Business Law

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Report from the Chair

By Drew Steen

Dear Members,

We have an exciting and ambitious agenda for this upcoming fiscal year, and we are hoping to take a fresh look at the way the Section and its leadership have operated. As the new chair of our Business Law Section of the Washington State Bar Association, I would like to briefly introduce myself and share a little bit of that agenda.

I am a partner in the Business & Tax Department of Davis Wright Tremaine, LLP, in Seattle. I have been practicing law for a little over a decade. I attending the University of Chicago for my undergraduate degree and Boston University for law school. I began my career at Lane Powell PC in Seattle, doing primarily commercial and securities litigation. It did not take me long to realize that my style and temperment were better suited for business transactional work, and I got the opportunity to work with some wonderful people in the corporate group there. I left Lane Powell in 2011 and went back to the east coast to practice at the Boston office of Proskauer Rose LLP, a large New York-based firm. With the exposure to much larger transactions than we regularly see in the Northwest, I learned an incredible amount at Proskauer about negotiating and documenting deals. I also learned that a New York law firm culture was not where I belonged, so, my wife and I found our way back to Seattle and I landed at Davis Wright Tremaine, where I hope to remain for as long as they will keep me.

I was approached by a colleague in 2014 about getting involved in the Business Law Section. Davis Wright Tremaine has a long and proud history of involvement and leadership in the Section, and I was honored to be invited to serve on the Section's executive committee as secretary/recorder. As is the custom, after a year in that role, I moved on to serve as vice-chair of the Section with the primary responsibility of coordinating the Section's annual mid-year meeting and CLE. Last year, I served as treasurer and chair-elect. On June 7, 2017, I took over for Andrew Ledbetter as chair. Due to the Section transitioning from a June election cycle to an October election cycle, I will serve in this role until October 31, 2018, about three months longer than my predecessors have been able to serve.

I have four primary goals for my time as chair, some of which may take longer to accomplish than I will have time for. But I see no reason not to diligently work towards them:

- The first is to continue the Section's strong tradition of close involvement with the state legislative process. The Business Law Section has historically been one of the most active sections in proposing and commenting on legislation in Olympia, and it is one of the things of which I am very proud. Playing this role means being responsive during the legislative session and carving out the time to participate, but it also means ensuring our subcommittees are adequately staffed. (For those who do not know, the Section includes numerous subcommittees dedicated to particularly substantive components of "Business Law." It is the expertise of these subcommittee members that allows the Section to provide the value that it does in this process.) As always, there is some turnover and shuffling within the subcommittees, and I will assist in smooth succession planning wherever I can.
- The second is to successfully complete the revisions to the Section's bylaws. These have not been amended since 2010, so there are plenty of necessary updates to bring the document in line with the Section's current practices. Further, the WSBA recently revised its bylaws, which included certain requirements of the sections that need to be incorporated into the bylaws. Our revisions have been through an internal review and comment process, approved by the Section's executive committee, reviewed by the Bar's general counsel, and awaiting formal approval by the Board of Governors. I sincerely hope that, at the time you are reading this, this process will have been completed and we can celebrate this success as a goal achieved.
- The third is to complete an update and revision to the Section's publications and communications strategy. As part of the revision of the Section's bylaws, we have

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consolidated several subcommittees into a Communications Subcommittee, currently chaired by the indefatigable, Deirdre Glynn Levin. Along with Joel Bodansky, a long-time Section leader and the chair of what was our "Website Subcommittee," Deirdre and I are working to revamp and update our Section's website as we transition it onto the Bar's platform. (We welcome any input or suggestions any members might have with respect to the website or how we can make it more useful!) Deirdre is also leading the charge to solidify our practice of circulating two newsletters per year – a tradition which has fallen off in recent years. Between the website, the newsletters and the list serve, we expect to strengthen the community of Section members.

- The fourth is to rethink the programming the Section offers. Because of our heavy legislative involvement, the Business Law Section's ability to offer high-quality programming in recent years has waned. Even our mid-year meeting, which was once a fairly grand event, has been reduced to a short meeting in the middle of an all-day CLE that seems to have lost relevance to our members. The executive committee and I are excited about reinventing our annual meeting into an evening event with a cocktail hour and networking. We are excited about coordinating with the Corporate Counsel Section in our programming and developing some new traditions of programming outside of Seattle. Section treasurer Dave Eckberg and I are working with the leadership of the Corporate Counsel Section to host a no-CLE networking event in Tacoma to celebrate our South Sound membership. We hope to be able to do something similar in Spokane later on.

I realize these goals are lofty. But I believe we can make great progress this year and inject fresh excitement into the future of our section. I invite your feedback and look forward to working with you and hearing from you how we can provide greater value to our membership.

Drew Steen can be reached by email at andrewsteen@dwt.com or 206-757-8081.

The Publications Committee of the Business Law Section encourages section members to contact the chair about article proposals, suggestions, or submissions. Inquiries may be directed to :

Deirdre Glynn Levin
dglynnlevin@hackettbeecher.com

Checklist for Enforcing International Licensing Agreements

By Mel Simburg

There are many ways a business in the United States can end up licensing technology or other rights to a business in a foreign country. The other company could be distributing products, assembling parts, contract manufacturing, or acting in another business capacity. Our question is, "What should your client do when the client learns of improper activity violating the licensed rights?"

The Problem

Common problems are (i) selling quality-failed goods out the back door,[1] (ii) selling outside the authorized market, (iii) under-reporting the number made or sold, (iv) making unauthorized copies that are sold separately, and (iv) copying a master (to avoid paying for masters or to avoid paying for the unauthorized products).

Enforcement is different abroad. We are used to filing lawsuits and engaging in discovery here. We are used to mostly ethical and cooperative opposing counsel. We are used to obtaining enforceable awards and judgments. You may need a different perspective when trying to reach the same goals in a different country. To a much greater extent, you will have to weigh the practical against the "legal" every step of the way.

What to do

To begin with, your best method of obtaining evidence is from a private investigator, not from initiating an enforcement proceeding. Legal proceedings will not likely provide you with U.S.-style discovery. In some jurisdictions, whether in arbitration or court, the only evidence you can introduce is evidence that you have found. You may not be able to demand documents as part of the legal process, but you might be able to demand them as part of the existing license agreement.

You also cannot assume that every violation is from an intent to undermine or violate your client's agreement. Sometimes education is sufficient. You might need to explain why it is necessary to destroy substandard products. Your client's business partner might just be trying to avoid waste and recover some value by selling the "seconds" out the back door. It is helpful to have the assistance of someone who knows the culture, the language and how to get things done.

A Checklist

The following checklist is designed to help you navigate the issues. What do you do about suspected violations? After concluding wrongdoing, do you arbitrate, litigate, or contact other local authorities? What are the choice of law issues to address? How do you deal with individuals and other non-signatories to the license? How does your client enforce its rights?

This checklist is not designed to give you all the answers. Rather it is designed to help you evaluate various approaches remind you of items to consider along the way, and to suggest some drafting tips for license agreements to make matters easier the next time.

1. **What the licensor should do when informed of suspected violations; how to prepare in advance of filing for arbitration (or litigation). Key: Evaluate both legal and practical.**
   a. Unilateral investigation:
      i. What is really going on?
      ii. What kind of violations?
      iii. How extensive substantively, geographically and quantitatively?
   b. Invoke accounting and inspection rights:
      i. Arrange forensic accounting review.
      ii. Plan out potentially useful investigations.
      iii. Give required notices.
      iv. Obtain desired records and send inspectors.
   c. Determine the types of wrongs:
      i. Misunderstandings?
      ii. Negotiable dispute?
      iii. Negligent or intentional acts?
      iv. Fraud or not? (E.g., exceeding allowances or failing to meet standards compared to counterfeiting.)
      v. Types of fraud?
   d. Economic analysis:
      i. Lost profits.
      ii. Wrongful proceeds.
      iii. Contractual remedies.
      iv. Legal remedies.
      v. Costs of types of remedial actions, including litigation and arbitration (especially 3-member panels).
   e. Rights issues:
      i. Contractual.
      ii. Applicable law or laws.
      iii. Choice of law issues.
      iv. Actual conflicts of law issues.
         (1) Is your IP registered to you in the jurisdictions in which and into which the licensing violations are taking place? Do you have ownership/priority problems or necessary actions to address there?
         (2) Is your trademark subject to EU Counsel Regulation No. 2081/92, which allows geographical indicators in the EU to coexist with earlier registered trademarks as long as consumer confusion is not likely, and that blocks later trademarks that conflict with EU registered geographical indicators? (As modified by 3/2005 WTO decision on Articles 16.1 & 17 of TRIPS).

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Checklist for Enforcing International Licensing Agreements *continued*

(3) Are there other potential substantive legal or policy issues, including affirmative defenses or counterclaims?

2. Arbitrate or litigate?

a. Direct pressure for remediation by opposing party: persuasive negotiation, contractually allowed escalation remedies (territories, product lines, markets).
b. Practical remedies: Stopping supplies from the licensor to licensee; informing purchasers of illegal products, customs seizures.
c. Is mediation possible first or is urgent action needed?
d. Careful review of the arbitration provision:
   i. Administering authority. Review its rules, procedures, availability of preliminary injunctive relief.
   ii. Who is bound by the arbitration clause? Are all necessary parties clearly subject to arbitration? Are all desired issues subject to arbitration?
   iii. Venue. Consider whether there are options. If so, consider issues of convenience, enforcement, language, effect of possible supplementation of proceedings rules by local procedural or substantive law and court rules.
e. Importance of confidentiality?
f. Does the arbitration clause protect IP rights that could be lost or undermined by litigation outcomes?
g. Compare the next steps after you obtain the desired award of damages and/or injunctive relief.
   i. If you do obtain an arbitral award, do you expect compliance? If not, what kind of enforcement is likely to be required and in which jurisdictions?
   ii. If you instead obtained a domestic court judgment, ask the same questions.
   iii. Are applicable enforcement jurisdictions parties to the N.Y. Convention (New York Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards)?
   iv. What are the advantages and disadvantages of bringing suit in a foreign jurisdiction instead of in the U.S.? Consult with overseas counsel. Consider where assets are located.
h. Now that you know what you prefer, what choices do you really have?
   i. Are there issues outside of the scope of the arbitration clause, such as violations of law rather than contractual claims?
   ii. Are there individuals or entities that you are not able to pursue under the arbitration clause?
   iii. Is a multipronged attack worthwhile, pursuing arbitration against some defendants or claims and litigation against others?
   iv. Beware the jurisdiction trap: Does the agreement contain a clause restricting initiation of litigation to a particular situs without including consent by the other parties to personal jurisdiction over them by that nation?
   v. Is there a forum shopping choice available to you? Do you need to act before the other side initiates a proceeding in a forum different from the type and/or location you want?

3. Choice of law issues:

a. Is the contractual choice of law appropriate and enforceable in the dispute resolution jurisdiction?
b. Are there public policies or choice of law rules in the expected enforcement jurisdiction that could be a problem?
c. Does the clause include the procedural rules for the arbitration?
d. Do you want to supplement (by agreement) the IBA Rules (International Bar Association Rules on the Taking of Evidence in International Commercial Arbitrations)?
e. What rules of procedure, privilege, discovery, or substantive law might be used to supplement the arbitral rules either intentionally or unintentionally (by virtue of the venue of proceedings).
f. What are the panelists' backgrounds? Are they familiar with litigation practices in the U.S.? Be aware of possible effects on the arbitration process or on discovery issues by panelists who are non-litigators, non-lawyers or from civil law jurisdictions if you are used to U.S. litigators familiar with IP issues.

4. Addressing the issue of non-signatories to the arbitration agreement:

a. A successful claim in arbitration requires arbitration jurisdiction over the potentially liable party. Is the non-signatory subject to the agreement (and specifically the arbitration clause) at issue in the case? The primary issues are the following:
b. Has the party by some act of its own subjected it to arbitration or to the arbitration agreement?
c. Has a representation by an agent bound the party to arbitration?
d. Has a representation by an agent sufficiently confused the claimant as to which company the agent represents that the claimant believed the party was represented by the agent?
e. Is the party directly affected by receiving benefits from the agreement, such that the party should be bound as a third-party beneficiary of the agreement?
f. Is the party bound as a result of fraud or fraudulent behavior affecting the documents or the transactions to which the documents relate?
g. Has the party by its conduct indicated an assumption of the obligation to arbitrate?

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Checklist for Enforcing International Licensing Agreements *continued*

h. Is the corporate relationship between the parent and subsidiary sufficient to require the subsidiary to be bound by the arbitration proceeding? This question relates to a number of legal theories: Piercing the corporate veil, alter ego, group of companies, consortium, joint venture, joint economic unit. In addressing this issue the Panel will want to be informed as to the relationship between the parent and its subsidiary, the extent to which the subsidiary may operate independently or not, whether they operate as a single economic unit for the purposes of the agreement at issue in the case, the structure and organization of the companies, their overlap of executives, and similar factors.

i. Has the party knowingly exploited the agreement containing the arbitration clause? Did the party have obligations and duties in the agreement or related to the agreement containing the arbitration clause? To what extent are the claims against that party intimately bound in and intertwined with the underlying contractual obligations?

j. Can the argument be made that the issues of whether a party is bound to the arbitration clause (i.e., arbitral jurisdiction over the party) are so dependent on facts that are so closely intertwined with the merits of the dispute that the determination of proper parties to the arbitration cannot be finally determined until the evidentiary hearing and therefore the parties should be treated as subject to the arbitration until final decisions in the matter?

k. Remember that a ruling based on the preceding paragraph requires the appropriate finding in the arbitration ruling.

l. Also remember that a ruling that a nonsignatory is subject to arbitral jurisdiction does not automatically mean that a finding of liability against the primary respondent applies against the nonsignatories; the panel still must determine specific respondent liability at the conclusion of the hearing. It is quite possible to have nonsignatories subject to a permanent injunction, but not to damages assessed against other respondents, or not subject at all to awarded relief.

5. Enforcement issues:

a. Beware of the merger issue. There is case law that an arbitral award taken to the courts of the arbitration situs and entered as a judgment becomes merged into the judgment. This means that enforcement of the award under the N.Y. Convention may no longer be possible.

b. Therefore the first steps should be to seek enforcement of the award in the foreign jurisdiction(s) pursuant to the N.Y. Convention.

c. If the losing side seeks review in court under the Federal Arbitration Act, should you cross-claim for confirmation of the award?

d. Can the award be enforced while an appeal is pending?

e. Remember the one-year limit for seeking confirmation of an award under the FAA.

f. Remember all the practical steps in addition to direct enforcement against the respondent.

6. Conclusion:

a. Enforcement begins with good planning at the beginning of the transaction.

b. This means due diligence on the parties, the landscape (legal, cultural, practical) and the potential pitfalls.

c. Good drafting includes considering restrictions as well as license grants.

d. Be sure to include all parties and persons who should comply and be subject to enforcement.

e. The arbitration clause should be drafted with all the enforcement considerations investigated and appropriate decisions made and included in the clause.

f. After the fact of breach, consider practical solutions and actions at the same time as the legal ones. The practical ones may be more rapid, more effective, more efficient and less costly.

 Mel Simburg is a partner in the Seattle law firm of Simburg, Ketter, Sheppard & Purdy, LLP, a member of the International Business Law Consortium, www.iblc.com. The bulk of his practice involves business and IP counseling and dispute resolution. Many matters are international transactions, including distribution and licensing, investments, joint ventures, and technology transfer. He regularly serves as an arbitrator or a mediator for business and intellectual property disputes, and serves under Rule 39.1 for cases in the Western District of Washington. Mel can be reached at msimburg@sksp.com *or 206-382-2600.*

1 See e.g. http://archive.fortune.com/magazines/fortune/fortune_archive/2006/05/01/8375455/index.htm

The "(c)" Change in Private Offerings

By Paul Swegle

The Jumpstart Our Business Startups Act of 2012, or the JOBS Act, spurred big changes in the federal securities laws. The most highly publicized change was the legalization of equity crowdfunding. Less high profile, but equally interesting to many securities practitioners, was the sea change involving "general solicitation."

Impact of the JOBS Act

The JOBS Act forced the SEC to write rules allowing companies to "generally solicit" accredited investors in private placements. Private placements are offerings that are exempt from registration as public offerings because of their limited nature. The congressional mandate to permit essentially all types of solicitation and public advertising for private offerings overturned an 80-year prohibition that was a core regulatory principle for the SEC.

Despite the JOBS Act's mandate to move quickly, the SEC dragged its feet in drafting the new rules. It also floated proposals that seemed designed to discourage the use of general solicitation. Ultimately though, to its credit, in 2016 the SEC adopted a fairly straightforward new Rule 506(c) under its Regulation D, or "Reg D," as it is more commonly known. Rule 506(c) is found at 17 CFR 230.506.

By way of background, virtually all venture capital, and most other private capital raised by smaller companies in recent years, has been raised under the exemption from registration provided by former Rule 506 of Reg D. Former Rule 506 allowed companies to raise unlimited funds from unlimited numbers of "accredited investors," and also from up to 35 unaccredited investors.

It has always been a point of concern as to whether a company or its placement agent must have a "pre-existing substantive relationship" before approaching an investor, no matter how wealthy. The rules and related guidance have likewise always prohibited public statements or advertisements about an offering, including in the press, at meetings, on websites, in blogs or in any other context.

Traps for the Unwary

Startup founders, among others, often stumble badly over this prohibition. Traps for the unwary and unsophisticated abound. It also seems the financial media are forever *trying* to trip up founders by asking about their current or future financing plans and then publishing responses like "we're just starting a Series A round" for all the world to see, including securities regulators. This leads to concerns around "blown exemptions from registration," investor rescission rights and related legal and regulatory contingencies.

Rule 506(c) changes all of this for companies that are willing to comply with the requirement that all investors be accredited and to take "reasonable steps to verify" such status. By simply collecting proper W-2s, 1099s, Form 1040s, or attestations from personal bankers, accountants, brokers or lawyers as described in Rule 506(c), and also keeping out any "bad actors" with prior securities law violations or other specified legal or regulatory blemishes, companies can now advertise their private offerings all they want and essentially "crowdfund" for accredited investors. No more concerns about errant founder statements to the press or to fellow attendees in tech meetups.

Use of 506(c)

As simple and potentially attractive as this sounds, surprisingly few companies are using Rule 506(c). Most are avoiding general solicitation and relying on the old version of Rule 506, which is now Rule 506(b). A casual review of the Form D filings streaming into the SEC's EDGAR system (https://www.sec.gov/edgar/searchedgar/webusers.htm) shows that 506(b) is claimed at least 10 times more often than new Rule 506(c).

Informally surveying a number of securities law practitioners on the reasons for Rule 506(c)'s low usage rates yielded these responses, some of which have been paraphrased:

- *My clients do not use 506(c) for several reasons. First, the process of verifying accredited status is more time consuming and more costly – the company must either use a verifying firm, or spend additional legal fees to ensure that the standards are met. Second, investors are reluctant to provide the backup needed to verify, and so there is a segment of potential investors that are not available. Third, the clients do not feel a need to undertake general solicitation – they believe they have a pool of potential investors needed to raise the funds.*
- *Why would you spend more time gathering additional information and prying into the personal finances of investors unless you really have to? Most of my startup clients want to limit the hassle for their investors as much as possible (and limit the ways an investor could choose to back out of the investment).*
- *I never use 506(c) because most investors are not interested in divulging this type of information in this type of setting.*

Other respondents raised different concerns, such as these two:

- *Beyond the administrative and legal issues associated with using 506(c), I think that using it can be viewed as a "tell" that the offering isn't a particularly attractive one. Relying on it essentially signals to the investing public that the offering isn't expected to be appealing to the most desirable sources of funding, for whom a general solicitation isn't necessary.*
- *If the 506(c) exemption fails, due to an inadvertent unaccredited investor, there is no fallback provision. 4(a)(2) is not available due to the general solicitation.*

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The "(c)" Change in Private Offerings continued

Lastly, a staff member in the SEC's Office of Small Business Policy acknowledged in a phone conversation on this topic that the SEC staff is also surprised by the low usage of 506(c). That staffer speculated that some issuers are likely concerned about not having the ability to fall back to a 506(b) offering if a 506(c) offering fails to get traction after general solicitation efforts.

But some issuers *are* using Rule 506(c). Numerous 506(c) offerings can be found on websites like Crowdfunder (www.crowdfunder.com) and Fundable (www.fundable.com). And a review of recent Form D filings reveals that Rule 506(c) has become popular for financing commercial real estate development deals and oil and gas deals.

So how are these issuers meeting the investor verification requirements? And how difficult, intrusive or expensive are the issuers or investors finding 506(c) compliance?

Interestingly, survey responses from counsel who have successfully used Rule 506(c) indicate fewer concerns about cost, difficulty and investor reluctance, as evidenced by these responses:

- *For the one 506(c) offering I did, the company used a combination of internal verification based on tax returns for those investors who were comfortable with this (about one-half of them) and having the other investors' CPAs or brokerage firms provide letters verifying accredited investor status.*
- *For verification of accredited status we have the investor engage a 3rd party accounting firm to review their assets and liabilities and provide certification of accredited status based on net worth.*
- *We've done a couple 506(c) deals. We have done some of the investor verifications in house, reviewing docs to fit within the safe harbor (W2s for the income test; or brokerage statements, credit reports under the net assets test). We also have a client who runs a fund with a 506(c) offering and since he's usually these folks' investment advisor, he generally has plenty of info about their financial situation to make a determination, and often they have $1mm+ with him.*
- *For the 506(c) offerings I have done, the clients contracted with their placement agents (registered brokers) to handle the accredited investor screening. I think this is ideal because investors sometimes balk at providing that much personal information to the offeror directly and because engaging a professional bolsters the argument that the offeror has taken reasonable measures.*

Conclusion

In summary, usage of Rule 506(c) is off to a slow start and only time will tell whether or not its popularity will grow. Investors may well get used to being verified, especially through services like www.verifyinvestor.com, and if enough big deals are run through the larger fundraising portals and angel investing platforms, 506(c) offerings might not seem quite so low brow, clunky or risky.

For startups outside of metropolitan areas or founders who are less well connected to wealthy individuals, angels or VCs, 506(c) may well offer their best opportunity for reaching potential investors to fund new businesses – a central goal of the JOBS Act. Tactically though, for most strong companies with good access to capital it probably makes sense to start a funding round under 506(b) and then switch to 506(c) if the dollars don't come in.

Paul Swegle currently serves as general counsel to several startups and is the Chair of the Corporate Counsel Section of the WSBA. He also serves on the Securities Law Committee of the Business Law Section of the WSBA and was recently elected to the Board of Governors of the WSBA. Paul began his law career with the Securities and Exchange Commission.

Committee Reports

The Corporate Act Revision Committee (CARC) has approximately 10-15 members, consisting of corporate attorneys practicing at large and smaller local law firms, in-house counsel at Washington corporations, professors of law at both local law schools (including the Dean of the University of Washington School of Law), and representatives of the Secretary of State's office.

CARC was instrumental in the development of the Washington Business Corporation Act (WBCA), and regularly considers the need for changes to the WBCA in light of developments in the Model Business Corporation Act (MBCA) overseen by the Corporate Laws Committee of the American Bar Association's Business Law Section, corporate laws and practices, judicial decisions and regulatory actions.

In the past year, CARC prepared numerous changes to the WBCA, effective July 23, 2017, which have been approved by the Washington state legislature and signed by the Governor. They include adopting a statutory procedure for ratification and validation of defective corporate actions, authorizing and enabling forum selection provisions, permitting asset drop-down transactions without parent corporation shareholder approval, eliminating 10-year term limits on voting trusts and shareholder agreements, and permitting downstream mergers.

Members interested in the activities of CARC are welcome to contact one of the committee co-chairs, Michael Hutchings (via email at: *michael.hutchings@dlapiper.com*) or Eric DeJong (via email at *edejong@perkinscoie.com*).

2016 Fifth Edition of Washington Business Corporation Act (RCW 23B) Sourcebook now available to Business Law Section members

The 2016 fifth edition of the *Washington Business Corporation Act {RCW 238} Sourcebook*, current through the 2015 legislative session, is available at no cost to current Section members, who have three options for accessing the current, complete 2016 fifth edition:

1. A limited number of print copies of the fifth edition of the *Sourcebook* are available at no cost, while supplies last, to current members of the WSBA Business Law Section *who have not previously received an earlier edition of this publication in hard copy*. Click **here** to order your copy. (Section membership will be recognized during the checkout process.)
2. Section members who received previous editions of the Sourcebook in hard copy may print out the replacement pages and follow the instructions for filing available through the links provided in the members-only area of the Section's website under "Publications" and "RCW 238 Sourcebook."
3. Section members may receive a free annual subscription, for as long as they remain Section members, to the online version of the Sourcebook on Case maker Libra. Access is provided through a discount code provided in the members-only area of the Section's website under "Publications" and "RCW 238 Sourcebook."

Seattle University Law School's Business Boot Camp Enters Its Third Year

By Steve Tapia

Seattle University School of Law's third annual one-day Business Boot Camp program was held on Wednesday, August 16, 2017, in Sullivan Hall, on the Seattle University campus in Seattle.

The Business Boot Camp is part of Seattle University School of Law's continuing efforts to bring entrepreneurship and business acumen into the legal curriculum. Steve Tapia, Distinguished Practitioner in Residence at the Law School and Director of the Program, said "the business community has given us consistent feedback that the lawyers we are forging need to better understand how business people think and what they care about in order to earn their seat at the table as trusted advisors, and this program seeks to do that in a one-day intensive format." It is intended to provide a strong foundation on an expedited basis in the knowledge, skills and values promoted in other related offerings such as the Innovation and Technology LLM program, the Community Development and Entrepreneurship Clinic, the one-week intensive program "The Lawyer's Role in Entrepreneurship and Innovation: An Immersion Experience," program and the Business of Intellectual Property class in the standard curriculum.

Attendees learned from skilled legal and business professionals who are expert in how businesses work and tackled a curriculum designed to build a basic foundation in real-world business skills. Specifically, the course featured intensive study of: finance and accounting principles; corporate management and strategy; current business models and the role of business plans; how companies are structured and regulated; and how intellectual property strategies fuel today's high-tech businesses.

Members of the faculty included Professor Tapia, formerly in-house counsel at HBO, DIRECTV and Microsoft; John Patera, a management, finance and business consultant currently serving as Director of Client Relations at Building*i*, a technology company in Bellevue, WA; Sam Chughtai, Managing Director of Cascadia Pacific LLC, Bellevue, WA, and noted cybersecurity expert; Sarah Doyle, member of the in-house legal team at Edifecs, a healthcare technology company headquartered in Bellevue, WA, and Deirdre Glynn Levin, Of Counsel at Hackett, Beecher & Hart and Chair of the King County Bar Association Business Law Section.

For further information about the Boot Camp program, please contact Professor Tapia at *tapias@seattleu.edu.*

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Greater Seattle SCORE Gives Back To Aspiring Businesses

Greater Seattle SCORE

Greater Seattle SCORE is a non-profit resource partner of the U.S. Small Business Administration with more than 300 chapters nationally. It was formed in 1964 to help aspiring and existing businesses succeed through mentoring and education. SCORE has helped more than 10 million people in pursuit of their business goals. Nationally, SCORE has more than 11,000 volunteers who have donated over 2.2 million hours of service. Since 2009, SCORE has help to start almost 205,000 businesses, which have created over 250,000 jobs. SCORE volunteers come from a wide variety of disciplines and many have held executive positions in their firms. While many SCORE volunteers are retired, others are still actively employed and motivated by a desire to give back.

There are SCORE chapters and branches is many areas in Washington state and nationally. In 2016, Greater Seattle SCORE helped launch 1,172 businesses, more than 70 volunteers provided 3,778 mentoring sessions, and 72 training workshops, attended by more than 1,000 people, were held.

What SCORE does

SCORE provides no-cost, confidential business advice to people interested in starting their own businesses and to entrepreneurs in various stages of developing and growing their businesses. Typically, an entrepreneur will ask for help in developing a business plan, marketing plan, financial plan, or solving some other business issue. They are matched with a SCORE mentor who will meet with them initially for an hour session to assess their needs. The initial session will often result in subsequent sessions with either the same mentor, or with another mentor with specific expertise needed by the client. Sometimes, more than one SCORE mentor will meet with a client at the same time, offering complementary expert advice.

Some SCORE volunteers have given years of service to the organization. Recently Greater Seattle SCORE Chapter Chair, Tom Hughes, recognized Jerry Zyskowsky for 25 years of mentoring and coaching local entrepreneurs. Jerry has mentored many entrepreneurs over his 25 years with SCORE and he has helped a large number of successful businesses. Jerry is not only an active business mentor, but has also been chapter chair and is currently coordinating the monthly "Building a Business Plan" workshop. Jerry has over 33 years of industry experience with the Boeing Company, both in management and engineering, and has spent significant time in long-range planning.

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Greater Seattle SCORE Gives Back To Aspiring Businesses *continued*

Jerry has been evaluating the management and finances of businesses from an investment standpoint for over 40 years.

Greater Seattle SCORE provides training for business owners

Workshops are offered monthly on key topics such as starting a new business, building a business plan, and understanding financial statements. In addition, special topics workshops are offered periodically, such as growing your business with email plus social media, starting and growing a consulting business, taxes on small business, and driving traffic to your website.

Webinars are also offered through the local and national websites on important business topics including essential steps to building a powerhouse online brand, SEO for small business (what Google wants) steps to starting a successful part-time business, boost sales and profits with CRM, and others.

Volunteer Opportunities

Volunteering as a SCORE Mentor means you are joining a nation-wide community of more than 11,000 diverse volunteers who are committed to helping small business owners succeed. Whether you have owned your own small business, come from a Fortune 500 company, are a practicing attorney, currently working or retired, a college student, or have some other relevant experience, if you have a sincere commitment for helping small businesses, there is a place for you as a SCORE volunteer.

As a SCORE volunteer, you can share your expertise through mentoring startup and early-stage business owners, lead workshops and seminars, provide online or telephone mentoring directly from your home or office, serve in a leadership capacity, and have flexibility in managing your volunteering time.

How can SCORE help in your law practice?

There are several ways in which SCORE can help you in your practice. First, attorneys may refer business clients to SCORE for help in almost any business function. Second, SCORE mentors have executive experience in management, marketing, IT, finance, accounting, and many other business functional areas – and our consultations are free! Third, SCORE business experts can complement your legal advice – attorneys can attend a workshop on starting and growing your own business, or other topics of interest. Lastly, attorneys may attend or lead a workshop or seminar on a legal topic about which business owners may need more in-depth knowledge.

SCORE invites members of the WSBA Business Law section to become involved. To learn more about Greater Seattle SCORE, meet with a mentor, or volunteer, please visit www.seattle.score.org, or call the SCORE office at 206-553-7320.

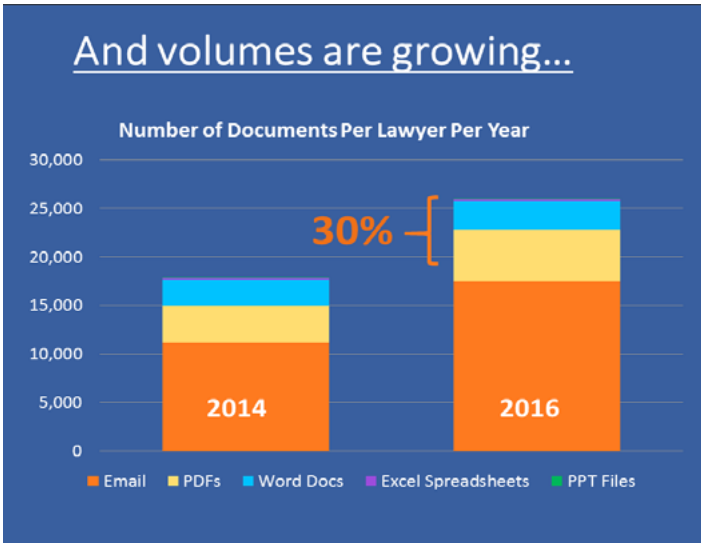
Solving Our Information Overload Problem

By Kevin Harrang, Esq. and Marty Smith, Esq.

The speed and stress of the legal business today is unprecedented. The pace of change, time demands, and breadth of knowledge that every lawyer needs to access, analyze and manage are reaching new levels. Business data is growing now at more than 43 percent year over year.[1] As individual lawyers, the pain associated with information management is acute, and for our firms, it is multiplied many times. How did we get here and what can we do now to ensure our practices don't get overwhelmed?

The Paper Baseline and the New Normal

In the 1980s, lawyers touched around 16 paper documents per day or around 4,000 letters, contracts, telephone message slips and notes of client meetings and telephone calls every year. That all changed in the 1990s with the adoption of computers and email. In the 2000s, mobile phones, tablets and online collaboration tools super-charged this number.



Source: MetaJure, Inc.

By 2016, the average lawyer sent or received a total of 26,001 documents that year, including 17,449 emails and 5,349 PDFs, and created or received 2,942 Word documents, 223 Excel spreadsheets and 39 PowerPoint presentations. That's *over 100 documents per day* – a far cry from 16 documents of the paper era. But that's not all. Electronic documents grew by more than 30 percent between 2014 and 2016 and are continuing at that pace.

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Solving Our Information Overload Problem *continued*

The Perfect Storm

At the same time the number of law firm documents has been exploding, other factors have combined to create a perfect storm. First, the number of support staff per attorney declined, leaving lawyers primarily responsible for managing their own information. Second, document formats proliferated at the same time clients were becoming increasingly fee-sensitive and demanding that their attorneys use these new formats. Finally, the tools available to the profession for dealing with all of this data didn't mature fast enough to help us. So what's a lawyer to do now?

Your Data Is an Opportunity

The reality is, your data – your firm's historic collection of knowledge and work product – can be a huge asset, provided you can put it to work. Think of the advantages of easily finding and reusing past work, quickly discovering and avoiding hidden conflicts of interest, dodging repeating a mistake, and immediately being able to tout detailed knowledge about your firm's experience with a prospective client.

New Technologies/New Approaches

Managing information is not a new problem; in fact a plethora of products promise relief. But many lawyers are leery of existing technology solutions – and for good reasons. These solutions have proven to be cumbersome, time consuming and expensive to implement. Moreover, many lawyers end up feeling the technology has simply turned them into the file room clerk of old. It is the most likely reason that, as of 2016, only 56 percent of all law firms had adopted a formal document management system.[3] Even when a firm does adopt one of these conventional solutions, less than 50 percent of the firm's documents ever make it into the system.[4]

Ironically, outside of the legal profession, sophisticated technology is doing much of the work of managing information for us. The latest smartphones can automatically label photos with locations and people. And Internet search engines can immediately find information from the world's largest collection of knowledge without formally organizing the data. These approaches have the potential to completely change how data is handled in our law firms, but we lawyers need to set aside some of our basic assumptions to give them a chance.

Thinking Differently Can Open New Solutions to Managing Documents

First, while it is important to organize libraries of books and paper-based file rooms in order to find anything, this isn't true for electronic information. The mistaken idea that electronic records are like paper ones has led lawyers to believe we must create a limited number of agreed-to filing structures (taxonomies), force every user to save documents into a single, dedicated location, and then manually tag and label every document and email.

Second, many believe that anarchy and chaos will ensue unless all users follow the same process and structure. The reality is attorneys overwhelmingly organize files, email and documents on their PCs in ways that make sense to them and their individual practices. Giving users autonomy with electronic information gives each lawyer the flexibility required as their practices and clients evolve.

Finally, documents no longer need to be manually moved into a central repository. Rather, repositories can now find, preserve and understand the documents. Webmasters don't need to submit a website to Google for it to know about the site and its content and now technology can do that for law firms as well.

Steps Towards 21st Century Document Management

As lawyers who have struggled to manage our own information, we encourage you to explore the latest data management technologies. Regardless of the solution you choose, we offer the following suggestions:

1. ***Digitize everything.*** Paper records not only take up expensive space, they can be hard to locate and search.
2. ***OCR every flat image file wherever it exists.*** In a typical law firm, 80 percent of their PDFs are image-only files that cannot be searched. Existing, cheap technology can automatically OCR all of the text in those documents behind the scenes, making them key-word searchable.
3. ***Connect your data systems.*** Documents often reside in independent silos, ranging from network file shares, archived email, data on individual PCs, to billing systems and thumb drives or CDs. Failing to connect those disparate data sources into a single system makes searching unnecessarily inefficient and time consuming.
4. ***Build a culture that encourages and rewards data sharing and reuse.*** Possessive treatment of documents (except when required by ethical walls or client confidences) decreases the resources and tools available to your broader team. The best and most efficient teams share knowledge and work product.
5. ***Finally, don't wait until your information is organized – start now.*** New tools and technologies enable all of the above with little expense and no lawyer overhead.

Kevin Harrang, Esq., and Marty Smith, Esq., are founders of MetaJure, Inc. *(www.metajure.com), a legal tech company that is helping law firms successfully driving efficiencies by automating email and document management. For almost three decades, Kevin and Marty have been drivers and observers of legal innovation. Kevin spent 18 years with Microsoft, most recently as Deputy General Counsel for Legal Operations. Marty established the Intellectual Property Practice Group for Preston Gates & Ellis (now KL Gates), co-founded one of the first eDiscovery firms (Attenex) and for 25 years advised leading edge tech companies and organizations. Kevin and Marty can be reached at:* kharrang@metajure.com *or* marty@metajure.com.

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Solving Our Information Overload Problem *continued*

1 www.realwire.com/releases/IDC-states-workers-lose-a-huge-20-productivity-due-to-document and www.idc.com/infographics/knowledgeworkers. According to the International Data Corporation's 2015 study, information workers (including lawyers and other professionals who are connected to the Internet and create, edit, review and/or approve electronic documents) lose 2 hours and 16 minutes each week searching, but not finding the right documents and another 2 hours recreating documents that can't be found. Time wasted in document creation and management activities cost firms $7,242 per information worker per year. For a firm with 100 lawyers, that amounts to more than $724,200 annually.

2 MetaJure, Inc.'s customers have a unique view into 100 percent of their documents and information. We talked to a host of them about quantifying their data. This data is the result of that in-house analysis.

3 Source: American Bar Association www.americanbar.org/publications/techreport/2016/practice_management.html.

4 Based on MetaJure, Inc.'s customer data.

Highlights of Key State Court Cases of Interest

By Bryan C. Graff

WLAD Provides Greater Protection for Business Patrons Than Business Owners

Barronelle Stutzman is a florist in Richland, Washington, and the owner of Arlene's Flowers, a family-owned business of 47 years. She is also an active member of the Southern Baptist church. Stutzman has sincerely held religious beliefs, including the belief that "marriage can exist only between one man and one woman." *State v. Arlene's Flowers, Inc.*, 187 Wn.2d 804, 816, 389 P.3d 543 (2017).

In 2013, a long-time customer of Arlene's Flowers, Robert Ingersoll, stopped in to speak with Stutzman. Ingersoll was engaged to be married and he wanted Arlene's Flowers to provide flowers for his wedding. Stutzman knew that Ingersoll was gay and that he was marrying another man, Curt Freed. Citing "her relationship with Jesus Christ," Stutzman told Ingersoll that she was unable to provide flowers for their wedding. Stutzman believes that participating, or allowing an employee to participate, in a same-sex wedding by providing custom floral arrangements is "tantamount to endorsing marriage equality for same-sex couples." *Id.* at 818. While declining to provide service for Ingersoll's and Freed's wedding, she gave Ingersoll the name of other florists that may be willing to provide flowers for the event. Ingersoll and Stutzman hugged before Ingersoll left the store.

The Washington Attorney General's Office became aware of Stutzman's refusal to provide flowers for the same-sex wedding and sent her a letter asking her to sign an "Assurance of Discontinuance," stating that she would no longer discriminate in providing wedding floral services. Stutzman refused to sign the Assurance of Discontinuance and, as a result, the State sued Stutzman and Arlene's Flowers alleging violations of the Washington Law Against Discrimination, RCW 49.60.215 ("WLAD") and Washington's Consumer Protection Act, ch. 19.86 RCW ("CPA"). Additionally, Ingersoll and Freed filed a private lawsuit against Stutzman and Arlene's Flowers and the two cases were consolidated.

The State, Ingersoll and Freed filed summary judgment motions against Stutzman and Arlene's Flowers, which the Benton County Superior Court granted. The trial court held that Stutzman violated the WLAD and CPA by refusing to sell floral services for same sex weddings and held both Arlene's Flowers and Stutzman (personally) liable for the violations. The trial court also rejected a number of constitutional challenges offered by the defendants. Stutzman and Arlene's Flowers appealed directly to the Washington Supreme Court, which granted direct review. On February 16, 2017, the Washington Supreme Court affirmed the trial court's rulings in full.

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Highlights of Key State Court Cases of Interest
continued

The WLAD prohibits discrimination in places of public accommodation on the basis of, among other things, sexual orientation, as well as on the bases of race, creed, color, national origin, sex, military status, and disability. *Id.* at 814; RCW 49.60.215. Places of public accommodation include places maintained "'for the sale of goods, merchandise, services, or personal property, or for the rendering of personal services… .'" *Arlene's Flowers*, 187 Wn.2d at 821; RCW 49.60.040(2). An act of public accommodation discrimination also constitutes an "unfair practice" and a per se violation of the CPA. *Arlene's Flowers*, 187 Wn.2d at 854; RCW 49.60.030(3).

In *Arlene's Flowers*, the Supreme Court rejected Stutzman's argument that she was not discriminating on the basis of Ingersoll's sexual orientation, but rather that any discrimination was on the basis of his marital status. The court concluded that such a distinction between one's status as a homosexual and "conduct fundamentally linked to that status," such as same-sex marriage, was contrary to precedent and inconsistent with the WLAD's statutory language. *Arlene's Flowers*, 187 Wn.2d at 825. The court further rejected Stutzman's contention that the WLAD's public accommodations provision contained an exception for same-sex weddings. *Id.* at 828. Next, the court addressed Stutzman's argument that it was required to balance her religious rights against conflicting rights of protected class members, such as Ingersoll's. The court disagreed, stating that "Stutzman cites no authority for her contention that the WLAD protects proprietors of public accommodations to the same extent as it protects their patrons." *Id.* at 829. Rather, "the plain terms of the WLAD's public accommodations provision—the statute at issue here—protect patrons, not business owners." *Id.* According to the court, "individuals who engage in commerce necessarily accept some limitations on their conduct as a result." *Id.*

The court next rejected Stutzman's numerous federal and state constitutional defenses. The court denied Stutzman's free speech challenge finding that her commercial sale of floral wedding arrangements did not amount to "expression" protected by the First Amendment. *Id.* at 831. The court also denied Stutzman's argument that the WLAD, as applied to her case, violated her First Amendment right to the free exercise of religion. The court held the WLAD is a "neutral, generally applicable law" subject only to rational basis review and that it clearly met that standard, *i.e.*, "it is rationally related to the government's legitimate interest in ensuring equal access to public accommodations." *Id.* at 843. Turning to her state constitutional challenge under Article I, Section 11 of the Washington Constitution, the Court held that the WLAD did not violate Stutzman's right to religious free exercise. Rather, the court found that the WLAD's public accommodations provision is a "neutral health and safety regulation" that survived strict scrutiny. Stutzman argued that "no real harm" came from her refusal to provide floral services for the wedding because other florists were willing to serve Ingersoll and, therefore, "[n]o access problem exists." *Arlene's Flowers*, 187 Wn.2d at 851. The court held, however, that "public accommodations laws do not simply guarantee access to goods or services. Instead, they serve a broader societal purpose: eradicating barriers to the equal treatment of all citizens in the commercial marketplace." *Id.* The court also rejected Stutzman's free association challenge under the First Amendment to the United States Constitution, holding that her commercial enterprise, open to the general public, is not an "expressive association" for purposes of First Amendment protections. *Id.* at 853.

Finally, the court affirmed the trial court's imposition of personal liability on Stutzman. "[T]here is long-standing precedent in Washington holding that individuals may be personally liable for a CPA violation if they 'participate in the wrongful conduct, or with knowledge approve of the conduct.'" *Id.* at 855 (quoting *State v. Ralph Williams' Nw. Chrysler Plymouth, Inc.*, 87 Wn.2d 298, 322, 553 P.2d 423 (1976)). Personal liability based upon a business owner's own participation or approval does not depend upon a claimant's ability to pierce the corporate veil.

Businesses in Washington should be cognizant of the protections afforded by the WLAD and the corresponding limitations imposed upon those engaging in commerce in our state. The WLAD does not protect business owners to the same extent as their customers, even those owners who may seek to conduct themselves consistently with their sincerely held religious beliefs.

On July 14, 2017, Arlene's Flowers and Stutzman filed a petition for certiorari with the United States Supreme Court. A response to that petition is due August 21, 2017. It is not known at this time whether the United States Supreme Court will grant that petition or accept review.

Washington Businesses Should Document Required Meal Periods for Their Employees

Washington law requires that: "Employees shall be allowed a meal period of at least thirty minutes which commences no less than two hours nor more than five hours from the beginning of the shift. Meal periods shall be on the employer's time when the employee is required by the employer to remain on duty on the premises or at a prescribed work site in the interest of the employer." WAC 296-126-092(1). "No employee shall be required to work more than five consecutive hours without a meal period." WAC 296-126-092(2). Furthermore, "[e]mployees working three or more hours longer than a normal work day shall be allowed at least one thirty-minute meal period prior to or during the overtime period." WAC 296-126-092(3). Washington's Department of Labor and Industries ("L&I") has issued a policy statement providing that "[e]mployees may choose to waive the meal period requirements." Wash. Department of Labor & Industries, Administrative Policy ES.C.6 § 8, at 4 (revised June 24, 2005).

When allegations are raised concerning violations, or missed meal breaks, what are the employee's and the employer's respective burdens of proof? The Washington Supreme Court recently provided guidance to Washington

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Highlights of Key State Court Cases of Interest
continued

businesses in *Brady v. Autozone Stores, Inc.*, __Wn.2d __, 397 P.3d 120 (2017). In *Brady*, the plaintiff filed a putative class action lawsuit against Autozone Stores, Inc., seeking unpaid wages for meal breaks it allegedly withheld from its employees. The case was removed to federal court, which granted plaintiff's motion to certify the following two questions to the Washington Supreme Court:

(1) Is an employer strictly liable under WAC 296-126-092?

(2) If an employer is not strictly liable under WAC 296-126-092, does the employee carry the burden to prove that his employer did not permit the employee an opportunity to take a meaningful break as required by WAC 296-126-092?

The Washington Supreme Court held that an employer is not strictly liable under WAC 296-126-092. *Brady*, 397 P.3d at 123. The court stated that this answer was compelled by the presence of the waiver option set forth in L&I's policy statement. An employer is not automatically liable if a meal break is missed because an employee may waive the meal break. *Id.*

Turning to the second question, the court found that WAC 296-126-092 imposes a mandatory obligation on Washington employers to provide meal breaks and to ensure they comply with the requirements of the regulation. *Id.* at 124. Accordingly, a plaintiff asserting a violation of the meal break requirements can make out his or her prima facie case by providing evidence that he or she did not receive a timely meal break. *Id.* The burden then shifts to the employer to prove that no violation occurred, or that a valid waiver exists. *Id.* The court stated "this should not be an onerous burden on the employer, who is already keeping track of the employee's time for payroll purposes." *Id.*

Businesses in Washington should be protecting themselves from such claims by ensuring their employees are taking timely meal breaks and documenting that fact. Further, while an employer is not required to obtain a written waiver from an employee who chooses to waive his or her meal break, Washington businesses would be well served to do so. Waiver is an affirmative defense upon which the employer bears the burden of proof. *Id.* at 123.

"National Sales" and "Drop-Shipped Sales" Held Subject to Business and Occupations Tax

In *Avnet, Inc. v. Wash. Dep't of Revenue*, 187 Wn.2d 44, 384 P.3d 571 (2016), the Washington Supreme Court rejected the appellant's dormant commerce clause challenge and held business and occupation ("B&O") tax can be imposed on an out-of-state distributor's (1) sales of product delivered to a Washington facility owned by a customer, even though the customer placed the order from an office outside Washington and the goods are billed to the customer out of state ("National Sales"); and (2) sales of product delivered to a third party in Washington at the request of the distributor's customer ("Drop-Shipped Sales").

The appellant, Avnet, Inc., is a New York corporation, headquartered in Arizona. Avnet did not include its National Sales or its Drop-Shipped Sales in its tax filings between 2003 and 2005. Avnet has a regional sales office in Redmond, Washington. The Redmond, Washington office included over 40 employees, including account managers with millions of dollars in annual sales revenue, in addition to sales and marketing representatives, engineers and technology consultants. The Redmond, Washington, office was not utilized, however, in the placing or completion of Avnet's National Sales or Drop-Shipped Sales. All of Avnet's products ship from distribution centers outside of the State of Washington. Approximately $80 million of Avnet's gross receipts between 2003 and 2005 came from National Sales and Drop-Shipped Sales.

Following an audit, the Washington State Department of Revenue assessed Avnet $556,037 in taxes and interest based on its alleged failure to include National Sales and Drop-Shipped Sales in its tax filings. Following an administrative appeal, Avnet paid the tax assessment under protest and filed a refund action in Thurston County Superior Court, challenging the assessment under the dormant commerce clause, among other grounds. The superior court concluded that the National Sales were subject to the B&O tax, but not the Drop-Shipped Sales. The parties cross-appealed the superior court's ruling to the Court of Appeals, Division II, which held that Avnet's B&O tax liability included both its National Sales and Drop-Shipped Sales. The Supreme Court affirmed. *Avnet, Inc.*, 187 Wn.2d at 67.

Addressing Avnet's dormant commerce clause challenge, the court recognized that a state tax on an out-of-state corporation must "(1) be 'applied to an activity with a substantial nexus with the taxing State,' (2) be 'fairly apportioned,' (3) 'not discriminate against interstate commerce,' and (4) be 'fairly related to the services provided by the State.'" *Id.* at 52 (quoting *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279, 97 S. Ct. 1076, 51 L. Ed. 2d 326 (1977)). A local taxing scheme that fails any one of these requirements is unconstitutional and invalid. *Id.* Avnet argued that because its Redmond, Washington, office was not involved in any way in the National or Drop-Shipped Sales, *i.e.*, the orders were placed directly with Avnet's headquarters in Arizona and the Redmond, Washington, office was not involved in fulfilling the sales, Washington lacked the requisite "substantial nexus" and the dormant commerce clause prohibited Washington from imposing a B&O tax on the sales. The court disagreed. It stated that the crucial factor governing nexus was whether the taxpayer's activities in Washington are significantly associated with the taxpayer's ability to establish and maintain a market in Washington for the sales. *Id.* at 57. A company must prove a "complete absence of any connection between the local office and the underlying sales." *Id.* at 58. "[W]here there is general contact between the taxpayer's in-state employees and its customers related to the taxpayer's products, a claim that such sales are dissociated will fail." *Id.*

In Avnet's case, the court noted that its Redmond, Washington, office provided market intelligence, strategized con-

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Highlights of Key State Court Cases of Interest
continued

cerning how to create greater product demand, worked on improving products and designing new prototypes, solicited orders for Washington customers, responded to requests for quotes, received orders, and responded to questions. While the Redmond, Washington, office did not place the National or Drop-Shipped Sales orders, or provide any post-shipment services related to those sales, the court further pointed out that Avnet did not indicate that the Redmond, Washington, office would not do so if requested. Accordingly, the court concluded that Avnet's activities were at least minimally associated with its ability to establish and maintain a market in Washington. *Id.* at 61. As a result, a sufficient nexus existed between Avnet's Washington activities and the State to support Washington's imposition of a B&O tax on gross receipts derived from all of Avnet's inbound sales, including the National and Drop-Shipped Sales.

Out-of-state businesses with a local office who challenge the imposition of B&O tax in Washington face a high hurdle. B&O tax can be imposed even where the local office is involved in only a "passive sense of being present, aware of the transaction, and available to assist if necessary." *Id.* at 61.

Bryan Graff is a Member at Ryan, Swanson & Cleveland, PLLC. Mr. Graff has broad litigation and appellate experience, which includes transportation, insurance coverage and regulatory matters, employment, class action and intellectual property cases, as well as construction defect, landlord/tenant and various other business disputes.