173-442-070.

20 WAC 173-442-020(1)(m).

21 WAC 173-442-110(1).

22 WAC 173-442-110(2).

23 WAC 173-442-150(1).

24 *Id.*

25 *See* WAC 173-442-160.

26 WAC 173-442-170(1).

27 WAC 173-442-170(2)(a).

28 WAC 173-442-170(2)(b).

29 WAC 173-442-230.

30 WAC 173-442-120(2).

31 WAC 173-442-130.

32 WAC 173-442-140(3).

33 WAC 173-442-210.

34 WAC 173-442-210(3)(d) and WAC 173-442-220.

35 WAC 173-442-200(3).

36 WAC 173-442-210(7).

37 WAC 173-442-240(2).

38 WAC 173-442-240(3).

39 *See* Carbon Pollution Accountability Act, available at *http://www.governor.wa.gov/issues/issues/energy-and-climate/2015-carbon-pollution-reduction-legislative-proposals* (last visited October 13, 2016).

40 Tom Banse, "Industry Lawsuits Mount Against Washington State's New Carbon Cap," Northwest News Network (September 30, 2016): *http://nwnewsnetwork.org/post/industry-lawsuits-mount-against-washington-states-new-carbon-cap.*

41 *Id.*

*Jury Diversity and Implicit Bias:*

# Tilting the Scales Toward Racial Balance

***By Judge Theresa Doyle***

**(Second of Two Parts)**

*In November's issue, Part I addressed juror bias generally and discussed proposed General Rule 36. Part II discusses the three main stages at which juror implicit bias can be addressed: juror orientation, jury instructions and voir dire.*

## How To Address Jurors' Implicit Bias

*Juror Orientation*

In most courts, jurors are assembled together in a jury room and shown an educational video about the court and basic legal tenets, i.e., burden of proof and presumption of innocence, and deciding the issues based on the evidence. Many experts recommend addressing implicit bias here, before jurors are assigned out to a courtroom, for several reasons.[29]

First, the jurors are a captive audience so are likely to pay attention. Second, social science research into learning shows that impressions formed early can shape the understanding of what follows. This is called "framing," "cognitive filtering" and "priming."[30]

Third, the concept of deciding issues fairly will already have been introduced. Fourth, addressing the topic before jurors are sent to a courtroom for a particular case minimizes the risk that jurors will punish the attorney assumed to have requested the bias education.[31]

Finally, the internal motivation to be fair is highly effective in reducing the effects of implicit bias. It is at juror orientation that pride in the jury system, the role of jurors in a democracy, and the right to a fair trial are first introduced. Eliminating racial bias is logically part of that discussion.[32]

Judge Mark Bennett[33] advocates showing jurors a short video clip that illustrates implicit racial stereotypes. This popular YouTube video shows a bicycle chained to a tree, and how the reactions of passersby change depending on the race and gender of the person trying to break the chain to free the bicycle.

Passersby look but don't do anything when a white man approaches the bicycle and tries to remove the chain. But when a black man does exactly the same thing, passersby question him, some yell at him, a crowd gathers, and the police are called. When a white woman takes the same actions, several men stop and offer to help her.[34]

*Jury Instructions*

Jury instructions on implicit bias are becoming more common. Judge Bennett gives a jury instruction on implicit bias prior to opening statements[35] and asks jurors to pledge to avoid stereotyping.[36] Other jury instructions in use suggest that jurors engage in race-switching when evaluating the evidence. This means imagining, in a civil case, that the parties' races are switched, and, in a criminal case, the races of the defendant and victim are reversed.[37] The American Bar Association (ABA) offers an instruction similar to Judge Bennett's.[38] California also has a model instruction on implicit bias.[39]

The effectiveness of implicit bias instructions is the subject of scholarly debate.[40] But what is agreed is that any instruction, to be effective, must avoid the authoritarian language common in jury instructions. Rather, formulations that encourage self-reflection and foster intrinsic egalitarian attitudes are advised.[41] Judge Bennett's instruction emphasizes that implicit bias is universal, which reduces the risk of resentment or backlash from jurors.[42]

In any event, it is clear that the Washington pattern instructions we use, admonishing jurors not to decide the case on "sympathy, bias, or personal preference" (WPI 1.01, 1.02, WPIC 1.01, 1.02), address conscious bias, but leave undisturbed implicit racial bias. A passive, color-blind approach, ignoring race, should be abandoned in favor of a multicultural approach that acknowledges group diversity and tackles bias.[43] As noted by Justice Harry Blackmun, "In order to get beyond racism we must first take account of race."[44]

*Voir Dire*

Finally, lawyers can address implicit racial bias during voir dire. As previously noted, research shows that implicit racial bias is most influential where the case is not racially charged, but the parties or witnesses are of different races.[45] The recommended approach is to make race salient.[46]

The familiar statement, "this is not a race case," ignores the social science research into implicit racial bias and needs to be retired. The very purpose

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## JURY DIVERSITY

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of voir dire is to uncover bias and implements the constitutional right to trial by an impartial jury.[47]

There are many sources available to lawyers for formulating questions designed to ferret out racial bias without triggering juror defensiveness or animosity toward the questioning lawyer.[48] However, even with well-crafted questions, some attorneys, particularly public defenders, are concerned about the risk of polarizing the venire and losing credibility among potential jurors if they bring up implicit bias.[49] Others believe that the danger of unconscious racial prejudice is the greater risk, and that failure to address implicit bias with jurors in a careful manner violates the client's right to competent representation.[50]

A questionnaire about racial attitudes is an option. Having jurors answer race-relevant questions before voir dire begins gets them thinking about race and guarding against unconscious racism.[51] It could also serve to encourage more honest answers.

Coming from the court and not the lawyers, a questionnaire could reduce the risk of jury animosity toward the lawyer planning to inquire further about racial bias. To pull off this dialogue, judges must "become comfortable with being uncomfortable," to quote my colleague, King County Superior Court Judge Veronica Alicea-Galvan.

Equal justice is the foundation of our legal system. Racially prejudiced juries are a direct threat to the legitimacy of the courts and democracy.[52] Parties have constitutional due process and equal protection rights to a fair trial free of racial bias. Persons of color have a constitutional right not to be excluded from a jury based on their race.

Society has a right to procedural fairness in the legal system. A jury system corrupted by racial bias corrodes public confidence and violates the social contract between the government and the governed.

President Barack Obama has stated that one of society's greatest challenges is to narrow the gap between the promise of our ideals and the reality of our times.[53] The ideal is equal justice. Our challenge is to make it a reality. ■

*Judge Theresa Doyle has been on King County Superior Court bench since 2005. She also served on the Seattle Municipal Court from 1998 to 2004. Judge Doyle works on criminal justice reform on behalf of the Washington Minority & Justice Commission and the Superior Court Judges Association (SCJA).*

29 *See* Cynthia Lee, "A New Approach to Voir Dire on Racial Bias," 5 U.C. Irvine L. Rev. 843, 861 (2015); Cynthia Lee, "Making Race Salient: Trayvon Martin and Implicit Bias in a Not Yet Post-Racial Society," 91 N.C. L. Rev. 101, 117–18 (2013); Anna Roberts, "(Re)forming the Jury: Detection and Disinfection of Implicit Juror Bias," 44 Conn. L. Rev. 827 (2012); Jerry Kang, Judge Mark Bennett, *et al.*, "Implicit Bias in the Courtroom," 59 UCLA L. Rev. 1124, 1142 (2012).

30 Roberts, note 29, *supra*, at 861–66.

31 *Id.* at 865–66.

32 *Id.* at 865–66, 878–79.

33 Judge Bennett is a judge for the United States District Court for the Northern District of Iowa.

34 "What Would You Do?", ABC television broadcast May 7, 2010, available at *www.youtube.com/vladcantsleep*.

35 "Do not decide the case based on 'implicit biases.' As we discussed in jury selection, everyone, including me, has feelings, assumptions, perceptions, fears, and stereotypes, that is, 'implicit biases,' that we may not be aware of. These hidden thoughts can impact what we see and hear, how we remember what we see and hear, and how we make important decisions. Because you are making very important decisions in this case, I strongly encourage you to evaluate the evidence carefully and to resist jumping to conclusions based on personal likes or dislikes, generalizations, gut feelings, prejudices, sympathies, stereotypes, or biases. The law demands that you return a just verdict, based solely on the evidence, your individual evaluation of that evidence, your reason and common sense, and these instructions. Our system of justice is counting on you to render a fair decision based on the evidence, not on biases."

*See* Kang, Bennett, *note* 29, *supra*, 59 UCLA L. Rev. at 1182. *See generally*, Bennett, "Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of *Batson*, and Proposed Solutions," 4 Harv. L. & Pol'y Rev. 149 (2010).

36 "I pledge I will not decide this case based on biases. This includes gut feelings, prejudices, stereotypes, personal likes or dislikes, generalizations or stereotypes." Kang, Bennett, *supra*, note 29, 59 UCLA L. Rev. at 1182.

37 "Jury Selection and Race – Discovering the Good, the Bad, and the Ugly," paper submitted by Jeffery Robinson, Director of ACLU Center for Justice, and others, available at *www.americanbar.org*.; Kang, Bennett, *supra*, note 29, 59 UCLA L. Rev. at 1184.

38 "Our system of justice depends on judges like me and jurors like you being careful and willing to make careful and fair decisions. Scientists studying how our brains work have shown that, for all of us, our first responses are often like reflexes. Just like our knee reflexes, our mental responses are quick and automatic. Even though these quick responses may not be what we consciously think, they could influence how we judge people and even how we remember or evaluate the evidence. Scientists have taught us some ways to be more careful in our thinking that I ask you to use as you consider the evidence in this case. Take the time you need to test what might be reflexive unconscious responses and to reflect carefully and consciously about the evidence." *See* American Bar Association, "Achieving an Impartial Jury (AJI) Toolbox", and extensive resources contained therein.

39 California has this instruction for use in civil cases: "Each one of us has biases about or certain perspectives or stereotypes of other people. We may be aware of some of our biases, but we may not share them with others. We may not be fully aware of some of our other biases. Our biases often determine how we act, favorably or unfavorably, toward someone. Bias can affect our thoughts, how we remember, what we see or hear, whom we believe or disbelieve, and how we make important decisions. As jurors, you are being asked to make very important decisions in this case. You must not let bias, prejudice, or public opinion influence your decision in this case." CACI, section 113 (2012).

40 *See* Jennifer K. Elek and Paula Hannaford-Agor, "Can Explicit Instructions Reduce Expressions of Implicit Bias? New Questions Following a Test of a Specialized Jury Instruction," National Center for State Courts, April 2014, archived at *http://perma.cc/ZZD4-XD73*; Jennifer K. Elek and Paula Hannaford-Agor, "First, Do No Harm: On Addressing the Problem of Implicit Bias in Juror Decision Making," 49 Court Rev. 190–98 (2013); *cf.*, Kang, Bennett, *supra*, note 29, 59 UCLA L. Rev. at 1182–84.

41 *See id.*

42 Kang, Bennett, *supra*, note 29, 59 UCLA L. Rev. at 1181–82.

43 Elek & Hannaford-Agor, *supra*, note 40.

44 *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 407 (1978) (Blackmun, J., concurring in part and dissenting in part).

45 Kang, Bennett, *supra*, note 29, 59 UCLA L. Rev. at 1184; Samuel R. Sommers & Phoebe C. Ellsworth, "White Juror Bias: An Investigation of Prejudice Against Black Defendants in the American Courtroom," 7 Psychol. Pub. Pol'y & L. 201, 255 (2001).

46 Lee, "A New Approach to Voir Dire on Racial Bias," 5 U.C. Irvine L. Rev. 843, 867–68, *supra*, note 29; Peter Joy, "Race Matters in Jury Selection," 109 Nw. U. L. Rev. 180, 184 ("How to Discuss Ferguson") (2015).

47 *State v. Davis*, 141 Wn.2d 798, 824–25 (2000).

48 *See* "Jury Selection and Race – Discovering the Good, the Bad, and the Ugly," *supra*, note 37. Examples to encourage juror discussion include open-ended questioning, i.e., for reactions to the Confederate flag, or to the expression, "playing the race card," and asking, "What if no one in the courtroom looked like you?" or "What do you think of the Black Lives Matter movement?" or "Do you think black people commit more crimes?"

49 Sarah Forman, "The #Ferguson Effect: Opening the Pandora's Box of Implicit Bias in Jury Selection," 109 Nw. U. L. Rev. Online 171, 176 (2015) (concern that jurors could view questions about implicit bias as an attempt to "play the race card").

50 Joy, *supra*, note 46, 109 Nw. U. L. Rev. at 185–86.

51 *Id.* at 181–82.

52 Regarding the fairness of the justice system, "African Americans and Whites are on two different ends of the spectrum, with the former exhibiting strong signs of cynicism about the ability of the justice system to provide fair, impartial, and respectful justice, and the latter displaying substantially more confidence and trust in the system." "Justice in Washington State Survey: 2012" (revised and updated 2014), report of the Washington State Minority and Justice Commission, available at *www.courts.wa.gov/content/publicUpload/News/Justice*.

53 "Speech on Race," delivered on March 18, 2000: "What would be needed were Americans in successive generations willing to do their part-through protests and struggle, on the streets and in the courts, through a civil war and civil disobedience and always at great risk to narrow the gap between the promise of our ideals and the reality of our times."

# Creating Workable Protections for Manufactured Home Owners: Evictions, Foreclosures and the Homestead

***By Rory O'Sullivan and Gabe Medrash***

**(Last of Four Parts)**

*(This article originally appeared in the Gonzaga Law Review in 2014. As noted by the authors, the article discusses a problem that has yet to be fixed, so it remains relevant. It is reprinted here with permission.)*

## Part IV – Statutory Regimes in Other States

Like Washington, most states have regrettably not enacted provisions in their landlord-tenant or summary process laws that take into account the unique challenges faced by manufactured home owners who place their homes on leased land. Several states, however, provide manufactured home owners an extended period of time after judgment has been entered against them in which they may attempt to sell their homes. While this time allowance is undoubtedly helpful in some cases, these statutes generally require that the homeowner continue to pay rent in order to benefit from the additional time allowance, a condition which is impractical in most cases and undercuts the utility of these statutes.

Of the states that provide manufactured home owners with extended time after eviction to sell their homes, Massachusetts currently provides the longest automatic time period. Under Massachusetts law, a manufactured home owner who has been evicted from the land upon which their home is sited is automatically given 120 days after eviction to sell their home.[122] The park owner is prohibited from terminating or otherwise interfering with the manufactured home's utility connections and from moving the home during this time period,[123] and moreover, the park owner is prohibited from buying the manufactured home "for a price substantially below the fair market value of the home," the incidence of which "create[s] a rebuttable presumption that such transaction was unfair or deceptive."[124]

While the homeowner may leave the manufactured home in place during this period, the park owner is granted a lien on the home, which, if perfected, must be signed by the homeowner.[125] Qualification for this 120-day period, however, depends upon the homeowner continuing to pay rent, even while the homeowner is prohibited from continuing to live in the home.[126] This continued rent requirement and prohibition on continued use and occupancy are shared by almost all states that provide an extended time allowance for manufactured home owners to sell their homes.

Several other states also provide an evicted manufactured home owner with extended time to sell the home or remove it from the park, each with their own conditions and restrictions. Virginia automatically provides manufactured home owners with 90 days, "conditioned upon the payment of all rent accrued prior to the date of judgment and prospective monthly rent as it becomes due;"[127] Iowa provides up to 60 days, conditioned most restrictively upon the plaintiff's consent;[128] and "[w]here the interests of justice require," a Minnesota court may grant a manufactured home owner 60 days to sell the home, conditioned upon continued payment of rent and utilities, among other provisions.[129] As in Massachusetts, manufactured home owners may not continue to use and occupy their homes during these stay periods in any of these three states.

In addition to granting manufactured home owners reasonable time to move or sell their homes, both Michigan and Connecticut provide for flexibility in this time period for the benefit of the homeowner. In Michigan, homeowners are allowed 90 days after judgment in which to sell their homes if they continue to pay rent and other charges accruing, maintain the manufactured home and lot, and provide the park owner with proof of winterization of the home within 10 days of the judgment.[130] If, however, the park owner denies tenancy to a bona fide purchaser of the home within this 90-day period, the period "shall be extended" 90 days from the date of that refusal.[131]

Connecticut has an even more flexible and potentially protective statutory mechanism for ensuring that manufactured home owners facing eviction have adequate time to sell or move their homes. Under Connecticut law, an eviction judgment against a manufactured home owner is automatically stayed for five days.[132] During the stay, a home owner may "move for permission to exercise in good faith the resident's right to sell the manufactured home in place."[133] If this motion is granted, "the court may stay execution upon such judgment pending sale of the home."[134]

While the length of this stay is in the court's discretion, the court is authorized by statute to stay the execution of the judgment for up to 12 months.[135] If the stay extends beyond six months, however, the stay must be "reviewed every two months to determine that the resident is making a good faith effort to sell the home."[136]

This level of court discretion to ensure an equitable, post-eviction outcome for both manufactured home owners and park owners is unique to Connecticut, and is surely a good model for other states contemplating making their own eviction proceedings more equitable. And unlike the other states discussed above, evicted homeowners in Connecticut may continue to use and occupy their homes during this stay. Predictably though, this is conditioned upon the homeowner continuing to pay rent and the performance of any other terms and conditions the court may impose.[137]

The continued rent requirement central to these statutory schemes must in practice discourage many manufactured home owners from pursuing the option for additional time. When it does, this requirement thereby undercuts the general usefulness of these statutory schemes. For example, if the cause of an eviction is nonpayment of rent, and the cause of the nonpayment is financial hardship, it is not likely that a homeowner will suddenly be capable of affording rental payments after eviction. While these states have all rightfully recognized how much more damaging an eviction can be in a manufactured housing context than in others, an effective, predictable and flexible statute that responds to this problem must be structured differently.

## Part V – The Solution

As this article has explored, the current legal framework in Washington can lead to significant unpredictability. When manufactured home owners facing eviction fail to exercise their homestead rights, and if they are not able to conduct a sale prior to the sheriff's sale, they lose their homes and any equity they have accrued. On the other hand, when a homeowner asserts homestead rights, the park owner may not have any way of recovering the loss of rent for that space for as long as it takes the homeowner to sell the manufactured home.

Any statutory proposal to resolve this dilemma must take into account the interests of all affected parties. While park owners have an interest in securing a return on their investments as well as the maintenance of a healthy and safe housing community, homeowners have an interest in protecting their homes, including their accrued equity. The homeowner also has an interest in stable and secure housing. Society at large would benefit as well from a stable and predictable post-eviction process for homeowners.

In many respects, the interests of the parties in a manufactured-housing eviction are similar to the interests of a lender and a borrower in the context of a home loan. Homeowners, whether an owner of a manufactured home or a site-built home, have their housing at stake as well as the equity they have accrued in their homes. The bank, like the park owner, is seeking a return on its investment. However, the park owner has an additional interest in maintaining the health and safety of the park. Despite this difference, the foreclosure model appears to be a logical place to look for a statutory framework for manufactured housing post-eviction.

With these interests in mind, we propose that the statutory framework for the post-eviction process be guided by the following principles:

1. If a homeowner violates her or his lease or the rules of the park to the extent that the park owner successfully evicts the homeowner, the park owner should have a means of forcing a sale of the homeowner's property, but a forced sale should be a last resort.

2. Forced sales should take place within a definite and finite period of time.

3. Forced sales should be conducted pursuant to the supervision of a court.

4. Forced sales should be public and advertised.

5. Any proceeds from a forced sale beyond what the park owner is owed should be returned to the homeowner.

6. A park owner who schedules a forced sale of the manufactured home should be prohibited from seeking a deficiency judgment against the homeowner.

7. A homeowner should have the option of seeking a court order postponing the date of the forced sale if the homeowner has a signed purchase and sale agreement that has not yet closed, or if the homeowner provides evidence to the court that the park owner is frustrating the homeowner's attempt to sell the home.

8. A homeowner should have the right to remain in the home throughout the forced sale process.

In order for a park owner to be able to force the sale of a manufactured home, the Homestead Act would need to be amended to create an exception for park owners. However, that exception should be offset by extensive additional protections for homeowners.

**WORKABLE PROTECTIONS**
*continued on page 19*

## WORKABLE PROTECTIONS

*continued from page 18*

We propose a revised eviction and sale process in which a manufactured home owner would have a minimum of six months between the time the park owner alleges a violation to the time when the park owner is able to conduct a sale. This six-month period mirrors the 190-day minimum in Washington's non-judicial foreclosure process between the time the homeowner defaults on a loan and when the property can be sold at a trustee sale.[138]

If the eviction is based solely on nonpayment of rent, then the homeowner should have the option of curing the default by paying the park owner all rent owed as well as court costs and attorney fees in order to settle the debt and prevent the forced sale. Again, this mirrors the non-judicial foreclosure statute, which allows a defaulting borrower to cure the default up until the 11th day before the trustee sale is scheduled to occur.[139]

Provisions from Washington's judicial foreclosure proceedings can also helpfully guide manufactured housing evictions and forced sales. First, because judicial foreclosures are overseen by the court, they do not require the plaintiff to appoint a trustee. Similarly, if forced sales of manufactured housing were overseen by the court, the sales could be conducted by park owners themselves while the court ensures the fairness of the process.

Second, in a judicial foreclosure, the court may elect to "take judicial notice of economic conditions, and after a proper hearing, fix a minimum or upset price to which the mortgaged premises must be bid or sold before confirmation of the sale."[140] Giving the overseeing court discretion to set an upset price in forced sales would help to stop the common practice of park owners taking title to manufactured homes after only bidding the rental amount owed in arrears. This upset price could be based on personal property assessments completed by county assessors.

Most importantly for the manufactured home owner, he or she should have the option of continuing to live in the home throughout the forced-sale process and this right should not be contingent upon the homeowner's ability to continue paying rent. Owners of site-built homes who are being foreclosed on by a bank can continue living in their homes throughout the foreclosure process and cannot be evicted until 20 days after the foreclosure sale.[141] In the context of foreclosures, the right to remain in the home is not contingent upon homeowners continuing to pay their mortgage.

By allowing manufactured home owners to remain in their homes during the eviction and forced-sale process, we recognize the reality that most homeowners who are evicted from manufactured housing communities are evicted because they are unable to pay their rent. We also recognize the interest that we have as a society in preventing homelessness. There is no reason that a manufactured home owner who fails to pay rent should be treated differently than a site-built homeowner who fails to pay a mortgage. Allowing the homeowner to remain housed during the foreclosure process is a central component of this proposal.

While a non-rent-paying manufactured home owner should be treated the same as a delinquent mortgagor, the park owner does have a more significant interest in the health and safety of the community than a bank does in its borrower's home. Therefore, the park owner should have the option of seeking an order from the court excluding the homeowner from the property if the park owner is able to demonstrate that the homeowner poses a danger or a nuisance to other tenants.

The notices that the MHLTA requires to initiate an eviction proceeding would not need to change. For instance, a park owner could issue a five-day notice to pay rent. If a homeowner failed to pay rent within the five days, then the park owner would have the option of filing a court case and setting a show cause hearing. If there is no dispute at the show cause hearing that the homeowner failed to pay rent, then the park owner could seek a court order scheduling a forced sale.

The date of the forced sale, however, could be no less than six months from the date the park owner issued the notice. The homeowner would then have approximately five months to either sell the home, come current on their debts to the park owner and remain in the property, or the park owner would conduct the forced sale.

If there is a dispute at the show cause hearing as to whether the homeowner had paid rent, or whether the homeowner had committed some other lease violation, it would be possible to conduct a trial pursuant to the standard 30-day trial schedule under the Unlawful Detainer Act. If the park owner prevailed at trial, the park owner would still have the option of conducting the forced sale, and it would still be possible for the forced sale to occur approximately six months after the date of the alleged violation.

Like forced sales of homes in the non-judicial foreclosure process, the sales themselves should occur on Fridays, and the owner would need to advertise the sale.[142] In order to provide clarity for both homeowners and potential bidders, the statute should require that the sale take place near the entrance to the manufactured housing community. Given that investors commonly use the Internet to research potential property purchases, the advertising process could be simpler than the advertising process as articulated in current foreclosure statutes. The Department of Licensing could host a website that lists all scheduled forced sales of manufactured homes, including the locations and the estimated value of those manufactured homes.

This proposal adds certainty to the eviction process. A manufactured home owner would have an opportunity to come current on rent or sell their home, while park owners would have a certain date when they could reclaim any debt owed to them through sale of the home.

### Conclusion

This article has identified a gap in our legislative framework. The existing statutes do not provide guidance about what should happen to manufactured homes after their owners are evicted from their communities.

We hope that advocates for homeowners and park owners can build consensus on a solution taking into account the significant housing and financial interests at stake. We offer this article as a starting point for a discussion and an opportunity to begin developing a solution with more certainty and stability for all parties involved. ■

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*Gabe Medrash graduated with a Bachelor in Arts from Wesleyan University in 2011 with high honors. He has since been a long-time volunteer legal assistant with the Housing Justice Project, in addition to working as a legal assistant for a private firm that specializes in real estate transactional law. He has also recently worked with the American Civil Liberties Union of Washington and the Innocence Project Northwest on long-term research projects, and is looking forward to working as an attorney for the public interest.*

122 Mass. Gen. Laws ch. 140, § 32J (2013).
123 940 Mass. Code Regs § 10.08(5)(a) (1996).
124 940 Mass. Code Regs § 10.08 (5)(c) (1996).
125 Mass. Gen. Laws ch. 140 § 32J (2013).
126 *Id.*
127 Va. Code Ann. § 55-248.50:2 (2012).
128 Iowa Code § 648.22A (2013).
129 Minn. Stat. § 327C.11 (2013).
130 Mich. Comp. Laws § 600.5781 (2013).
131 *Id.*
132 Conn. Gen. Stat. § 47a-35(a) (2013).
133 Conn. Gen. Stat. § 21-80(d) (2013).
134 *Id.*
135 *Id.*
136 *Id.*
137 Conn. Gen. Stat. § 21-80(c), (d) (2013).
138 *See* Wash. Rev. Code § 61.24.040(8) (2012).
139 *See* Wash. Rev. Code § 61.24.090(1).
140 Wash. Rev. Code § 61.12.060 (2012).
141 *See* Wash. Rev. Code § 61.24.060(1).
142 *See* Wash. Rev. Code § 61.24.040(5).

*Electoral Tension*

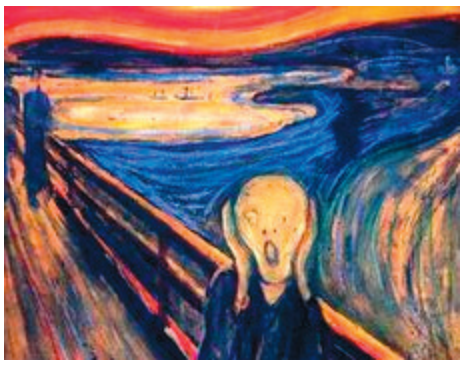
# America, Is It Time for a Divorce?

***By Larry G. Johnson***

As this article was being written, literally on the eve of the 2016 presidential election, after much mud and manure had been slung by both parties for months, one thing was already clear: The aftermath will be ugly. Things are not going to get better.

Expectations were that half the country would loathe the winner, with claims the election was rigged; or rant that a corrupt crook or an oafish groper was elected; or see Russian hackers or dirty Arab money behind the outcome; or that George Soros or the Koch brothers bought the election; or all of the above, *ad nauseum*.

We are guaranteed to have four more years of recriminations, hearings, lawsuits, investigations, partisan bickering and much worse. With maybe just a week's respite, the politicians will gear up all over again to start campaigning for the next election.



Ugh!

So, no wonder many battle-fatigued citizens such as I are now seriously asking the question: America, do we need a divorce? How about we just agree to split ways now and wish each other well? Is the only way out of gridlock to change the grid?

These questions are not academic. A growing group of Californians, for example, planned to meet in Sacramento the day after the elections to discuss pursuing a statewide referendum that proposes secession from the Union. Calling itself "YesCalifornia,"[1] it seeks to accomplish a "Calexit" by 2019. Its rallying cry is that California could do so much more to promote progressive causes if it could keep the money that it has to contribute to subsidize all the other states. As the group states on its website:

> In our view, the United States of America represents so many things that conflict with Californian values, and our continued statehood means California will continue subsidizing the other states to our own detriment, and to the detriment of our children.

Of course, the last time there were serious arguments about states having the right to secede from the Union, we had the bloodiest war in our history, and the arguments were settled only by force of arms.

But a number of scholars today argue that the "might makes right" solution from the Civil War did not intellectually address the question whether there indeed may be a legal, constitutional basis for renewing the debate. One such historian is Robert F. Hawes Jr., whose well-written *One Nation, Indivisible?: A Study of Secession and the Constitution* makes cogent, persuasive arguments for how, at a minimum, the framers of the Constitution had avoided resolving conclusively whether the states, existing prior to the *federal* (and not "national") government, having *acceded* to the Constitution, did not thereby relinquish their right to *secede* from it in the future.[2]

Hawes marshals a lot of evidence to support the conclusion that secession, not expressly prohibited by the Constitution, remained an implied right of the states. I think his most compelling argument is that at one time four states were neither part of the defunct Articles of Confederation nor signed on to the new Constitution.

Article 7 of the Constitution set out the ratification requirements:

> The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the states so ratifying the Same.

The ninth state to ratify was New Hampshire, on June 21, 1788. On that date, the current constitutional republic of the United States of America came into existence, even though Virginia (June 25, 1788), New York (June 26, 1788), North Carolina (November 21, 1789) and Rhode Island (May 29, 1790) joined later. The Founding Fathers would have been thus content, if need be, had these four states remained completely separate, sovereign entities outside the Union.

But rather than sorting through old arguments about what sort of Union Jefferson, Madison and others had envisioned centuries ago, or limiting the discussion to just Calexit, maybe the cleanest, honest way to go is simply to invoke the amendment process provided by the Constitution itself.

Proposed amendments to the Constitution tend to be pithy, so here is my candidate:

> Each State has the right to secede from the United States by vote through convention or referendum.

Of course, a state's secession would in all likelihood lead to several more required steps; it could hardly be a one-step, clean divorce. No doubt it would take a long process to figure out such issues as a state's share of the national debt; whether the remaining federal government would still provide a national defense and foreign policy; whether a state would develop its own currency and monetary policies; whether there would be unfettered free movement into and out of the state; whether states would form new kinds of smaller unions; and a whole host of other thorny problems.

No doubt many lessons could be learned and models developed by looking at how the EU deals with Brexit and avoiding some of the negatives that came from the breakup of the Soviet Union and Yugoslavia.

Whatever comes from [as it has turned out] a Trump administration, it should now be fairly clear that for better or worse, the United States has become too diverse and divisive for "one size fits all" policies to work well across a country as big and hopelessly divided as ours. In time, "less may be more," as the typically trend-setting Californians may be the first to find out. ■

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*Larry G. Johnson is a lawyer in Newcastle, and has been a member of the Washington bar since 1974. He recently served on the E-Discovery Subcommittee of the WSBA Escalating Cost of Civil Litigation (ECCL) Task Force. Besides being a litigator, for the past 20 years he has served as a consultant and expert witness in e-discovery matters. He does business as Electronic Data Evidence (www.e-dataevidence.com).*

1 *http://www.yescalifornia.org/*

2 It is not widely known that the first states to seriously consider secession from the Union were the New England states that met secretly in 1814 in what is known as the Hartford Convention. "New Englanders were unhappy over political concerns that they were being badly treated by the Union. Since Thomas Jefferson's election in 1800, the president had been a Southerner chosen by an electoral system that allowed the slave-holding Southern states to count each slave as 60 percent of a free person for their allocation of congressional seats and the number of presidential electors. Indeed, the New Englander John Adams would have won a second term as president in 1800 if slaves, prohibited from voting, did not boost Southern electoral votes." See *http://www.courant.com/opinion/op-ed/hc-op-janis-hartford-convention-secession-1213-20141212-story.html*.

*YLD Trivia Night:*

# An Evening of Camaraderie and Competition

We packed the house with 17 teams competing at the Third Annual Trivia Night held on October 26 at Alstadt in Pioneer Square. Competitors arrived a little wet, but were in good spirits after grabbing a hot pretzel and sampling some of the specialty German beers on tap.

Once everyone was settled, our quizmaster called for attention and the six rounds began. We had a "Stupid Laws – True or False" round, which consisted of questions such as, "In North Dakota it's illegal to lie down and fall asleep with your shoes on." (True!) Another round had participants guess which movie or show the fictional judge was in. After each round, points were tallied for that round and small prizes were handed out, including Seahawks keychains, bags of chocolates, movie tickets and beer boots.

With so many teams, the competition was stiff, but in the end one team did consistently well, winning the audio round of identifying the song and artist, and ultimately having the most points. That was "The Devil's Advocates," comprised of Shaina Johnson, Mark Mills, Emily Albrecht, Joe Albrecht, Russ Chiupka, Ty Johnson and Natalie Moore, who got to take home a $100 gift card to Alstadt.

We saw lots of creative team names, and the prize for best team name went to "Super Callous Fragile Ego Bigly Bragadoccius." In the spirit of friendly competition, our last place finishers, team "Lochte's Locks," went home with $5 Starbucks gift cards and a promise to study up for next year.

Overall, it was a lighthearted and lively event. We would like to thank the wonderful staff at Alstadt for their excellence service, as well as being so accommodating. A big thank you also goes out to Brad Gandt from LexisNexis for sponsoring the event and hanging around to enjoy a beer with everyone. We had so much fun and hope to see everyone back for next year's YLD Trivia Night! ■

*Pfau Cochran: PCVA's Varsity Squad won the "If These Walls Could Talk" round (Jessica Burras, Jesse F., Vinnie Nappo, Nick Franzen)*

*BMP: The big winners of the night, The Devil's Advocates (Joe Albrecht, Emily Albrecht, Ty Johnson, Shaina Johnson, Natalie Moore, Russ Chiupka, Mark Mills)*

*Supra Lawyers: Team Supra Lawyers won the "Stupid Laws — True or False" round (Kaya Lurie, Cat Connell, Breanne Schuster, Robbie Sepler, John Butler)*

*K&L 2: Team from K&L Gates (Marco Puccia, Paulina Wu, Tony Yerry, Nicholas Nahum, Peter Talevich)*

*Team MLawInWA (James Herr, Stephen Scheele, Aaron Schaer, Hannah Swanson, Brendan Vandor, Dan Osher)*

*Riddell Williams: Team Beyond a Reasonable Stout (Laura Hansen, Greg Hansen, Kristina Markosova, Nick Timchalk, Kate Seabright)*

*Our UW team PCVA's Ninja Tortles (Carolea Casas, Kaleigh Boyd, Carlie Bacon, Marlana Kuper, Chad Law)*

KING COUNTY BAR ASSOCIATION YOUNG LAWYERS DIVISION

News and Information

## *Call for Nominations*

## Outstanding Young Lawyer Award

The award will be presented at the KCBA Annual Dinner

**To nominate a young lawyer, please email the following to Chelsea at chelseah@kcba.org:**

1. A resume or biography of the nominee
2. A brief letter detailing how the nominee embodies the traits below and why the nominee deserves the award.

**The award recognizes any combination of the following:**

Substantial contributions to the legal profession
Substantial contributions to the KCBA
Substantial contributions to the community
Demonstrated excellence in their legal practice

Deadline for nominations is Feb. 10, 2017
For more information visit: www.kcba.org/yld

# Ten Tips To Tidy up the Messy Process of Firing Employees

***By Gena Bomotti and Skylar Sherwood***

Firing employees is uncomfortable and awkward. But it is often unavoidable and necessary.

When your client plans and executes employee dismissals promptly and properly, your client's business benefits. Poor performers are removed from the workplace, employee morale often improves, and your client might limit potential risk stemming from negligent retention or other claims.

These 10 tips include some of the best practices all employers should follow on the road to a dismissal, from effective performance and behavior management to closing the loop on post-dismissal issues after completing a respectful termination meeting.

### 1. Don't Rely On At-Will Employment

In Washington (and most other states), employment is "at will" unless otherwise agreed to by the parties. This means that either party may terminate the employment relationship at any time for any reason or no reason at all.

However, smart employers (and their lawyers) aren't lulled into a false sense of security by that. They know that they should still have a clear, articulable reason(s) for a dismissal and that at-will employment doesn't eliminate their obligation to ensure that all employment decisions comply with applicable federal, state and local employment laws, including those protecting employees from discrimination and retaliation.

If an employer doesn't have a clear reason for firing or laying off an employee, or doesn't clearly communicate the legitimate basis for the decision, it can be more challenging to defend against a claim that the decision was motivated by a discriminatory or retaliatory intent.

### 2. Comply With Policies and Practices

In addition to complying with the law, your clients should comply with their own applicable policies and procedures. If the employee files a discrimination or retaliation lawsuit arising out of the dismissal, the employer's failure to follow its own policies and procedures likely will be used as evidence of unlawful intent.

*Moore v. The Regents of the University of California*[1] is a recent textbook example of this. In *Moore*, the employer had a policy requiring that laid-off employees be given preference for reassignment or transfer, and had a right to recall to any job in the same classification that might become available after the layoff. After the layoff in *Moore*, the employer hired eight employees, but never considered the plaintiff despite her meeting the criteria for preferential treatment under the policy.

In reversing summary judgment and remanding for trial, the California Court of Appeal held that the employer's failure to follow policy could be evidence that the reason the employer gave for the plaintiff's layoff wasn't the real reason and was instead motivated by discrimination based on the plaintiff's medical condition.

### 3. Document Responsibly

Any employer who has sought employment advice has likely been advised to document performance and behavioral issues. But not just any documentation will do. Bad documentation can actually hurt an employer in defending against an employment lawsuit.

Attorneys should advise clients that managers and HR should always operate as though litigation is a possibility. Employers should assume that every one of their email messages about the employee will be disclosed during discovery, even those between the manager and HR. All non-privileged drafts of documents relating to the employee will be discoverable, including any corrective action; responses to or internal deliberations about accommodation requests; investigation reports and notes prepared by HR or other company or third-party investigators; performance reviews; and/or dismissal letters. At a minimum, all written communications and documents should be professional.

How can employers make documentation effective? Start by making the documents clear, concise, legible and thorough. Identify the specific conduct or behavior that needs to improve and provide recent examples of it. Give care and thought to performance feedback, counseling and reviews, and avoid inflated performance reviews and stock phrases ("He's not a good fit" or "She's not dependable").

Inflated performance evaluations in which weak managers fail to give honest feedback are particularly vexing to defense lawyers. When, eventually, a strong manager steps up to take appropriate adverse action against the employee (fire, demote, discipline), the employee's inflated performance evaluations — often completed by former managers — are prima facie evidence of pretext and discrimination. This is the most common and difficult poor management practice for a defense lawyer to manage in litigation.

### 4. Assess Risk

You can help your clients carefully consider the potential risk surrounding a dismissal before taking action by asking them a variety of questions, including:

- Would dismissal be inconsistent with any promises made to the employee?
- Does the punishment fit the crime?
- Would dismissal be inconsistent with how other employees have been treated in similar situations? If so, is there a legitimate business reason for the deviation now?
- Has the employer followed its own policies?
- Are you and your client fully apprised of the relevant facts, favorable and unfavorable?
- Has your client heard the employee's side of the story?
- Have alternatives to dismissal been considered?
- Has the employee received clear prior notice of his/her undesirable performance or behavior and been given a reasonable opportunity to improve or change?

### 5. Consider Severance

Employers may want to offer severance for various reasons. Perhaps they are dismissing a long-term employee who hasn't improved, the separation is amicable, and the company wants to recognize the employee's contributions over the years. Perhaps there is risk associated with a dismissal and the company wants to offer severance in order to get the benefit of a release of claims.

In evaluating whether to pay severance, employers should consider the following:

- Do you have a severance plan or policy that applies?
- In what circumstances have you paid severance before and, historically, how have you determined how much to offer?
- Is there legal risk to the dismissal such as a recent complaint about harassment or discrimination, accommodation request or protected leave of absence?
- Would it seem suspicious to offer severance under the circumstances?
- Consult with a qualified employment lawyer to draft a settlement and release agreement and give appropriate advice.

Although it may be obvious to lawyers, regardless of how amicable a separation might be (or be perceived), employers should never offer to pay severance or anything else of value to a departing employee without obtaining a full waiver and release of claims.

### 6. Plan the Termination Meeting

Your client has diligently reviewed its policies and procedures, documented responsibly, and after conducting a risk assessment, has decided to fire the employee. Well done! But the planning is not over yet.

Far too often employers skip this step and go into the termination meeting without knowing who to include or what to say, and in doing so, not only make an awkward and difficult meeting worse, but may even increase the legal risks associated with the termination. Or, on the other end of the spectrum, some employers overthink and over prepare, bring a small army of managers and security to the meeting, and adhere robotically to a script, which likewise makes things worse. Your clients, of course, want to avoid landing on either end of that spectrum.

While the planning and details required will vary from situation to situation, some general rules apply. Ideally, this meeting should be done in person, with a witness (not the company's inside or outside counsel).

Though many employers seem to prefer to fire employees on a Friday afternoon, there is no magic time to conduct a termination meeting. Rather, an employer should hold this meeting at a time that makes the most sense for its business, minimizes disruption to its workforce, and is likely to be the most respectful to the person being fired.

The meeting should be held in a private conference room or office, where curious outsiders cannot see or hear what is happening in the meeting. The person leading the meeting (usually, but not always, the employee's supervisor) should give clear reason(s) for the dismissal as soon as possible in the meeting (avoiding stock phrases — see tip No. 3), and should be direct, honest and succinct in doing so.

Encourage your clients to prepare what they will say, and practice if necessary, but to avoid sticking to a script (or looking like they are doing so). Employers must also be prepared to discuss logistical questions that the employee is likely to have, such as: When is my official last day? When will I get my final paycheck? What will happen to my benefits? The employer also may want to provide the employee with a letter that addresses these questions because the employee may not be in the best frame of mind to remember such details.

### 7. Just Do It ... Respectfully

With careful planning behind it, your client is now ready to conduct the termination meeting itself. At the meeting, participants should give the employee their undivided attention and be empathetic, but not apologetic. Employers should:

- Avoid trying to talk the employee into understanding the reasons behind the termination;
- Be firm, but kind;
- Listen with respect to the employee's response;
- Clarify that the decision is not negotiable, then redirect the discussion to the practicalities of moving on;
- Collect keys, access cards, company credit cards, laptops and other property; and
- Consider having IT deactivate the employee's access to computer systems during the meeting.

Unless there is a good reason not to do so, the employee should leave work (at least for the day) soon after the meeting, and the employer should allow them to stop at their desk briefly to gather personal belongings. If security is not a concern, don't have security present — doing so will only anger or embarrass the employee and likely incite water cooler gossip.

### 8. Plan Your Post Communication Strategy

Now that your client has made it through firing the employee, it still must work through how, and to what extent, to explain this decision to other employees, clients and customers. In general, employers should promptly inform others that the employee is no longer with the company, but should not provide details.

Focus instead on making sure that

**FIRING EMPLOYEES**
*continued on page 29*

# 2016 Annual Bench Bar Conference

The annual Bench Bar Conference was held November 11 at the Washington State Convention Center with more than 100 judges and lawyers in attendance.

Special guest Washington Supreme Court Chief Justice Barbara Madsen reviewed major initiatives under way in our state courts.

Panels included a forum featuring presiding judges and chief judges from each of the courts in King County, including Judge Ricardo Martinez of the U.S. District Court for the Western District of Washington; Judge James Verellen of the Washington Court of Appeals Division I; Judge Susan Craighead from King County Superior Court; Judge Donna Tucker from King County District Court, and Judge Karen Donohue from Seattle Municipal Court.

Additional sessions looked at the role of the judiciary in citizen initiatives and referendums, ethics challenges faced by attorneys and judges in the courtroom, and a litigators' roundtable featuring judges and plaintiff/defense trial lawyers sharing helpful tips. ■

*State of the Courts with Presiding/Chief Judges (from left): Hon. Donna Tucker, King County District Court, Presiding Judge; Hon. Susan Craighead, King County Superior Court, Presiding Judge; Hon. Ricardo Martinez, US District Court for Western Washington, Chief Judge; Hon. Karen Donohue, Seattle Municipal Court, Presiding Judge; Hon. James Verellen, Washington Court of Appeals, Chief Judge; and Kathryn Battuello, KCBA President.*

*The Role of The Courts in Referendum & Initiatives (from left): Andrew Maron, KCBA First Vice President; Barbara Madsen, Chief Justice, Washington Supreme Court; Hon. Bruce Heller, King County Superior Court; and Beth Barrett Bloom, KCBA Referendum & Initiative Project.*

*Litigators' Roundtable (from left): Christopher S. Howard, Schwabe Williamson, Wyatt; Mark Johnson, Past President Washington State Bar Association; Hon. Sean O'Donnell, King County Superior Court; Hon. John Chun, King County Superior Court; and Brett Hill, Co-Chair, KCBA Judiciary & Litigation Committee.*

*Supreme Court Update (from left): Hon. Susan Craighead, King County Superior Court, Presiding Judge; Barbara Madsen, Chief Justice, Washington Supreme Court; and Kathryn Battuello, KCBA President.*

*Ethics in the Courtroom (from left): Hon. Veronica Galvan, King County Superior Court; Kenneth S. Kagan, Attorney at Law; and Stephanie Lakinski, Chair, Young Lawyers Division.*


# 10 Reasons To Be Grateful To Be a Carnivore in Seattle

There are lovely restaurants in Seattle for herbivores. We list them in this column from time to time. This month is not such a time. This month we dedicate this column to our guilty pleasure — eating copious amounts of meat. Here are 10 reasons why it is good to be a carnivore in Seattle.

### 10. Our New Meaty Spots Are Making National News

Seattle occupied two spots in Bill Addison's 21 Best New Restaurants in America in 2016. One of the two restaurants is from James Beard Award-winner Renee Erickson — **Bateau** (1040 E. Union St.; 900-8699; *restaurantbateau.com*).

Bateau takes the term "contemporary steakhouse" to new levels, as it "in-house" ages and butchers local cows with a bright and airy flare. On a large black chalkboard towers an illustrated chalk cow with the large letters "BEEF." Below that are lists of those butchered cuts available for the evening. Adjacent is a window into a room where the butcher does his magic and sides of beef hang from meat hooks, making it a festive visit unsuitable for the vegans in your life. There is a reason this place makes national news — it is a truly delightful experience.

### 9. Seattle's International District "Kills It" with All the Meats

If you see us standing on King Street in the International District worshiping barbecue duck hanging from a hook in the window, you know we are outside of **Kau Kau** (656 S. King St.; 682-4006). This fixture has been barbecuing up chicken, pork, duck, spareribs and roasted pig for almost 30 years.

The portions are healthy, and all the barbecue comes in at less than $8.30. There is very little that a carton of barbecue from Kau Kau cannot fix. Some of us used it after the election to comfort ourselves and our loved ones. If you haven't given it a try, you are missing out. There are tons of great spots in this neighborhood, but we are, perhaps unreasonably, loyal to Kau Kau.

### 8. Good Beef Can Be Found at Holes in the Wall

If you search on Bing — you know, if you still use Bing — for "Best Beef in Seattle," one of the top results will be **Hole in the Wall Barbecue** (215 James St.; 622-8717; *holeinthewallbarbecue.blogspot.com*). Hole in the Wall is well known to those whose offices are on the south side of downtown. It really is a hole in the wall, located on James between First and Second avenues.

There are 10 stools if one chooses to eat onsite, and no tables, just bars. The line can be out the door, but moves quickly. We recommend sampling with the "hole plate" option. This allows two meats and a side. Between us we tried the beef brisket, the pulled pork, the smoked turkey, the smoked chicken and the hot link, spicy smoked sausage with coleslaw, potato salad and cornbread. It was "ribs day" (Thursday or Friday), but we will have to go back for those.

The meat comes with only a touch of the barbecue sauce, so you can actually taste the meat. But there are ample extra barbecue sauce and hot sauce available. Among us, the three favorites were the pork — tender, lots of flavor, and well complemented by their standard sauces — and the beef brisket. The latter was cut in thicker chunks compared to the traditional thin-sliced brisket, but still managed to simply fall apart at the touch of your fork and provide the smokiness expected from a true brisket.

For those inclined toward poultry rather than beef, both the chicken and turkey were juicy and flavorful through and through. The plate — two meats and a side for $10.50 — is quite sufficient to probably feed two people at lunch. As a side note, the cornbread was worth the extra $2 expense, as it was flavorful (but not overly sweet) and moist.

### 7. In Seattle, You Can Visit the Woodland Park Zoo and Then Feast on Beasts

Those of us who are former vegans are absolutely going to find ourselves in a cozy little cabana in vegan hell, but it is totally worth it to visit **Ed's Kort Haus** (6732 Greenwood Ave. N.; 782-3575) after a day at the zoo. Ed's has all the options you could possibly want for your burger.

While there are five veggie burgers, we come for more exotic fare. For instance, you can get a burger made of alligator, antelope, buffalo, camel, caribou, elk, beefalo, llama, kangaroo, ostrich, reindeer, boar, elk, bear, venison or yak. The owner will walk you through the options; you can grab a beer, play some pool, and have as much fun as a day at the zoo.

### 6. Only Seattleites Eat Ribs in the Rain.

There is no shortage of decent ribs, but we need to draw your attention to **The Boar's Nest** (2008 NW 56th St.; 973-1970; *ballardbarbecue.com*) — a great spot that serves delicious southern barbecue in a small location near the Ballard Public Library.

We ordered a full rack of wet ribs, which were cooked perfectly, and the meat easily peeled off the bones. Ribs from the Boar's Nest are in the running for the best ribs in town. Our order included two side dishes and cornbread. We selected the potato salad and baked beans, but we also opted for an additional side of tater tots.

Our meal was enough to serve three or four people. For two, it provided a great amount of leftovers. Next time, we will be trying some of the other side options, which include fried mac and cheese, sweet potato fries, onion rings, collard greens, coleslaw and fried pickles.

We appreciated that the Boar's Nest has seven options for barbecue sauce. We settled with the classic sweet Kansas City sauce. It was finger-lickin' good.

The Boar's Nest feels similar to a sports bar, with television sets and sports banners on the walls. When we arrived, the television sets were playing multiple games. The restaurant features several seating options, but space is limited and the eating area is loud.

We ordered takeout from Yelp's Eat24 and the food was waiting for us when we arrived. We will absolutely return to the Boar's Nest, but we will likely order takeout again unless we are in the mood to watch some sports.

### 5. Seattle Traffic Getting You Down? Grab Some Salmon Candy for the Road

Pike Place Market is a great stop if the traffic report home is looking dim. Stop by **Pike Place Fish Market** (86 Pike Place; 682-7181; *pikeplacefish.com*). It closes at 6 p.m., but nothing can tide you over until dinner like a few pieces of "salmon candy."

Before you cry mutiny, hear us out. Pike Place Market sells candied salmon that is softer than most smoked salmon and transports well. Sure, you may have to buy a lot of it, but it is worth it for a snack that won't fill you up and will get you to dinner without a case of the traffic hangry.

### 4. Our Steak Tastes Are Changing

While you can certainly take your hard-earned cash to **The Metropolitan Grill** (820 Second Ave.; 624-3287; *themetropolitangrill.com*) or **El Gaucho** (2505 First Ave.; 728-1337), the Seattle steakhouse is changing. Now, Seattle craves inventive Vietnamese-French beef cuisine in industrial-chic environments such as **Seven Beef Steak Shop** (1305 E. Jefferson St.; 328-7090; *sevenbeef.com)*.

The new Seattle also craves modern expressions of classical Korean cuisine at steakhouses such as **Girin** (501 Stadium Place S.; 257-4259; *girinseattle.com*). We are loving the journey that steakhouses are taking in Seattle and welcome the change.

### 3. We Show Our Love by Ordering a Whole Pig

Earlier this year, one of our coworkers was getting hitched. We thought long and hard about what we would do for him to celebrate finding the man of his dreams. Then clearly we knew. We would order him a whole pig roast from **Brass Tacks** (6031 Airport Way S.; 397-3821; *georgetownbrass.com*).

This spot, with its upcycled art and furniture, and its shuffleboard and Foosball, is always a delightful stop. But for $700, and a week's advance notice, you can fill up an army with a suckling pig. If that's too rich for your blood, on Sundays there is a kid-friendly brunch with a live DJ from 10 a.m. to 3 p.m.

### 2. Dick's Drive-In Now Takes Credit Cards

At 1:20 a.m., being a carnivore in Seattle historically has been a pain in the rear end. Why? Because **Dick's Drive-In** (115 Broadway E. and elsewhere; 323-1300) required cash. The following statement was made by Dick's owner Jim Spady earlier this year to KIRO radio: "The only reason people still carry cash in this city is to eat at Dick's Drive-In. Many of our customers have asked us to please start accepting credit and debit cards, and one of the last major decisions my Dad made was to start us on this path. Moving from cash-only to accepting credit and debit cards has been a long process with many challenges. It began over two years ago. We had to replace all of our registers and update all of our systems."

It's a great time to be a carnivore.

### 1. We Have Salumi (Mic Drop)

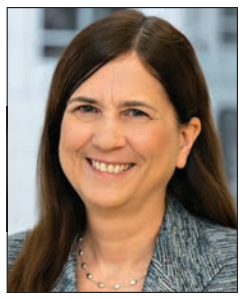
Let us be clear: We love our traditional Italian salumeria nestled in Pioneer Square. The food at **Salumi** (309 Third Ave. S.; 621-8772; *salumicuredmeats.com*) is undoubtedly divine, but the story of how it came to be is also so very Seattle.

Armandino Batali and Marilyn Batali are a husband-and-wife duo. Armandino spent 31 year years as a process-control engineer at Boeing. Naturally, the Batalis combined that with formal study of meat-curing and created a small neighborhood deli that took its rightful place in the Seattle culinary scene.

In 2002, their daughter and son-in-law joined the family business, while their son (yes, Mario Batali) took to Food Network, which has featured the shop. We recommend grabbing a winter coat and a sandwich (the offerings sometimes change, but everything is great) and taking them to the UPS Waterfall Garden Park, at 219 Second Ave. S., for a truly Seattle lunch break. ■

# BAR TALK

*by Karen Sutherland*



December is the time of the year when people start thinking about New Year's resolutions, and I have a suggested resolution for you. How about sharing some of your hard-won knowledge and experience and raising your profile in the legal community by writing an article for the Bar Bulletin? We have article-writing opportunities every single month and you don't even need to stick with the monthly themes if what you have to say is interesting. Intrigued by the possibility of seeing your name in print? Then send an email to our esteemed editor, Gene Barton. His email address is *gbarton@karrtuttle.com*.

## Partner Pronouncements

**Heath Fox** has joined the Seattle office of **Lewis Brisbois** as a partner in its Healthcare Practice. **Fox** defends claims against hospitals, physicians, nurses, long-term care facilities, and other healthcare professionals.

The **Dussault Law Group** has become **Brothers Henderson Dussault**, signaling its partnership transition from founder **William Dussault** to **Joshua Brothers** and **Christopher Henderson**. **Brothers** and **Henderson** take full ownership of the firm and **Dussault** remains with the firm as of counsel. The firm's practice focuses on disability law, elder law, estate planning and settlement planning.

**Blake Marks-Dias** has joined **Corr Cronin Michelson Baumgardner Fogg & Moore LLP** as a partner. His practice emphasizes complex litigation such as employment discrimination, condemnation, contract, product liability, professional liability, and insurance bad faith claims. **Marks-Dias** was formerly a partner at **Riddell Williams**.

**Elizabeth Baker** has joined **Socius Law Group, PLLC** as a member. She was formerly with **E. Baker Law Firm, LLC** and is former in-house counsel with **Homestreet Bank and Equity Funding, LLC**. Her practice focuses on banking and financial institutions, commercial real estate lending, and commercial transactions.

**Chris Wion** has joined **Summit Law Group PLLC** as a member. He has a litigation practice handling matters such as breach of contract, fiduciary duty, shareholder disputes, trade secrets, securities, and design and construction defects.

## Associate Additions

**Rachel Haller** has become an associate with **Seed Intellectual Property Law Group PLLC**. She has a practice involving life science patent matters, including patent preparation and prosecution.

**Sallie Lin** has joined **Stoel Rives LLP** as an OnRamp Fellow in its Seattle office. **Lin** practices real estate law. **OnRamp** is an international program for women returning to the legal and financial services professions.

## Other Attorney Moves

**Annie Allison** has joined **Cairncross & Hempelmann**'s Intellectual Property and Technology team. Her practice focuses on intellectual property analysis and assistance to companies in all stages of development. **Allison** was previously with the **Hughes Media Law Group**.

**Mary DePaolo Haddad** has joined **Helsell Fetterman** as of counsel. She practices in the firm's Professional Liability, Employment, and Commercial Litigation Practice groups. Her experience includes professional liability, real estate, construction, copyright and trademark, product liability, school law, employment law, and premises liability.

**Michelle Gail** has joined **Hillis Clark Martin & Peterson P.S.** as an attorney in its Real Estate and Business groups. Her practice focuses on real estate and corporate transactions. She was previously an attorney with **McNaul Ebel Nawrot & Helgren PLLC** and **Venture Law Group**.

**Gregory Lutje** has become of counsel with **Ryan, Swanson & Cleveland** in the firm's Real Estate, Development & Finance Group. **Lutje** previously served as associate general counsel for **General Growth Properties**.

**Jessica Cutler** and **Rob Levin** have joined **Washington Bike Law**. **Levin**'s experience includes litigation; he is a bike commuter and recreational rider. **Cutler** is a former professional bike racer and has also worked as a bike messenger.

**Daniel Radthorne** has become an attorney in **Oles Morrison Rinker & Baker**'s Seattle office. His practice focuses on construction law, commercial litigation and government procurement.

**Brett Durbin** has become of counsel in the Tax Group of **Stoel Rives LLP** where he handles state and local tax matters. He was previously an assistant attorney general representing the Department of Revenue.

## Outside of Private Practice

**John McHale** has left **Washington Bike Law** and will begin serving as a **King County Superior Court** judge in January.

## Honors and Awards

**Seattle Municipal Court Presiding Judge Karen Donohue** has been awarded the 2016 Justice Vaino Spencer Leadership Award for her outstanding leadership in promoting the association's vision, core values and mission.

**Athan Papailiou** has been elected to the **Washington State Bar Association**'s Board of Governors. At the age of 29, **Papailiou** is the youngest person to ever serve on the Board. **Papailiou** is an attorney with **Pacifica Law Group**.

## Obituaries

**James ("Doc") Rolfe** recently died at the age of 92. He earned his J.D. degree from the **University of Washington School of Law** and practiced at **Graham & Dunn** prior to retiring from the legal profession. ■

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

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Doninique Jinhong
Ben Johnson
Brady Johnson
Carol Johnson
Daniel F. Johnson
Darrel Johnson
Hugo Johnson
Josh Johnson
Brianna Johnston Hanks
Jamie Johnston
Dallas Jolley
Courtney Jones
Cynthia Jones
Jennifer Jones
Juliet Jones
Geir Jonsson
Shannon Jost
Becky Juhl
Nathan Julius
Daniel Jung
Kevin Jussel
Jeff Kaatz
Mudit Kakar
Andrew Kamins
Matthew Kaminski
Jessica Kamish
Melvin Kang
John Kaplan
Suki Kaplan
Megan Kaufmann
Christina Kefalas
Alice Keh
Megan Kelley
David Kelly
Jennifer Kelly
Meghan Kelly
Sarah Kelly
Bethany Kelsch
Carol Kennedy
Elliot Kennedy
Le'a Kent
Chase Kepler
Gena Kerr
Jeffrey Kestle
Ruth Keyes
Kristina Khaleghi
Mohamed Khalil
Hamid Adam Khan
Zeshan Khan
Julia Khorun
Astor Kidane
Andrew Kim
Eunhye Kim
Jie Woo Kim
Jong Kim
Joseph Kim
Michael Kim
Peter Kim
Sally Kim
Sara Kim
Soloman Kim
Soojin Elise Kim
Colleen Kinerk
Maurice King
Drue Kirby-Coats
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Ali Kirsch
David Kirshenbaum
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KCBA KING COUNTY BAR ASSOCIATION

*Volunteer list to be continued in the January 2017 issue of the Bar Bulletin

Law Library

*Five Plus Five Plus Two:*

# 12 Things You Need to Know about the Public Law Library

***By Rick Stroup***
***Assistant Director***

## Five Services We Provide

Our staff is available in person, via email and over the phone, during all hours of operation, to help you with your research. Sometimes, this may be something as simple as helping you use our online catalog. We use it all the time and are aware of its quirks. As a busy practitioner, you may not be, so don't hesitate to ask us for help.

Sometimes, you may want our help in choosing between a variety of possible resources. Our staff can help here, too. We can provide you with "mechanical" information — such as which is more up to date or which has a more authoritative author — or with more subjective information — such as which is more popular among our other patrons or which is easier to use.

Sometimes, you might be aware of a particular online resource for a specific question, but not aware that there is also a valuable paper resource on the same topic or vice versa. We can help you in either of those situations. Sometimes, we don't own the particular resource you really need, but we can help you locate it in another library's collection. Sometimes, we can also redirect you to a resource we do own that might be a viable alternative.

Conference room space is a scarce commodity in either of King County's courthouses. We have six rooms in our Seattle location and one in our MRJC location. They are available for free on a first-come, first-served basis and can be reserved for your exclusive use for a modest hourly fee, which is very competitive with other similar services in either downtown Seattle or downtown Kent. Members of our Subscriber Program receive a 25-percent discount on conference room reservations.

If you have a citation to a case, a statute or regulation, or a particular treatise, consider using our document delivery service to have a copy faxed or emailed directly to your office. For most requests, the turnaround time is usually less than one hour. Members of our Subscriber Program receive a 25-percent discount on document delivery requests.

Sometimes what you really need is a place to spread your notes out for review before a hearing; sometimes it's a convenient place to meet briefly with your client; sometimes it's a convenient computer from which to check your email; sometimes it's a place to make a quick photocopy; sometimes it's a place to send or receive a fax. In all of these situations, we can help and most of the time that help is free.

We support audio and video conferencing in both of our locations, so if that form of communication is necessary, we can help.

## Five Resources You Might Need

*Westlaw and Lexis Advance* — We provide free access to both of these foundation online services in both locations. Subject to some restrictions imposed by each vendor, these services allow downloading and emailing of results, so if you prefer to remain paperless we support you there, too.

*HeinOnline* — We provide free access to this valuable online resource so you can have full-text access to a universe of law reviews and journals, classic legal research texts, and state and federal statutory and regulatory materials. Subject to some restrictions imposed by the vendor, this service allows downloading and emailing of results as well.

*SupportCalc from LegalPlus* — We foot the bill for this time-saving online resource, through which you can draft, test and modify child support scenarios using our state's new plain language forms or its traditional child support forms. Again, results can be downloaded and emailed free of charge.

*Shepard's Causes of Action* — This comprehensive set provides full litigation support for thousands of litigation situations. Each article includes a substantive law analysis, analysis of complaint elements and limitations of actions, and sample pleadings. Members of our Subscriber Program can check out volumes from this set for up to two weeks for further study at the office.

*Bender's Forms of Discovery* — This comprehensive set provides, in genuine encyclopedic format, thousands of model interrogatories for hundreds of litigation topics. Each chapter provides both general and fact-specific interrogatories for plaintiffs and defendants. Each also includes a convenient cross-reference note to other chapters with interrogatories related to your main research topic. Members of our Subscriber Program can check out volumes from this set for up to two weeks for further study at the office.

## Two Locations To Serve You

Your practice may or may not require you to travel between Seattle and Kent, but if so, we have you covered. We operate from two locations: Our "main" branch is located on the sixth floor of the King County Courthouse, on the corner of Third Avenue and James Street, in downtown Seattle.

Our "smaller" branch is located on the ground floor of the Maleng Regional Justice Center, on the corner of Fourth Avenue North and James Street, in downtown Kent. Though the Seattle location is physically bigger and has a larger print collection, we offer all services in both libraries to better support your research needs, regardless of the courthouse in which your case is set. ■



# *Volunteer Legal Services Seeking Pro Bono Help*

*"I was convicted of a crime 20 years ago and I still cannot secure a job or stable housing. I am just trying to turn my life around."*

*"My family and I are living paycheck to paycheck and somebody started to garnish my wages. I didn't even know that I was sued."*

*"I have thousands of dollars' worth of credit card and medical debt. How can I keep paying for a roof over my head?"*

*"I was diagnosed with a terminal illness and I need to make sure that everything is taken care of so my family doesn't have to worry."*

*"Social Security is telling me that I owe them $10,000 and reducing my benefits. How am I going to pay my bills?"*

These are just some of the dire situations facing very-low-income King County residents who turn to the King County Bar Association's Volunteer Legal Services (VLS) program. VLS provides direct legal assistance to those who would otherwise go without legal assistance when they need it most. VLS programs assist clients in debt defense, Chapter 7 bankruptcy cases, Social Security overpayment cases, estate planning, and vacating criminal record cases.

The combined efforts of our dedicated pro bono attorneys and staff members have proven significant, with 51 attorneys closing 133 cases in 2016 thus far. However, the current demand for VLS cases far exceeds the number of attorneys available to take on new matters. KCBA Pro Bono Services is actively seeking experienced lawyers to volunteer their time in committing to one to two cases annually, or to act as a mentor to other attorneys working on VLS cases.

If you are interested in volunteering to help VLS by taking cases or providing mentorship, our VLS staff attorney, Paige Hardy, is happy to answer any questions you might have about the program. She can be reached by email at *PaigeH@KCBA.org* or at 206-267-7025. ■

BUSINESS OF

THE BOARD

# Finances, Membership Looking Strong

The following are highlights from the KCBA Board of Trustees meeting held on October 19, convened by KCBA President Kathryn Battuello.

Treasurer Kinnon Williams reported that the first financial report for the new fiscal year shows as of August 31 revenues of $1.5 million and expenses of $525,000, for net income of $972,000. He noted that revenues and expenses should be at roughly 17 percent of the approved budget and that revenues are currently 42 percent due to membership renewals traditionally appearing in financial reports at the beginning of each fiscal year.

Williams also briefed the trustees on the final financial statements for the year ending June 30. KCBA received $3.5 million in revenue, with $3.4 million in expenses, for net income of $49,000. In addition, the Association has $1.3 million in cash and cash equivalents and has $959,000 in reserves. He noted that the independent auditor will audit the data and report to the Board in December.

Membership Committee Chair Paul Crisalli reported that this year's membership renewal numbers are on par with prior years and the retention rate is 82 percent. He noted that there has been no negative feedback related to the dues increase. Lastly, he distributed a list of non-renewed members and asked trustees to call and email colleagues whom they know to remind them to renew their dues or to learn why the member is no longer interested in KCBA membership.

Executive Director Andrew Prazuch briefed the trustees on the annual Bench Bar Conference, which was held on November 11 at the Convention Center in downtown Seattle versus being hosted at one of the law schools due to scheduling conflicts.

Threesa Milligan, director of Pro Bono Services, briefed the trustees on KCBA's pro bono program history and provided an overview of each of KCBA's six pro bono programs. Carl Marquardt, Pro Bono Services Committee chair, discussed how the Committee works to support the program operations. Prazuch also briefed the trustees on the financial resources used to support the pro bono programs.

Battuello briefed the trustees on her recent activities, including highlights from the Volunteer Recognition Reception where outgoing committee chairs were honored and notable pro bono volunteers were recognized.

Finally, the Board went into executive session to continue its review of pending fair campaign practices complaints concerning judicial candidates. Trustees agreed that letters be sent to the Eric Newman and Catherine Moore campaigns clarifying that the Board's October 10 action was not intended to be confidential, and it directed its Fair Campaign Practices Committee to review the latest related complaints under the guidelines. ■

# KCBA Launches ADR Referral Service

***By Lori Buchsbaum***

Now available — an easy, convenient and user-friendly way to find mediators and arbitrators.

KCBA launched a pilot dispute resolution and conflict management platform on October 20 in coordination with celebrations of alternative dispute resolution (ADR) around the world. The new platform will operate in parallel with KCBA's existing Lawyer Referral Service (LRS).

Having launched the service initially as a pilot program, we are in the process of developing mediation and arbitration panels. Please consider joining either or both panels. Applications and qualifications are available at *kcba.org/lrs/lrsben* or you can request them by contacting Lesa Henry at *LesaH@kcba.org*.

Take advantage of the new referral service. If you are in need of a mediator or arbitrator, avail yourself of our panel of experts. They can be accessed through LRS (see the LRS webpage at *www.kcba.org/lrs* for details). Refer represented or pro se parties to this page and encourage them to explore non-litigated options to resolving their conflicts. We have already had great success helping parties who did not know ADR was an option.

The ambitious intentions of KCBA's newest program are to:

• create a robust, interdisciplinary platform that reflects dynamic industry trends;

• meet community needs for flexible, swift and affordable dispute resolution choices;

• support the strategic objectives of the Escalating Cost of Litigation Task Force; and

• increase community awareness regarding ADR, while supporting the business goals of ADR providers.

This initiative emerged from nine months of prodigious effort by ADR Section members, in close collaboration with KCBA leadership. As section chair, I am very excited about this dynamic and creative approach to meeting the needs of clients in conflict.

Estera Gordon of Miller Nash Graham & Dunn LLP said, "My goal for this program is that it will provide a useful resource to King County lawyers, businesses and residents, helping them resolve disputes with less frustration and greater satisfaction than traditional litigation models afford."

Mel Simburg of Simburg, Ketter, Sheppard & Purdy LLP, also is optimistic about the new program. "Although the Lawyer Referral Service is viewed as an easy way for the public to find access to a lawyer, this new panel is intended to serve a broader purpose," Simburg said.

"It can be a vehicle for consumers of legal services to find an alternative way to resolve disputes. In addition, this new program will create an easy way for attorneys to find mediators and arbitrators appropriate for disputes or other matters. Whether attorneys are looking for an ADR approach for a client or for their own partnership issues, the panel will have a number of experienced members who can provide assistance tailored to the specific problem." ■

## FIRING EMPLOYEES

*continued from page 22*

the team, customers and clients who worked with the former employee know whom to work with going forward. Depending on the former employee's role and duties, and the context surrounding the termination, the company and the employee may work together to craft a message for this purpose.

### 9. Think through Post-Dismissal Concerns

At the termination meeting or soon after, the former employee will likely want to know whether he can apply for unemployment, and whether the company will provide an employment reference. Thus, prior to delivering the news, your client should consider how it plans to respond (if at all) to an application for unemployment, and who, if anyone, it will authorize to provide a reference, and what procedure should be followed to obtain that reference.

Further, the company should determine if any restrictive covenants apply (such as a non-disclosure, non-solicitation, and/or non-compete agreement), and, if so, should remind the former employee of his continuing obligations under such agreement(s).

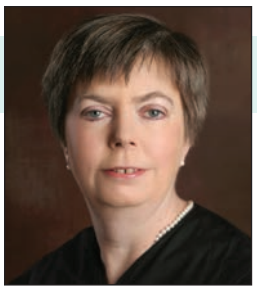
### 10. Consult with a Qualified Employment Attorney

Bet you saw that one coming! Firing an employee is rarely a risk-free proposition, but there are things that your clients can do, including following these 10 tips, to make it less risky. Consulting with an employment attorney through the performance management process, up to and including termination, may further minimize such risks.

It is inevitable that your clients will have to dismiss an employee at some point. Keeping to these 10 tips will go a long way in helping your clients (or even your own firm) manage that successfully. ■

*Gena Bomotti and Skylar Sherwood are principals in the Employment Law Group at Riddell Williams. They represent clients on a wide range of employment issues from HR counseling to litigation relating to federal and state discrimination and retaliation laws, WISHA/OSHA compliance, leaves of absence, disability and religious accommodations, wrongful discharge, wage-and-hour compliance, employment agreements, and workplace policies and handbooks.*

1 248 Cal. App. 4th 216, 206 Cal. Rptr. 841 (2016).



From the Desk of the Presiding Judge

# *Parting Words of Praise and Progress*

***By Judge Susan Craighead***

People keep asking me how I am going to celebrate the end of my term as presiding judge on December 31. I hope by the time that date arrives I will be ready to let go, but it will be hard. This was the most satisfying job I've ever had. Not necessarily the most fun job, I will acknowledge. But the one I will look back on as having made the most difference for the most people.

As a presiding judge, I was lucky. The 53 judges on this bench for the past three years have been team players. I asked Governor Jay Inslee not to send me blowhards and divas, and he didn't. Having a bench full of judges far more committed to getting the work done than worrying about who was getting credit for doing it made all the difference. I could focus on long-term projects to improve the Court without wasting time refereeing petty disputes. A bench this hardworking would make any PJ love the job.

I've also been fortunate to receive very wise counsel from the chief judges and the Executive Committee. And I have not had to worry for one minute about keeping the Court running day to day because in addition to the chiefs, I've had three dedicated and efficient assistant presiding judges — Judge Palmer Robinson, Judge Beth Andrus and Judge Laura Inveen, who succeeds me as presiding judge.

And then there is Paul Sherfey, the Court's chief administrative officer. I honestly cannot imagine being presiding judge without a talented and hard-working partner in the office across the hall. Paul has innate political skills, but shies from the limelight. He lets the PJ execute his strategy and tactics. Paul and I could not be more different (he's a rule follower; I'm a recovering public defender) and yet we have found ways to balance one another to benefit the Court. I am really going to miss working with my partner and friend.

Paul leads a staff of 380. As presiding judge, one becomes much more familiar with all of the people it takes to run the 14th largest county court system in the country, and an innovative one at that. We have staff who get up every morning excited to help angry, stressed out, pro se litigants navigate the court to get the divorce they desperately want or need. There are others who greet resentful jurors every day with a smile. We have juvenile probation counselors who find joy working with some of our community's most challenging young people — often for 30 years. It has been an honor helping Paul to lead this small army of dedicated staff.

With day-to-day operations well in hand, I have been able to work on long-term projects. One of the most satisfying has been empowering our staff to take a leading role in designing and implementing our strategic agenda. The Court adopted a plan with five broad strategic focus areas and specific objectives. The staff came up with ideas for projects that would improve the Court's performance in each of these areas (such as access, case flow and work environment). We created staff-led teams to work on these projects — now, in our second year, I can report that the strategic action teams have mostly completed their projects and, more important, this approach has energized the staff from bottom to top.

One of the first things we tackled when I began my term was creating a King County replacement for the State's mainframe data and case management system, SCOMIS. Once the Court decided not to go along with the State's "one size fits all" case management system, our doggedly determined county clerk, Barbara Miner, led the effort to obtain funding from the County Council to build our own system. It will be ready to "go live" in a little over a year. Many complications remain on the state level, but it will not be long before our clerks get to input data into a modern system that will produce information far more understandable to lawyers and the public.

During my three years in this role, judges Jim Rogers, Dean Lum, Ronald Kessler and Pat Oishi have worked very hard to make our criminal and MRJC operations as efficient as possible. Especially in Kent, our judges have stepped up to get cases moving as fast as we can do so. There are limits on what judges can do alone, however, and we now need to work with the other branches of government — the prosecutor and the Department of Public Defense — to devote more lawyers to child-sex cases in Kent. I'm satisfied, though, that we are doing our level best.

We've had some hard times while I've sat in this chair. The hardest were the weeks we spent considering how to lay off three commissioners. These are our colleagues, our subject matter experts on family law, guardianship and probate. They know their stuff. Laying off such valuable employees demonstrates with crystal clarity that our tax structure is strangling our justice system.

Times like these, as well as the inevitable personnel matters that bubble up to the PJ's office, are balanced by the moments of celebration. At this point, I've sworn in hundreds of new lawyers. The highlight for me of these ceremonies is meeting first-generation law graduates and their proud families. And by my count I've sworn in nine new judges. I get goose bumps every time I raise my right hand and read the line "I will support the Constitution …"

As regular readers of this column know, my passion these past three years has been juvenile justice. Chief Juvenile Court Judge Wesley Saint Clair has been a visionary leader and eloquent spokesperson in the community on juvenile issues. The community itself has pressed the Court to reduce the use of detention, reduce racial disproportionality and increase the use of diversion to keep youth out of the justice system altogether. Our entire Juvenile Court staff — from Director Lea Ennis to the administrative assistants in the field offices — have all had a hand in improving our work at Juvenile Court.

In mid-November, we learned that comparing the first nine months of 2016 with the same period last year, filings in Juvenile Court have plummeted by 24 percent, and a smaller share of those filings are against African-American youth. African-American youth are spending less time in detention, but still account for more than half of incarcerated youth. To be sure, dropping from 54.8 percent to 51.6 percent in this area might not look like much, but it does look like we are finally moving the needle a little.

Our use of detention for probation violations has dropped by 28 percent. Not only do we have the lowest incarceration rate in the United States, we are the only jurisdiction in the country to reduce disproportionality while continuing to reduce the use of detention.

Folks in our Juvenile Court are working really hard to achieve these results. It takes one little policy change after another to eke out a single percentage point change. It might not be the dramatic shift that parts of the community are looking for, but if there is one thing I've learned in this job, it is that courts change incrementally. By design, courts are conservative institutions. That's a hard lesson for a recovering public defender to learn, but it's the truth.

Justice itself happens one case at a time. Only as presiding judge does one have the privilege of helping to move the needle by a percentage point, affecting dozens of people at a time. I'll be going back to a role where I make justice a reality for individual people every day. I know once I get to look in their eyes, I will be thrilled all over again by the responsibility of doing right by each person before me. At least, that's what I am telling myself. ■

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## Attorney & Support Services

# MLK Luncheon Promises Engaging Address

***By Karen Murray***

On January 13, Washington Post columnist and 2009 Pulitzer Prize recipient Eugene Harold Robinson will be the guest speaker for the annual KCBA Rev. Dr. Martin Luther King Jr. Celebration Luncheon. This event will take place at the Washington State Convention Center in downtown Seattle from noon to 1:15 p.m.

There's very little doubt that Robinson's keynote address will speak to the most recent election and what that means to the future legacy of Dr. King, when the president-elect used disparaging statements to vilify women, immigrants, Muslims, and black people living in urban cities. On Election Day, the people exercised their voting rights and now the question is how will this play out? If you are a logical thinking human being, one can understand why the outcome was the way it was regardless of the fact that the billionaire candidate in all reality had nothing in common with those who believed he was talking for them.

In his most recent post on November 13 titled, "The American experiment will soon be put to the test," Robinson wrote, "Trump was the candidate not of working-class America, but of working-class white America. It is hard not to see his victory as partly, or perhaps mostly, a reaction to the eight-year presidency of Barack Obama, the first black man to occupy the White House." I can't help but wonder if there's truth to what Robinson writes; if it is, then where do go from here?

When Robinson takes the podium on January 13, he will have had more time to set aside the rawness and shock of the election results he and others felt that night while others felt elation. Regardless of what side of the political and emotional spectrum you happened to be on, we are still one America and we must decide how to address the civil divide that appears to have created two distinct Americas where the color of one's skin or national origin determines one's fate.

Robinson will take the opportunity to examine Dr. King's faith and inspiration during difficult and challenging times through his own words. Truly, this is Dr. King's legacy.

Please reserve your seat at the Luncheon. ■