



## Welcome to the Administrative Law Section's E-Newsletter!

We hope you enjoy our newsletter, and encourage your feedback. Feel free to forward our newsletter to your colleagues, and encourage them to join the Section so they can receive the newsletter directly! We also welcome your suggestions for topics for future newsletters

Contact Us  
**Kristal Wiitala, Chair**  
[witakk@dshs.wa.gov](mailto:witakk@dshs.wa.gov)

Newsletter Submissions  
**Merrilee Harrell**  
[mharrell@rtwccg.com](mailto:mharrell@rtwccg.com)

## Inside This Issue

Jeffrey D. Goltz Receives Frank Homan Award .....	1
U.S. Supreme Court Hears Federal FOIA Case of Local Interest .....	2
Member Activities .....	2
On Diversity – A Young Lawyer's Perspective .....	3
Case Summaries – Washington Supreme Court .....	4
Case Summaries – Washington Court of Appeals.....	7
Case Summaries – Federal... ..	9
News from Other Sections..	10

## Jeffrey D. Goltz Receives Frank Homan Award

The Washington State Bar Association is pleased to announce that Olympia attorney Jeffrey D. Goltz has been selected as the 2010 recipient of the WSBA Administrative Law Section's Frank Homan Award. Established in 2005, the award is given in recognition of noteworthy contributions to the improvement or application of administrative law – for long-term distinguished service; in recognition of a single, extraordinary contribution or project; and/or by significant commitment to administrative law, the justice system, and the public.

After growing up in Bellingham, Goltz received his undergraduate degree from Macalester College in St. Paul, Minnesota, in 1971, and his law degree from the University of Oregon School of Law in 1974. He was appointed chairman of the Washington Utilities and Transportation Commission (UTC) by Governor Chris Gregoire in February 2009. Before joining the Commission, Goltz practiced law for 34 years, 30 of which were in the Washington Attorney General's Office. Most recently, he served as one of four supervising deputy attorneys general, both under Attorney General Rob McKenna and former Attorney General Gregoire. Prior to that, Goltz served as head of the Utilities and Transportation Division of the Attorney General's Office for 11 years, serving as chief counsel to the UTC; as head of the Ecology Division; and as an assistant attorney general

both in the Ecology and Revenue Divisions. From 1993 to 1995, he also was assigned to serve as counsel to the Governor's Task Force on Regulatory Reform. Outside the Attorney General's Office, he also was in private practice and worked on environmental and energy issues as a legislative assistant in Washington, D.C.

Goltz has participated in numerous continuing legal education programs on administrative law, utilities law, and other topics. He is the co-author (with C. Robert Wallis and Richard A. Finnigan) of *Rule Making under the Administrative Procedure Act* in the Administrative Law Section's *Administrative Practice Manual*. He currently serves on the Electricity and Consumer Affairs committees of the National Association of Regulatory Utility Commissioners and is one of Washington's representatives on the State-Provincial Steering Committee, an advisory committee of the Western Electricity Coordinating Council on transmission planning issues.

The Homan Award will be presented to Mr. Goltz by WSBA President Steven Toole at the Board of Governors luncheon in Olympia on Thursday, January 27, 2011.

*To nominate someone for the Homan Award, contact Kristal Wiitala, [witakk@dshs.wa.gov](mailto:witakk@dshs.wa.gov), or Larry Berg, [larry.berg@comcast.net](mailto:larry.berg@comcast.net).*

## U.S. Supreme Court Hears Federal FOIA Case of Local Interest

*Milner v. U.S. Dep't of the Navy* was argued to the U.S. Supreme Court on December 1, 2010. This case involves the interpretation of 5 U.S.C. § 552(b)(2), which exempts from disclosure documents "related solely to the internal personnel rules and practices of an agency" (FOIA's Exemption 2). At issue was whether the Navy could withhold Explosive Safety Quantity Distance ("ESQD") data pursuant to Exemption 2.

Milner, a resident of Puget Sound, requested ESQD data for Indian Island (near Port Townsend), which stores various munitions and explosives. The Navy claimed the data was exempt from disclosure pursuant to the "High 2" category of the exemption, which "applies to 'internal personnel rules and practices,' disclosure of which 'may risk circumvention of agency regulation.'" The High 2 exemption first appeared in a D.C. Circuit decision interpreting FOIA's exemption 2, *Crooker v. BATF*, 670 F.2d 1051 (D.C. Cir. 1981). The Ninth Circuit followed *Crooker* in its decision. The Supreme Court is likely to use this case to determine whether the "High 2" category is a correct interpretation of section 552(b)(2).

Watch for a decision in the case in the spring or early summer.

- Jeffrey B. Litwak

## Member Activities

Board of Trustee member Jeffrey B. Litwak published the first-ever law school text on interstate compact law to accompany the compact law seminar he teaches at Lewis and Clark Law School. Jeff tells us that he began writing the book more than two years ago in response to suggestions from his students, who were asking for more background about compacts generally and more excerpts of cases than he had been assigning. Two chapters may be of interest to administrative law practitioners. Chapter 4 discusses compact agencies as federal, state and independent agencies. Chapter 10 is a long chapter on compacts and administrative law, addressing subjects such as appointments and removal of compact officials; oversight of compact agencies; withdrawal, termination, and winding up of compact agencies; and the application of the federal and state APAs. The book is available electronically at [www.semaphorpress.com](http://www.semaphorpress.com).

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[wiitakk@dshs.wa.gov](mailto:wiitakk@dshs.wa.gov)

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[marc@ulproject.org](mailto:marc@ulproject.org)

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[litwak@gorgecommission.org](mailto:litwak@gorgecommission.org)

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[mharrell@rtwgc.com](mailto:mharrell@rtwgc.com)

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[lisa.malpass@hotmail.com](mailto:lisa.malpass@hotmail.com)

**Dawn Reitan**

[dreitan@insleebest.com](mailto:dreit@insleebest.com)

##### Terms expiring in 2012

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[aab@aterwynne.com](mailto:aab@aterwynne.com)

**Melanie deLeon**

[melanied@atg.wa.gov](mailto:melanied@atg.wa.gov)

**Suzanne Mager**

[suzannem@doh.wa.gov](mailto:suzannem@doh.wa.gov)

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[hwachter@cityoflakewood.us](mailto:hwachter@cityoflakewood.us)

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[marc@ulproject.org](mailto:marc@ulproject.org)

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**Melanie deLeon**

[MelanieD@atg.wa.gov](mailto:MelanieD@atg.wa.gov)

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[stewajjk@dshs.wa.gov](mailto:stewajjk@dshs.wa.gov)

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[pottierre@frontier.com](mailto:pottierre@frontier.com)

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[larry.berg@comcast.net](mailto:larry.berg@comcast.net)

##### Newsletter

**Merrilee S. Harrell**

[mharrell@rtwgc.com](mailto:mharrell@rtwgc.com)

##### WYLD Liaison

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The Administrative Law Section also welcomes other articles and items of interest for publication. The editors and Board of Trustees reserve discretion whether to publish submissions.

Send submissions to: Merrilee Harrell ([mharrell@rtwgc.com](mailto:mharrell@rtwgc.com)).

This is a publication of a section of the Washington State Bar Association. All opinions and comments in this publication represent the views of the authors and do not necessarily have the endorsement of the Association nor its officers or agents.

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## On Diversity – A Young Lawyer’s Perspective

by Gabriel Verdugo

*The Administrative Law Section encourages and promotes diversity in our field. Gabriel Verdugo, a 3L at University of Washington and a student member of the Administrative Law Section, shares his perspective on the meaning of “minority.”*

I doubt I am the only law student in my 3L class who took Latin in college with the hope that a study of the dead language was the secret prerequisite to law school. If that is true, then I am probably not the only one who feels a little disappointed. Other than *res ipsa loquitur* and *caveat emptor* in my 1L torts class, I found that Latin has been largely excised from the study of law. By the beginning of my 3L year I had resigned myself to the belief that Latin would be about as useful to me as a lawyer as would be my hours of rat dissection. Reflecting on the past two years, however, I was surprised to find that one lesson from my first day of Latin class readily came to mind. Wheelock’s Latin, the standard textbook, begins with a quote that, surprisingly, is not even in Latin. Johann Wolfgang von Goethe said: “Whoever is not acquainted with foreign languages knows nothing of his own.” As an undergraduate student I regarded this as Wheelock’s effort to keep pre-law students in their seats. Being openly gay in law school, however, has led to conversations that made me realize Goethe’s admonition to study foreign languages also encourages us to learn how our friends and colleagues might define words differently, even when we speak the same language.

During my 1L year, Professor Dean Spade from Seattle University came to the University of Washington to discuss critical views of same-sex marriage. Although same-sex marriage seems to be a path to equality for the lesbian, gay, bisexual, and transgender (LGBT) community, he argued that legalizing same-sex marriage would likely benefit only a small segment of the community, while further marginalizing the subgroups that are in the direst need. Holding this view, however, puts him in an awkward position with the mainstream gay rights movement. How can he be in favor of LGBT rights and against same-sex marriage, the movement’s most publicized goal? Is he still a “gay rights supporter,” as same-sex marriage proponents define the term? The answer for me was clear: yes. Even if Professor Spade’s opinion differs from that of the majority of the gay rights movement, both share the goal of equality, which includes the right for same-sex couples to enter into any legal relationship that is available to opposite-sex couples. Professor Spade would likely consider same-sex marriage a result of equality, rather than a means of achieving it.

A harder test for my definition of “gay rights supporter” came after Professor Spade’s lecture, when a friend asked if she could speak with me in private. She sympathized with Professor Spade’s predicament. She also supported LGBT rights and opposed same-sex marriage, but her reason for opposing same-sex marriage was completely different. She felt that marriage, the term itself, should be limited to a man and woman. Unlike Professor Spade’s definition of “gay rights

supporter,” it was difficult to reconcile my friend’s beliefs with my own definition. I believe that full equality for same-sex couples necessarily includes marriage, but my friend would stop just before the word. People had expressed this view to me before, just none whom I believed. I could tell from my friend’s concern, however, that she truly did care. She had no desire to change my opinion or to make me feel uncomfortable, but was genuinely troubled by the issue of whether or not her LGBT friends would still consider her an ally. After speaking with her, I knew that the answer, at least for me, was yes. My definition of support, and ally, had to open up a bit.

Later that year I also learned that my definition of “minority” is not universal. As a 1L I applied for summer diversity programs, wondering whether each specific group or firm encouraged LGBT students to apply. Some firms expressly included sexual orientation in diversity statements and advertisements for diversity fellowships. Other firms, however, stated that they defined the term broadly, or provided examples of minority groups without expressly including LGBT students. Under the canon of statutory interpretation *expressio unius est exclusio alterius*, another Latin holdout, the programs in the latter group might specifically target only the groups listed. I asked a friend what he thought those firms and programs meant, and he was surprised to hear that anyone considered LGBT people to be a minority group. Again, this view was completely different from my own. I could conceive of a group specifically reaching out to a minority community that was underrepresented, and therefore limiting its definition of “minority” for a specific program. But my view of the general term “minority” always includes the LGBT community. What followed was an interesting and respectful conversation. Rather than attempting to persuade each other, I think we were both motivated by curiosity. I do not know if this conversation changed his definition of “minority,” but we at least learned that different meanings existed.

These conversations were not easy. In both instances we were tiptoeing around issues that can – and often do – end up nurturing discord instead of understanding. I think that the success of the exchanges largely lay in the motivations behind them. Concern and curiosity kept us talking, rather than the desire to be right. Although I doubt that I changed my friends’ opinions, I did learn how their definitions of important terms differ from my own and, in turn, the limitations of my own understanding. Latin’s role in the law may be declining, but Goethe’s contribution to the study of Latin has already shown some benefit to my future as a lawyer.

## Help us make this newsletter more relevant to your practice.

If you come across federal or state administrative law cases that interest you and would like to contribute a summary (approx. 250 – 500 words), please contact Merrilee Harrell: mharrell@rtwccg.com.

## Case Summaries – Washington Supreme Court

### ***Seattle Times Co. v Serko, 84691-0 (Nov. 8, 2010).***

The Seattle Times sought a writ of mandamus vacating trial court orders that exempted documents gathered during a criminal investigation from production under the Public Records Act, and sealed trial exhibits generated during a subsequent criminal trial.

Maurice Clemmons shot and killed four Lakewood police officers on November 28, 2009. A Seattle Times reporter requested that the Pierce County Sheriff's Department produce various records related to the investigation of the shootings. Accomplices of Clemmons, then defendants in a pending criminal proceeding, enjoined the release of the documents claiming that the records were exempt from release under the PRA, and that production would impair their right to a fair trial.

The documents were deemed exempt from production following an *in camera* review by Judge Serko, who found that the defendants' fair trial rights would be impaired by production. Meanwhile, Clemmons' sister, Latanya Clemmons, was being tried as an accomplice. Trial exhibits admitted into evidence in open court were discussed by the media. Some of the exhibits contained records that were exempted from production by Judge Serko. On the day the evidentiary portion of Ms. Clemmons' trial was concluded, another accomplice moved, *ex parte*, for an order to seal all of the trial exhibits, citing Judge Serko's order in support. A temporary order sealing all the exhibits marked or admitted was set for hearing. On the same day, the Supreme Court granted expedited review of the Times' petition for a writ of mandamus.

On review, it was noted that Judge Serko had identified RCW 42.56.540 as the relevant exemption premised on concern for the respondents' fair trial rights. The respondents offered two additional exemptions – work product and investigative records. The Court did not find the documents to be work product, and further found that the investigation into the murders of the Lakewood officers was no longer ongoing. The Court also held that there was no specific exemption under the PRA that mentioned an individual's fair trial rights, though it was noted that courts have an independent obligation to secure those rights. The Court held that in order to withhold public documents based upon protecting a fair trial right, a trial court must find with particularity that it is more probable than not that unfair-

ness or prejudice will result from the pretrial disclosure and must consider alternatives to withholding the records. The Court struck Judge Serko's order.

The Court also reviewed the order sealing trial exhibits for abuse of discretion. Starting with the presumption of openness, based upon the state constitution's mandate, the Court pointed out that the court rules require a hearing before court records are sealed or redacted. This procedure was not followed with the *ex parte* order. The sealing of the exhibits constituted a court closure to the extent it removed from public access documents marked as exhibits or admitted into open court. In order to make such a closure, the trial court was required to engage in an on-the-record analysis of the factors outlined in *Seattle Times v. Ishikawa, 640 P.2d 716 (1982)*, and to set forth findings supporting a determination that there is a compelling interest that overrides the public's right to the open administration of justice.

- Melanie deLeon

### ***TracFone Wireless v. Department of Revenue, 82741-9 (Oct. 28, 2010)***

In a 5-4 decision, the Supreme Court upheld the Department of Revenue's (DOR) determination that TracFone, a cellular telephone service provider, must pay the state enhanced-911 (E-911) tax for subscribers who purchase pre-paid wireless cell phone service.

In 1994, the Legislature extended an excise tax on telephone lines to cellular phones, for the purpose of funding emergency communications services. Typically, phone companies collect the tax from their subscribers by charging 20 cents per phone line per month on the monthly bill. But TracFone is a pre-paid cellular service; subscribers pre-purchase blocks of minutes rather than signing up for monthly service. TracFone filed a tax refund action contesting DOR's determination that the E-911 tax must be paid on TracFone's wireless cellular phone service, arguing that the company's business model and billing practices made it impossible to collect the tax from subscribers.

The Court held that the plain language of the statute imposes the 20 cent per month E-911 tax on all phone lines whose place of primary use is in Washington. TracFone cannot avoid its tax obligations due solely to its choice of business model. In other words, TracFone's business choice

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**Case Summaries – Washington Supreme Court** *continued*

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of not billing subscribers monthly does not convert a plainly taxable event into a nontaxable event. If TracFone's chosen business model makes it impossible for the company to collect the monthly tax from its subscribers, then the statute allows the tax to be paid by TracFone directly (rather than from collections from the individual subscribers). Summary judgment in favor of DOR was affirmed.

- Katy A. King

**O'Neill v. City Of Shoreline, 240 P.3d 1149 (Oct. 7, 2010).**

The Court held that metadata is a public record that must be disclosed under the Public Records Act. The request at issue was for the metadata of a single specific email, which was sent to an official's home computer, and which the official deleted.

The Supreme Court discussed that email metadata may include among 1200 or more properties such as "the dates that mail was sent, received, replied to or forwarded, blind carbon copy ... information, and sender address book information," and that "most metadata is not generally visible when a document is printed or when the document is converted to an image file." The Court principally relied on *Lake v. City of Phoenix*, 218 P.3d 1004 (Ariz. 2009), which ruled that "metadata in an electronic document is part of the underlying document and does not stand on its own." Combining this with the usual statements of the policies grounding the Washington PRA, the Supreme Court quickly concluded that embedded metadata is as much a public record as the visible text of an email. The Court noted, "Metadata may contain information that relates to the conduct of government and is important for the public to know. It could conceivably include information about whether a document was altered, what time a document was created, or who sent a document to whom."

The Court avoided the question of whether State Records Management Guidelines properly allow agencies to delete metadata once the visible text of a document has been printed. Instead, the Court seemed to understand that the official may have destroyed metadata by deleting the document while a records request was pending (however, this is not certain because the city did not search the official's home computer). In this respect, the decision leaves open the question of when metadata might be properly destroyed. The largely unsurprising default position for now is to retain metadata as part of electronic records. Also not surprising, the Supreme Court affirmed the Court of Appeals ruling remanding the case back to the trial court for the City to inspect the official's home computer's hard drive for the requested metadata. In this respect, this case is a reminder of the risk of conducting public business using a home computer.

- Jeffrey B. Litwak

**Sanders v. State, 240 P.3d (Sep. 16, 2010).**

This case covers a long list of public records issues and warrants close study by any public records practitioner. The following discussion of issues and holdings provides only a brief summary.

Justice Richard Sanders sued the Washington Attorney General's Office (AGO) for alleged public records violations arising from his public records request for "all records relating to his visit to McNeil Island and the related (Commission for Judicial Conduct) Action." The AGO had already responded to a similar, but broader, request from the Building Industry Association of Washington (BIAW), so it asked Justice Sanders' counsel if he would agree to accept the broader production in response to Justice Sanders' request. Counsel agreed. As a result, the AGO provided 334 documents, along with a document index. The index listed claimed exemptions for each redacted or withheld document, but did not contain any facts or explanation as to how each claimed exemption applied to the corresponding record.

**Agreement to Alter the Request:** The AGO argued that, given Justice Sanders' adjustment of his request to encompass the documents produced to the BIAW, he could not now complain when he received exactly what the BIAW had received. The Supreme Court disagreed, concluding that Justice Sanders' counsel agreed to expand his request to match the BIAW's, but did not agree to accept without challenge everything that the BIAW received in response to its request.

**Brief Explanation Requirement and Remedy:** RCW 42.56.210(3) requires an agency claiming an exemption to "include a statement of the specific exemption authorizing the withholding of the record (or part of a record) and a brief explanation of how the exemption applies to the record withheld." The Court held that the plain language required both identification of the specific exemption and a brief explanation of how it applies. The Court concluded that the agency's failure should be considered when calculating penalties, fees, and costs, but the agency is not precluded from offering a satisfactory explanation in subsequent litigation.

**Subsequent Productions:** After Justice Sanders filed his complaint, the AGO provided a subsequent production of "innocuous" documents in a good faith effort to narrow the issues in dispute. Justice Sanders argued that the post-complaint disclosure amounted to a waiver of the exemptions claimed for those documents. The Court declined to punish public records responders for cooperating with PRA litigants by construing subsequent disclosures as waivers. Nor was the court willing to hold that a subsequent disclosure automatically admits the initial withholding of the documents was wrongful. An agency can legitimately seek to reduce potential penalties with a subsequent disclosure without waiving the ability to argue that the original withholding was proper.

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**Case Summaries – Washington Supreme Court** *continued*


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Penalty: The trial court imposed a \$5 per record, per day penalty for wrongful withholding, in light of the AGO's good faith, plus an additional \$3 per record, per day for the failure to provide a brief explanation of the claimed exemption. The Supreme Court explained that the PRA does not provide for a free-standing penalty based on failure to adequately explain a claimed exemption; it is the public records response as a whole that is insufficient when the brief explanation is omitted. The Court concluded, however, that the failure to provide a brief explanation can aggravate the penalty for wrongfully withholding the document. The Court noted that the trial court has discretion to set the penalty within the statutory \$5-\$100 range. The Court declined to omit from the penalty calculation the number of days that the trial court took to decide the case noting that the PRA requires the agency to pay a penalty for each day that a requester is unable to inspect a requested record, regardless of whether the agency created the delay.

- Rebecca Glasgow

***In re Disciplinary Proceeding Against Scannell*, 239 P.3d 332 (Sep. 9, 2010)**

In *Scannell*, the Court disbarred a lawyer for his "deliberate attempt to stonewall, prolong, and ultimately defeat the disciplinary proceedings against him" – a violation of his duty to cooperate in the disciplinary process. What started out primarily as disciplinary action based on a failure to inform a client in writing of a conflict of interest, devolved into a much more serious affair when the lawyer defended his prosecution as a "fascist" attempt to "terrify the population into submitting to illegal depositions," delayed discovery, and propounded excessive discovery of his own. The lawyer also characterized the process as retaliation for a previous grievance against former Attorney General Christine Gregoire. As the dissent pointed out, the lawyer stayed largely within the confines of the disciplinary process in resisting disciplinary action: "the complaint against Scannell, when it is reduced to its essence, appears to be that he was too persistent a presence, asserting multiple objections to the proceedings against him and arguing for delays and rescheduling. I have no doubt that this conduct was irksome and caused the bar to view Scannell, in plain terms, as 'a pain in the neck.'" The dissent further warned against the impression that "vigorous defense against allegations of misconduct is noncooperation *per se*." What is clear following this case, is that "unreasonable" behavior, even if largely conducted under the rules governing the disciplinary process, may give rise to the most serious of professional sanctions.

- Anthony Broadman

***Internet Cmty. & Entm't Corp. v. Wash. State Gambling Comm'n*, 238 P.3d 1163 (Sep. 2, 2010).**

The Washington State Gambling Commission (WSGC) targeted Betcha.com, a website that allowed bettors to place wagers without a guarantee that they would be paid if they won. Players, like buyers and sellers on eBay, bore reputational ratings. But under the terms clearly posted on the site, bettors retained the right to opt out of their bets, even after they lost. Betcha.com's founder, relying on a WSGC publication, argued that gambling has three elements – consideration, chance and prize, and that if one of those elements is removed, it is no longer an illegal gambling activity. The Court of Appeals agreed, holding that Betcha.com users had not "gambled" because bettors did not have an understanding that they *would* receive something of value, only that they might, if the losing bettor decided to actually honor the bet. The court also held that Betcha.com did not engage in "bookmaking" because that crime involves "accepting bets," which, construing in favor of Betcha.com, the court found to be ambiguous. The Supreme Court reversed, finding that Betcha.com had been bookmaking because it charged fees for the opportunity to place a bet. The Court observed that the bets were not "gambling bets" but rather some other specie. Nevertheless, it adopted the WSGC's interpretation of the gambling act.

The state had a stronger argument that the Court appears to have ignored. "Gambling" requires that the gambler "will receive something of value in the event of a certain outcome." RCW 9.46.0237. Betcha.com's argument was that bet winners received nothing of value because losers did not have to pay. Common sense suggests that if players were really receiving nothing of value, they wouldn't play. The opportunity to be paid in the event that Betcha.com won, supported by the site's honor system, must be something of value. The Court chose instead to reverse based on the fee charged for the placing of what still might be legal bets.

- Anthony Broadman

***Segaline v. State Dep't Of Labor and Industries*, 238 P.3d 1107 (Aug. 19, 2010)**

This case looks at whether a government agency qualifies as a "person" under RCW 4.24.510 for purposes of immunity from civil liability in SLAPP suits. In an unusual 4-1-4 split, the Court had a lead opinion, a concurrence on separate grounds, and a four justice dissent. Five justices agreed that a state agency is not a "person" within the meaning of RCW 4.24.510.

Michael Segaline, an electrical contractor, interacted regularly with the Labor and Industries (L&I) staff in East Wenatchee. While the facts are in dispute, employees of L&I stated that Segaline yelled and threatened staff to the extent that they feared for their physical safety. On one occasion, L&I staff phoned the police. At the suggestion

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**Case Summaries – Washington Supreme Court** *continued*

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of the responding police officer, an L&I employee drafted a “no trespassing” notice, and a different staff member presented the notice to Segaline when he came to the office at a later date. When Segaline refused to leave, the police were called. About a month later, Segaline again returned to the office; after he refused to leave even after the police arrived, he was arrested. The prosecutor ultimately dropped the charges for criminal trespass.

Segaline sued L&I, alleging that barring him from the office and his subsequent arrest constituted (1) negligent infliction of emotional distress, (2) intentional infliction of emotional distress, (3) malicious prosecution, (4) negligent supervision, and (5) violation of his civil rights. Segaline subsequently moved to amend his complaint to include a 42 U.S.C. § 1983 claim against the employee who drafted the no trespassing notice. The superior court held that RCW 4.24.510 granted L&I immunity from the majority of Segaline’s claims. The Court of Appeals affirmed. But the majority of Supreme Court justices disagreed that RCW 4.24.510 granted L&I immunity from suit. The lead opinion stated that the purpose of RCW 4.24.510 was to immunize from civil liability a “person” who communicates a complaint or information to the government. The Legislature was concerned with civil lawsuits that were being used to intimidate citizens from exercising their right to freedom of speech, especially when that speech involved reporting potential wrongdoing to governmental agencies. But a government agency does not have free speech rights and therefore, according to the lead opinion, it makes no sense to extend immunity to agencies.

The concurrence opinion by Chief Justice Madsen agreed that L&I was not a “person” within the meaning of RCW 4.24.510. The Chief Justice was “not convinced” that whether a person enjoyed free speech rights in the sense of the right to petition the government is dispositive of the question of whether a government agency is a person qualifying for immunity from civil liability. Rather, the purpose of the law is to remove the threat and burden of civil litigation that might otherwise deter a speaker from communicating. In her view, this intimidation factor simply does not affect government agencies in the way that it does private individuals or organizations.

The dissent argued that the statute provides immunity to L&I, and that there is no policy reason that would support otherwise.

- Katy A. King

## Case Summaries – Washington Court of Appeals

### **Gendler v. Batiste, 39333-6-II (Nov. 24, 2010).**

The Washington State Patrol (WSP) appealed from a summary judgment motion requiring it to disclose historical bicycle accident reports occurring on Seattle’s Montlake Bridge, claiming that federal law prohibited it from disclosing the records unless Gendler agreed not to use the information to sue the state. The Court upheld the trial court’s finding that the WSP had a statutory duty to provide the requested information under RCW 46.52.060.

In October 2007, as Gendler biked across the Montlake Bridge, his bicycle tire became wedged into the bridge grating and he was tossed off of the bike onto the bridge, suffering a serious injury that left him a quadriplegic. After learning that other bicyclists had suffered debilitating accidents on the bridge, Gendler suspected that the bridge was unsafe for bicyclists since 1999, when the state had replaced the bridge decking. He sought records of other bicycle accidents from the WSP. Gendler learned that he could obtain the records from the WSP website, but only if he certified that he would not use the information to sue the state. Not wanting to waive his right to take action against the state, he brought an action against WSP to compel disclosure of the records in superior court. The trial court allowed the Washington State Department of Transportation (WSDOT) to intervene because it compiles the traffic data that WSP provides to it and only WSDOT could produce an historic list of traffic accidents by location.

At issue was whether the collision records collected and compiled by WSDOT in compliance with the Federal Highway Safety Act are privileged under federal law such that the WSP need not provide them despite its duty under state law. The U.S. Department of Transportation requires states to identify and correct high-collision locations by collecting traffic records that identify collision locations, types, injuries and environmental conditions. In 1973, Congress passed the Hazard Elimination Program, which requires greater collection and compilation of data to identify locations and priorities for federally funded improvements. In 1987, 23 USC § 409 was enacted to protect states from tort liability arising from self-reporting of hazardous collision data. §409 provides that data collected for highway safety construction improvements will not be admitted into evidence or subject to discovery in any action for damages arising from any occurrence at a location mentioned or addressed in any of the data. The U.S. Supreme Court explained the scope of this provision in *Pierce County v. Guillen*, 537 U.S. 129 (2003), stating that §409 protects not just the information an agency generates to comply with the Hazard Elimination Program, but also any information it collects from other sources for purposes unrelated to this program and held by agencies that are not pursuing hazard elimination objectives.

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**Case Summaries – Washington Court of Appeals** *continued*


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WSP argued that its police traffic collision reports (PTCR) fell under the above protections because it provided, and WSDOT collected, the data for a Hazard Elimination Program purpose. WSP noted that the Federal Highway Administration issued a memorandum after Guillen explaining that even if the collision reports were stored in an integrated database, the collision data was protected under §409 because it was, at least in part, there for a hazard elimination purpose. WSP further argued that the PTCR was developed specifically to comply with the Hazard Elimination Program. It was undisputed that WSDOT's database was developed specifically for this compliance requirement.

In Washington, law enforcement officers are required to prepare accident reports on state highways, and the WSP chief has a statutory duty to gather and annually publish statistical information on accidents. In fulfilling this duty, WSP provided accident histories at particular locations. After the *Guillen* case, WSDOT and WSP entered into a memorandum of understanding (MOU) that WSDOT would maintain all accident reports in its database.

The Court found that although WSDOT may use the PTCR records to comply with the hazard elimination program, the WSP does not. Because the WSP has an independent duty to collect traffic collision reports and delegating the duty to maintain the records to another agency does not shield it from its obligation under the PRA.

- *Melanie deLeon*

***Booker Auction Company v. State Dept. of Revenue,***  
**28715-7-II (Oct. 19, 2010).**

Booker Auction Company had been claiming a tax exemption for auction items that it sold on its property under RCW 82.08.0257 which exempts farm auctions when the sale is held or conducted on a farm. Pursuant to an audit, a DOR auditor determined that this exemption did not apply because Booker was not a farm. DOR instructed Booker to pay sales tax on any future farm items that it auctioned. Booker was not required to pay any back taxes owed on items sold prior to the audit.

On appeal to the Franklin County Superior Court ("Franklin County"), the case was dismissed as the court found it lacked subject matter jurisdiction because DOR's determination was not subject to judicial review under the Administrative Procedures Act ("APA"). Booker appealed to the Court of Appeals, contending that it was entitled to review under the APA and that RCW 82.32.180, which requires an aggrieved taxpayer to appeal their case in Thurston County, is unconstitutional.

Under RCW 82.03.180, judicial review of a decision of the board of tax appeals is *de novo*, but no review can be made until the taxpayer pays the contested tax. The only time collection of a tax can be prospectively enjoined is

when a tax assessment violates the federal or state constitution. Booker argued that the APA trumped the statutory requirements, but the APA states that its exclusive judicial review procedures do not apply "to the extent *de novo* review ... of agency action is expressly authorized by provision of law. RCW 34.05.510(3). Since RCW 82.32.180 provided for *de novo* review, Booker could not alternately obtain review under the APA. Applying the APA to provide a review before paying the tax would directly conflict with the statute. The Court held that the APA's general provisions could not overcome RCW 82.32's specific ones.

Booker also argued that the statute requiring aggrieved taxpayers to file complaints in Thurston County Superior Court was unconstitutional. The Court held that the legislature has the right to direct in what matter and in what courts suits may be brought against the state. Further, the state Supreme Court had long held that the legislature can limit tax refund suits against the state to Thurston County Superior Court under article II, section 26 of the state's constitution.

- *Melanie deLeon*

***Puget Sound Harvesters Assoc. v. State Fish and Wildlife,***  
**239 P.3d 1140 (Sep. 28, 2010).**

The Washington Department of Fish and Wildlife (WDFW) adopted two rules setting the 2008 fall chum salmon fishing schedule in two South Puget Sound areas by allocating fishing opportunities between gillnetters and purse seiners, rather than placing a limit on the total catch of either group. The trial court invalidated the rules as arbitrary and capricious, and the court of appeals affirmed.

This case provides a succinct review of the basic legal principles relevant to a rule challenge. A court can declare a rule invalid only if it finds that the rule violates constitutional principles, exceeds the agency's statutory authority, the rule was promulgated without compliance to proper procedures, or the rule is arbitrary and capricious. An agency action is arbitrary and capricious if it is willful and unreasoning, and taken without consideration of attendant facts and circumstances. In reviewing a rule, the court must consider the agency's rulemaking file, along with its explanations for why it adopted the rule. Where there is room for two opinions, a court's simple disagreement with the rule is not enough to overturn it. Substantial weight is given to the agency's interpretation of the law if it falls within the agency's particular area of expertise.

Even so, the court concluded in this case that the Department's decision to allocate only fishing time or opportunity, without regard for catch rates and without allocating total catch, was arbitrary and capricious. The court explained that while the Department may not have been able to allocate catch with mathematical precision, it was not reasonable for the Department to ignore the information it did have to estimate likely harvests. Ignoring this information ignored the attendant facts and circumstances.

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**Case Summaries – Washington Court of Appeals** *continued*


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The court then discussed the level of mathematical precision that WDFW had to show in order to support its rules. The court emphasized its understanding that mathematical precision is sometimes impossible; however, WDFW should have considered its stated objectives. Harvest opportunity could not be fairly allocated between gillnetters and purse seiners unless relative fishing efficiency was taken into consideration. In past years, gillnetters had caught an average of 725 salmon per hour, while purse seiners caught an average of 4,893 salmon per hour of fishing time. Given this historical disparity, the rules allocating pure fishing time were arbitrary and capricious.

- Rebecca Glasgow

**Rainier View Court Homeowner's Association, Inc., v. Zenker, 238 P.3d 1217 (Sep. 8, 2010)**

The court upheld the trial court's summary judgment order, which relied on extrinsic evidence to determine a developer's intent. Rainier View Court Homeowners' Association (HOA) is composed of homeowners who purchased property in Phases I and II of Rainier View Court. Zenker was the developer. The preliminary plat for Rainier View Court was approved for development in three phases. Phases I and II consisted of 179 lots for single-family homes. Phase III consisted of a single lot for 64 multifamily units. The approved preliminary plat map depicts a park, labeled Tract "B," located within Phase I, but adjoining all three phases. The hearing examiner who approved the plat determined that only the design of the plat as a whole – including the single-family and multifamily units, along with the open spaces achieved in part by the park, satisfied the requirements for development within the high-density residential district zone.

Rainier View Court, LLC, recorded a declaration of protective covenants, easements, conditions and restrictions (CCRs), but did not expressly reference any easement rights in the Tract "B" park. The CCRs created a HOA and Zenker and his wife served as two of the initial three directors of the HOA. In August, 2007, while still an HOA director, Zenker granted to the residents of phase II and future residents of phase III an easement for use of the Tract "B" park.

The HOA filed a complaint for declaratory relief that Zenker lacked authority to grant residents of Phases II and III easement rights in the park. The trial court granted Zenker's motion for summary judgment that the Phase I plat, together with the hearing examiner's decision, granted residents of all of the phases easement rights to use the community park.

A party may create a private easement by including the grant in a plat; no particular words are necessary so long as the language shows an intent to grant with terms that are certain and definite. Extrinsic evidence will not

be considered unless ambiguity exists. After examining the Phase I plat as a whole, the court determined there was an ambiguity as to the future Phase III residents' right to use the park. After scrutinizing the plat maps and the dedication on the Phase I plat, the Court held that the Rainier Court View developers intended to construct the park for the enjoyment of all residents of all of the phases of Rainier View Court. The hearing examiner's decision clearly demonstrated that the park was necessary for the development and approval of the planned development district by the county. The trial court did not err in looking to extrinsic evidence to ascertain the grantor's intent regarding the park.

- Melanie deLeon

## Case Summaries – Federal

**American Small Bus. League v. U.S. Small Bus. Assoc., 623 F.3d 1052 (9th Cir., Oct. 15, 2010).**

In this FOIA case, the Ninth Circuit concluded that the SBA was not under an obligation to retain or seek Verizon cell phone records of the SBA Press Director for a government-issued cell phone that it once possessed, but did not retain. Pursuant to *Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 148 n. 10 (1989), the record did not show the SBA "extensively supervised or was significantly entangled with Verizon's production and management of the records; and the phone records did not qualify under FOIA as "information maintained by an entity under Government contract for the purposes of records management" pursuant to 5 U.S.C. § 552(f)(2)(B).

What makes this short decision interesting is the last paragraph, in which the Ninth Circuit rejected the League's argument that limiting the §552(f)(2)(B) exemption to only documents maintained under a records management contract would render that provision meaningless. The court noted, "Section 552(f)(2)(B) codified a constructive control theory that only a handful of courts have applied in only a handful of decisions," and, "The statute obviates predictable legal battles over constructive control in the arguably common cases where a contractor maintains agency records pursuant to a records management agreement with the agency."

- Jeffrey B. Litwak

**EnergySolutions, LLC v. Utah, No. 09-4122 (10th Cir. Nov. 9, 2010).**

This case involves interpretation of the Northwest Interstate Compact on Low-Level Radioactive Waste. Washington and Oregon are two of the eight party states to the compact. The Northwest Committee (the committee created by the compact) and staff has its home within the Washington Department of Ecology, and the compact

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**Case Summaries – Federal** *continued*


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commission uses the Washington Attorney General for much of its legal advice and litigation.

At issue was the authority of the Northwest Committee to prohibit a low-level radioactive waste facility from receiving shipments of low-level radioactive waste ("LLRW") from Italy. EnergySolutions wanted to decommission nuclear power plants in Italy and dispose of the LLRW waste resulting from the decommissioning in its Clive Facility in Utah. EnergySolutions applied to the Nuclear Regulatory Commission for a permit to import the waste. EnergySolutions sued the Northwest Compact seeking a declaratory judgment that the Compact has no authority to prevent disposal of the Italian waste at the Clive Facility. The NRC stayed a ruling on the permit application pending the outcome of the case.

In many respects this is an unremarkable decision involving statutory interpretation and a determination of which of three federal acts established the Northwest Committee's authority. A 1985 act uses the term "regional disposal facility," a definition EnergySolutions argued would not give the Northwest Committee jurisdiction over the Clive Facility. The Northwest Compact, to which Congress gave its specific consent in title II of the 1985 act (the consent act), uses the term "facility," the definition of which would give the Northwest Committee jurisdiction over the Clive Facility. The compact also specifies that the Northwest Committee must approve all LLRW disposal from outside the compact region.

The Court started its analysis with a summary of the principal federal low-level radioactive waste acts from 1980 and 1985, both of which authorized states to enter into regional compacts to construct facilities to handle LLRW disposal, and the consent act, which granted consent specifically to the Northwest Compact and seven other LLRW compacts.

The court applied conflict of laws principles, quickly deciding that the 1980 Act did not apply because the 1985 Act had repealed and replaced it. It then turned to whether the 1985 act or the compact controls when determining the Northeast Committee's authority. The court decided the compact controls, noting that the consent act specifically found the Northwest Compact "is in furtherance of the (the 1985 Act)." Finally, it considered recent Supreme Court precedent, *Alabama v. North Carolina*, 130 S. Ct. 2295 (2010), which involved interpretation of the Southeast Compact, another LLRW compact. In that case, the Supreme Court noted that the "terms of the (Southeast) Compact determine" the question at issue. The Supreme Court did not even cite the 1985 act.

The Tenth Circuit concluded that the Northwest Compact has the authority to exclude importation of LLRW into the Clive Facility.

- Jeffrey B. Litwak

## News from Other Sections

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