Just Enough to Be Dangerous: Bridging the Gaps between Trust & Estate Clients, Practitioners, and Practice
April 8, 2016 | 3.0 General CLE Credits
WSBA Activity ID # 1004658

Agenda

9-9:15 a.m. Welcome & Overview of the Program
Speaker: James W. Spencer, Spectra Law PS

9:15-10:15 a.m. Session 1 - The Dialog Gap: Helping Clients Understand the Creative Process that is Estate Planning
Materials
In today’s world of LegalZoom, Rocket Lawyer, and Suze Orman, clients are bombarded with information about the trust and estate world, and for better or for worse, are more “educated” than ever about estate planning tools. We’ll discuss ways you can help your clients sort the good information from the bad, how to tackle your client’s self-prepared documents, and tips and tricks to enhance and economize the estate planning process for both client and practitioner.
Speaker: James W. Spencer, Spectra Law PS

10:15-11:15 a.m. Session 2 - The Fiduciary Gap: Helping Clients Make Good Decisions about Selecting Their Fiduciaries
Materials
For too many clients, and practitioners, the fiduciary selection process is an afterthought in the overall estate plan. We’ll explore the important questions attorneys should discuss with their clients about selecting attorneys-in-fact, personal representatives, trustees, and other fiduciaries, as well as the minefield of electing co-fiduciaries, the pros and cons of
professional fiduciaries, and the hazards of attorneys agreeing to serve in a fiduciary role in a client’s estate.

**Speaker:** Heather deVrieze, deVrieze Carney PLLC

11:15-11:25 a.m.  Break

11:25-12:25 p.m.  Session 3 - **The Practice Gap: A Practitioners Tool Box for Their First Trust and Estate Litigation Case**

**Materials**

For many trust and estate transactional attorneys, estate litigation is the next logical step in expanding their practice. We’ll discover how a transactional attorney can go from knowing just enough about trust & estate litigation to be dangerous (to themselves and their clients), to build the knowledge needed to become a skilled litigator in the trust and estate and general civil realms.

**Speaker:** Mark A. Trivett

12:25-12:30 p.m.  **Closing Remarks & Evaluations**

**Speaker:** James W. Spencer, Spectra Law PS
Faculty Biographies

Chairperson

James W. Spencer, Spectra Law PS
James W. Spencer is principal at Spectra Law PS and an adjunct professor at Seattle University School of Law where he teaches Community Property, Solo & Small Firm Business Planning, and Solo & Small Firm Practice Planning & Management. In addition to serving a large lesbian, gay, bisexual, & transgender (“LGBT”) clientele with their legal needs, he practices in estate planning, probate, real estate, and small business law. Professor Spencer is a graduate of Seattle University School of Law, and has presented widely on community property, LGBT law, and law practice management. When not working with his clients, teaching, or volunteering (he sits on the board of directors for both Three Dollar Bill Cinema and Washington Future Business Leaders of America), you’ll find James exploring his passion for travel, anywhere from Washington’s wilderness to a remote South American desert.

Presenters

Heather deVrieze, deVrieze Carney PLLC
Since graduation from Seattle U School of Law in 1998, Heather de Vrieze has worked in a small firm West Seattle, focusing her practice on estate planning, probate, and elder law. Heather has always had an interest in working with underserved populations and began early in her career working with the LGBT community and estate planning for special needs beneficiaries.

Balancing work and home life has been important to Heather since the beginning of her law career. Having been diagnosed and treated for two separate cancers during law school, and giving birth to her son just before the start of her final year in law school, the importance of living life to the fullest was a clear priority. When not in the office, or at home, Heather enjoys hiking and just about any activity that gets her outside. She enjoys travel both within the US and abroad as often as possible. A trip to Tanzania to climb Mt. Kilimanjaro and go on safari was a highlight. A summer 2016 trip to Switzerland for a 101km trail “race” helps her stay focused on fitness and serves as a good excuse to take time away from the office.

Mark A. Trivett

Mark Trivett is an attorney with experience in civil litigation, real estate, corporate governance, and securities matters. Before joining Han Santos Reich, PLLC, Mark owned and operated the law firm of Trivett, Monghate & Co, PLLC. Mark has operated in a wide variety of legal practice areas, including both civil and criminal divisions of local prosecutors’ offices. Mark has also worked on and resolved business transactions and disputes arising both inside Washington State and other regions of the globe. In addition, Mark has developed expertise in white collar crime or “bad actor” investigations; helping corporations investigate malfeasance by employees, or officers and limiting potential internal damages.

Clients often find that Mark brings a common sense approach and experienced legal acumen to any potential issue.

Mark is familiar with real estate transactions, exempt securities offerings, and pre-litigation factual investigations.
The Dialog Gap

Helping Clients Understand the Creative Process that is Estate Planning

An Overview

How and why have legal services become commoditized?
An Overview

What is LegalZoom?
(And what other technology-based services are we competing against?)

An Overview

What role does a licensed attorney have in today’s estate planning world?
(Or what I like to call the “Attorney’s Charge”.)
An Overview

(And if we have time…)

What about those pesky Limited License Legal Technicians?

Commoditization of Legal Services

A commodity is a basic good used in commerce that is interchangeable with other commodities of the same type.
Commoditization of Legal Services

The basic idea is that there is little difference between a commodity coming from one producer and the same commodity coming from another producer.

Commoditization of Legal Services

The consumer doesn’t necessarily know the difference between downloading their will from the Internet and having it drafted by an attorney.
Commoditization of Legal Services

Therefore, the consumer sees the law as a commodity.

Law as a Commodity

The consumer wants their legal concerns resolved quickly and painlessly.
Law as a Commodity

Working with a lawyer is anything but quick and painless.

The consumer has to find an attorney with the right qualifications and experience, get in touch with that practitioner (often requiring multiple calls and emails), and establish a budget, which is inevitably more than the consumer wants to pay.
Law as a Commodity

Weeks may pass before the consumer finally signs an engagement letter, and the consumer hasn’t even started resolving their legal issues yet!

Which leads to the question…

Who wouldn’t prefer answering some questions online and taking care of the issue in a matter of minutes and at a fraction of the cost of using a live attorney?
LegalZoom as Estate Planner

- LegalZoom’s Estate Planning Bundles
  - Last Will and Testament Bundle $149/$249
  - Living Trust Bundle $299/$349
  - Includes 1 year subscription to “Personal Legal Plan”, which renews automatically each year at $119.88.
  - May only be cancelled by telephone.

Other Document Creation Services

- RocketLawyer
- Cigna/ARAG
- Quicken WillMaker/NOLO
- Suze Orman’s Must Have Documents
- Just Google “create a will online” and you’ll find many, many more…
Group Discussion

What can we do as practitioners to make our product more appealing to the consumer?

LegalZoom’s Disclaimer (some highlights)

“LegalZoom is not a law firm, and [is] not acting as your attorney. LegalZoom's legal document service is not a substitute for the advice of an attorney.”
LegalZoom’s Disclaimer (some highlights)

“LegalZoom is prohibited from providing any kind of advice, explanation, opinion, or recommendation to a consumer about possible legal rights, … selection of forms or strategies.”

LegalZoom’s Disclaimer (some highlights)

“[C]ommunications between you and LegalZoom are protected by our Privacy Policy, [but] are not protected by the attorney-client privilege….”
LegalZoom’s Disclaimer (some highlights)

“At no time do we review your answers for legal sufficiency, … provide legal advice or apply the law to the facts of your particular situation. LegalZoom and its services are not a substitute for the advice of an attorney.”

LegalZoom’s Disclaimer (some highlights)

“The legal information on this site is not … guaranteed to be correct, complete or up-to-date…. The law is a personal matter, and no general information or legal tool like the kind LegalZoom provides can fit every circumstance.”
LegalZoom’s Disclaimer (some highlights)

“LegalZoom is not responsible for any loss, injury, claim, liability, or damage related to your use of this site…. In short, your use of the site is at your own risk.”

Advisor and Counselor

RPC 2.1 Advisor. In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client’s situation.
As practitioners, we must be able to advise clients of the value of our services if we are to compete with the non-attorney document generator.

That means that WE must understand the value of our services.
LegalZoom’s Disclaimer

“LegalZoom is not a law firm, and [is] not acting as your attorney. LegalZoom's legal document service is not a substitute for the advice of an attorney.”

Attorney’s Charge

“LegalZoom is not a law firm, and [is] not acting as your attorney. LegalZoom's legal document service is not a substitute for the advice of an attorney.”
Attorney’s Charge

“I will act as your attorney, which means I am ethically bound to provide to you the best legal advice and counsel I can, and you will be able to rely on that advice.”

LegalZoom’s Disclaimer

“LegalZoom is prohibited from providing any kind of advice, explanation, opinion, or recommendation to a consumer about possible legal rights, … selection of forms or strategies.”
Attorney’s Charge

“LegalZoom is prohibited from providing any kind of advice, explanation, opinion, or recommendation to a consumer about possible legal rights, … selection of forms or strategies.”

Attorney’s Charge

“As your estate planning attorney, I shall provide to you, MY CLIENT, the best advice, explanations, opinions, and recommendations about the law’s impact on your estate that I can, and I will guide you through the selection of forms and strategies.”
LegalZoom’s Disclaimer

“[C]ommunications between you and LegalZoom are protected by our Privacy Policy, [but] are not protected by the attorney-client privilege....”

Attorney’s Charge

“[C]ommunications between you and LegalZoom are protected by our Privacy Policy, [but] are not protected by the attorney-client privilege....”
Attorney’s Charge

“As your attorney, I am legally bound to the strictest privacy in communications between you and I. This is a level of privacy that is afforded only to lawyers, doctors, spouses, and clergy. Anything that you and I discuss will remain completely confidential between us, and with very limited exceptions, only you can waive that privilege.”

LegalZoom’s Disclaimer

“At no time do we review your answers for legal sufficiency, … provide legal advice or apply the law to the facts of your particular situation. LegalZoom and its services are not a substitute for the advice of an attorney.”
Attorney’s Charge

“At no time do we review your answers for legal sufficiency, … provide legal advice or apply the law to the facts of your particular situation. LegalZoom and its services are not a substitute for the advice of an attorney.”

Attorney’s Charge

“I will always seek your full advise and consent to learn from you the information I need to create for you a sound estate plan that protects your loved ones and assets in the manner you desire. It is my responsibility to ensure that this plan is legal sufficient, and that I’ve applied the law to the facts of your particular situation.”
LegalZoom’s Disclaimer

“The legal information on this site is not ... guaranteed to be correct, complete or up-to-date.... The law is a personal matter, and no general information or legal tool like the kind LegalZoom provides can fit every circumstance.”

Attorney’s Charge

“The legal information on this site is not ... guaranteed to be correct, complete or up-to-date.... The law is a personal matter, and no general information or legal tool like the kind LegalZoom provides can fit every circumstance.”
Attorney’s Charge

“As your attorney, it is my responsibility to keep myself up-to-date on the law as it applies to your matter, and to always apply the law completely and correctly to your personal circumstance.”

LegalZoom’s Disclaimer

“LegalZoom is not responsible for any loss, injury, claim, liability, or damage related to your use of this site…. In short, your use of the site is at your own risk.”
Attorney’s Charge

“LegalZoom is not responsible for any loss, injury, claim, liability, or damage related to your use of this site…. In short, your use of the site is at your own risk.”

Attorney’s Charge

“As your attorney, I strive to ensure that I practice the law diligently and accurately. In the unlikely event I mess up, I carry professional malpractice insurance to protect you against any loss, injury, claim, liability, or damage resulting from errors I make in drafting your estate plan.”
Limited License Legal Technicians

Currently the Washington Supreme Court has authorized Limited License Legal Technicians to practice and advise clients in family law cases.

Limited License Legal Technicians

The Court is likely to add additional practice areas in the next year or two.
Limited License Legal Technicians

Practice areas under consideration include a focus on elder law, landlord tenant disputes, and immigration.

• Currently, LLLTs can:
  • Obtain relevant facts from clients.
  • Inform clients about possible implications of the law as applied to their cases.
  • Advise clients on how best to manage their legal action for best results.
  • Prepare clients to represent themselves in court proceedings.
  • Perform legal research to answer clients’ legal questions.
  • Draft legal documents to be filed with the court.
Limited License Legal Technicians

- LLLTs cannot:
  - Represent clients in court.
  - Negotiate on behalf of a client.
  - Prepare legal documents that have not been approved by the Limited License Legal Technician Board.

Group Discussion

When LLLT can draft simple estate plan documents, how will we distinguish ourselves as attorneys?
Links & Resources

- [http://www.wsba.org/Licensing-and-Lawyer-Conduct/Limited-Licenses/Legal-Technicians/Legal-Technician-FAQs](http://www.wsba.org/Licensing-and-Lawyer-Conduct/Limited-Licenses/Legal-Technicians/Legal-Technician-FAQs)

Heather S. de Vrieze

What is a Fiduciary?

“The term is derived from the Roman law, and means (as a noun) a person holding the character of a trustee, or a character analogous to that of a trustee, in respect to the trust and confidence involved in it and the scrupulous good faith and candor which it requires. A person having duty, created by his undertaking, to act primarily for another’s benefit in matters connected with such undertaking.” (Black's Law Dictionary 6th Edition 1990)

Acting for another person’s benefit. Trust, confidence, candor, good faith. All of these are definitions of a fiduciary, as well as good descriptions of the characteristics a fiduciary should have.

A Trustee of a Trust – Trustee acts for the benefit of the beneficiaries of the Trust

An Executor or Personal Representative of an Estate – Personal Representative acts for the heirs, creditors and/or beneficiaries of an estate

An agent acting under a durable power of attorney – Agent acts on behalf of principal

Who can be a fiduciary? Washington law describes who may serve as Trustee (RCW 11.36.021), and those who may be entitled to letters (of Administration for an estate) when there is no Will. (RCW 11.28.120); more particularly, it describes parties disqualified from serving as Personal Representatives (RCW 11.36.010).

RCW 11.36.010

Parties disqualified—Result of disqualification after appointment.

(1) Except as provided in subsections (2), (3), and (4) of this section, the following persons are not qualified to act as personal representatives: Corporations, limited liability companies, limited liability partnerships, minors, persons of unsound mind, or persons who have been convicted of (a) any felony or (b) any crime involving moral turpitude.

(2) Trust companies regularly organized under the laws of this state and national banks when authorized so to do may act as the personal representative of an individual's estate or of the estate of an incapacitated person upon petition of any person having a right to such appointment and may act as personal representatives or guardians when so appointed by will. No trust company or national bank may qualify as such personal representative or guardian under any will hereafter drawn by it or its agents or employees, and no salaried attorney of any such company may be allowed any attorney fee for probating any such will or in relation to the administration or settlement of any such estate, and no part of any attorney fee may inure, directly or indirectly, to the benefit of any trust company or national bank.
(3) Professional service corporations, professional limited liability companies, or limited liability partnerships, that are duly organized under the laws of this state and whose shareholders, members, or partners, respectively, are exclusively attorneys, may act as personal representatives.

(4) Any nonprofit corporation may act as personal representative if the articles of incorporation or bylaws of that corporation permit the action and the corporation is in compliance with all applicable provisions of Title 24 RCW.

(5) When any person to whom letters testamentary or of administration have been issued becomes disqualified to act because of becoming of unsound mind or being convicted of (a) any felony or (b) any crime involving moral turpitude, the court having jurisdiction must revoke his or her letters.

(6) A nonresident may be appointed to act as personal representative if the nonresident appoints an agent who is a resident of the county where such estate is being probated or who is an attorney of record of the estate, upon whom service of all papers may be made; such appointment to be made in writing and filed by the clerk with other papers of such estate; and, unless bond has been waived as provided by RCW 11.28.185, such nonresident personal representative must file a bond to be approved by the court.

Understanding who cannot serve is important, but doesn’t provide guidance to clients in making a good decision about who they should select. If someone doesn’t have a Will naming a Personal Representative, or that Personal Representative can’t serve, Washington law identifies a priority for those entitled to seek Court appointment and Letters.

**RCW 11.28.120**

**Persons entitled to letters.**

Administration of an estate if the decedent died intestate or if the personal representative or representatives named in the will declined or were unable to serve shall be granted to some one or more of the persons hereinafter mentioned, and they shall be respectively entitled in the following order:

(1) The surviving spouse or state registered domestic partner, or such person as he or she may request to have appointed.

(2) The next of kin in the following order: (a) Child or children; (b) father or mother; (c) brothers or sisters; (d) grandchildren; (e) nephews or nieces.

(3) The trustee named by the decedent in an inter vivos trust instrument, testamentary trustee named in the will, guardian of the person or estate of the decedent, or attorney-in-fact appointed by the decedent, if any such a fiduciary controlled or potentially controlled substantially all of the decedent's probate and nonprobate assets.

(4) One or more of the beneficiaries or transferees of the decedent's probate or nonprobate assets.

(5)(a) The director of revenue, or the director's designee, for those estates having property subject to the provisions of chapter 11.08 RCW; however, the director may waive this right.
(b) The secretary of the department of social and health services for those estates owing debts for long-term care services as defined in RCW 74.39A.008; however the secretary may waive this right.

(6) One or more of the principal creditors.

(7) If the persons so entitled shall fail for more than forty days after the death of the decedent to present a petition for letters of administration, or if it appears to the satisfaction of the court that there is no next of kin, as above specified eligible to appointment, or they waive their right, and there are no principal creditor or creditors, or such creditor or creditors waive their right, then the court may appoint any suitable person to administer such estate.

RCW 11.36.021
Trustees—Who may serve.

(1) The following may serve as trustees:
   (a) Any suitable persons over the age of eighteen years, if not otherwise disqualified;
   (b) Any trust company regularly organized under the laws of this state and national banks when authorized to do so;
   (c) Any nonprofit corporation, if the articles of incorporation or bylaws of that corporation permit the action and if the corporation is in compliance with all applicable provisions of Title 24 RCW;
   (d) Any professional service corporations, professional limited liability companies, or limited liability partnerships, that are duly organized under the laws of this state and whose shareholders, members, or partners, respectively, are exclusively attorneys;
   (e) Any state or regional college or university, as those institutions are defined in RCW 28B.10.016;
   (f) Any community or technical college, as those institutions are defined in RCW 28B.50.030; and
   (g) Any other entity so authorized under the laws of the state of Washington.

(2) The following are disqualified to serve as trustees:
   (a) Minors, persons of unsound mind, or persons who have been convicted of (i) any felony or (ii) any crime involving moral turpitude; and
   (b) A corporation organized under Title 23B RCW that is not authorized under the laws of the state of Washington to act as a fiduciary.

Qualities of a good fiduciary: 1) Knows how to get things done; 2) Takes the job seriously; 3) Works well with others, communicates and is respectful of all parties involved; 4) Responsible; 5) Seeks out and listens to professional advice; 6) Levelheaded.

Each of these qualities is relevant to any fiduciary role, but that doesn’t mean the same person should fill all roles for the same client. A typical estate plan may nominate as many as 6 different fiduciaries (and a back-up or alternate for each position). Imagine a couple in their 40s with a possibly taxable estate, young children ages 10, 12 and 18, and the fiduciary roles they will be filling.
1) Personal Representative (PR) – Will administer the estate in the immediate aftermath of death. Often each spouse will identify the other as their first choice, but are drafting with the possibility of both of them dying as their primary motivation. Paying bills, marshalling assets, probating the Will, filing final income tax returns and distributing the estate according to the Will are all duties of a PR.

2) Trustee for Credit Trust – If only one spouse dies, a Trust for the surviving spouse’s benefit may be established to save taxes. The surviving spouse may be the initial trustee, but an alternate is essential, to step in if the survivor is incapacitated or otherwise unable to serve and upon the death of the surviving spouse, to wind up the trust and make final distributions at that point.

3) Trustee for Children – Minors cannot inherit assets directly and most often a direct inheritance by a young adult is unwise. This Trustee will manage money and property for the benefit of the Children, making distribution decisions and filing tax returns for the trust annually.

4) Guardian for Children – The guardian fills the role of a parent for any minor children, school, housing, and medical decisions may be the legal aspects of this role, but choosing a role model to finish raising your children, in a location of your preference, with values you share should be the primary focus of this choice of fiduciary. This person will also generally receive funds, exclusive of the trust (i.e. social security survivor benefits) and is necessarily a fiduciary of those funds.

AND THAT IS JUST THE WILL – Further fiduciary designations . . .

5) Agent in Durable Power of Attorney (DPOA) for general/financial purposes – In the event of incapacity, there is no corollary statute to 11.28.120 for management of an incapacitated person’s affairs, naming an agent in a DPOA is the best way to avoid a guardianship. A spouse may not have authority to handle the community affairs, even for jointly held assets. This fiduciary will be able to make withdrawals from accounts, including retirement accounts, to apply for benefits on behalf of the principal, to purchase or liquidate assets, including the principal’s home. It can be in effect for days, weeks, months or years.

6) Agent in a Health Care Durable Power of Attorney (HCPOA) – While limited financial responsibility will fall to this fiduciary, they still have a fiduciary responsibility to act in the principal’s best interest, to act in good faith and honest judgment in making decisions, both routine and those with life or death consequences.

For many clients, the choice of a spouse or child, a parent or sibling is clear. For others, understanding what may be required of the fiduciary and working through why the obvious choice may not be the best choice is the important to explore with all clients. The following questions often come up.

What about my oldest child? Shouldn’t they be named first?

Naming an oldest child might seem like a good way to keep the peace, but there are many reasons they may not be the best choice.
One of my children has a job, the other is a stay at home parent with more time shouldn’t the less busy one get this job?

Availability of the fiduciary is an important consideration, but sometimes a couple days away from work is less of an imposition for the working child than trying to get time while parenting.

My daughter lives near me and my son is on the East Coast. I can't appoint him if he is so far away.

R.C.W. 11.36.010(6) explains the extra step required for appointment of nonresident, so distance from client should be considered only in terms of the ability of the nonresident to get the job done long distance, and proximity may be less relevant than some of the other qualities of a good fiduciary.

I shouldn’t appoint one of the children as my Personal Representative because my kids don’t get along all that well. Shouldn't they be co-PRs?

Co-PRs that get along well can work, but introduce additional complexities that can be insurmountable when the Co-PRs don’t get along. Many banks won’t open accounts for Co-PRs; both signatures or personal presence may be necessary to accomplish many tasks; and unlike dividing tasks between them (e.g. one serving as medical agent and the other as financial under durable powers of attorney) forcing cooperation can result in intractable problems that require Court intervention with no clear path to resolution.

Shouldn’t I name a disinterested friend or family member so there isn’t a conflict of interest that might arise if a beneficiary is also fiduciary.

Often the best fiduciary is one of the primary beneficiaries of the estate. Who has a greater interest in getting the estate settled? Conflicts between the Personal Representative and a Beneficiary do arise and there are statutory options for settling those conflicts. Nevertheless, appointing a fiduciary who demonstrates respect and works well with others can minimize conflict. Appropriate drafting of the Will can also help reduce or eliminate these conflicts. A Personal Representative has a duty to act impartially, clients should select PRs they believe can do that.

My oldest child is an adult now, shouldn’t s/he be guardian for the younger ones?

Sometimes it can be appropriate to name an oldest child as guardian for the younger children, but parenting an adolescent, especially following events that are traumatic or emotional for all involved can be challenging. I generally don’t recommend this, and instead advise clients to name a more appropriately aged friend or family member and leave them instructions that may include allowing the younger child(ren) to live with their older sibling if that seems like it will work for all involved.

Why not just have the attorney serve?

This is fraught with difficulties and has never been formally brought before the Supreme Court, but WSBA Informal Opinion 86-1 provides guidance to attorneys in this situation. Their conclusion “While undoubtedly it is the better practice for a lawyer not to be named as executor in a will which the lawyer prepares and such a course would preclude any questions arising later, the
Committee believes that the ultimate decision is the client’s. If the client, after full disclosure, desires the lawyer to act as executor, a lawyer has no professional obligation to refuse to do so.” So, with a few (very few) exceptions, this is something I will try to counsel a client against.

The former Code of Professional Responsibility, Ethical Consideration 5.6 discouraged a lawyer from naming him or herself, but our current RPCs do not address this specifically. However, any other person or company advertising preparation of legal documents are disallowed from acting as fiduciary. (R.C.W. 30A.04.260). In fact, it is a gross misdemeanor for anyone other than an attorney. Though not explicitly disallowed, this should serve as a warning.

And, if you are ever considering doing otherwise, check with your professional liability policy provider to determine if they have prohibitions, or if your premiums will be increased. See “Lawyer’s Professional Liability Estate/Trust Supplement” included at the end of these materials for information professional liability insurer may request if the attorney undertakes the role of fiduciary.

Finally, if a client wants to name their lawyer despite the considerations discussed, it is essential to take appropriate steps to document full disclosure and client consent discussed in Opinion 86-1.

When naming a professional is best.

When a client can’t seem to identify a good fiduciary among their family/friends, or when the question of the attorney serving as fiduciary arises, I use this as an opening to discuss the role of professional fiduciaries and the potential costs and benefit to a client of appointing a professional. When there is no family, or no family capable of filling these roles, some clients will turn to friends or neighbors. Other clients don’t feel comfortable placing the burden being a fiduciary on friends or neighbors and/or don’t want their private affairs to be handled by these individuals. There are several professional fiduciaries just in the Seattle area, and they range in size from very small companies to some that have significant staff with a variety of skills. Here are a couple I have successfully worked with in the past.

<table>
<thead>
<tr>
<th>Partners In Care</th>
<th>PO Box 21947, Seattle WA 98111-3947</th>
<th>(206) 525-2729</th>
<th><a href="mailto:info@pic.org">info@pic.org</a></th>
</tr>
</thead>
<tbody>
<tr>
<td>Ohana Fiduciary Corporation</td>
<td>Suite 205, 9725 3rd Avenue NE, Seattle, WA 98115</td>
<td>(206) 782-1189</td>
<td></td>
</tr>
<tr>
<td>Guardianship Services of Seattle</td>
<td>3101 Western Ave, Suite 330, Seattle, Washington 98121</td>
<td>206-284-6225</td>
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<tr>
<td>Farther out,</td>
<td>Inslee, Maxwell &amp; Associates</td>
<td>P. O. Box 28395, Bellingham, WA 98228</td>
<td>360-676-7398</td>
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<td></td>
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<td><a href="mailto:insleemaxwell@hotmail.com">insleemaxwell@hotmail.com</a>.</td>
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It is ideal to have the client meet with the professional to see if they will be a “good fit” prior to naming them, but sometimes that is not possible, or will hinder completion of documents, so if a client is naming based on your recommendation alone, make sure to have language for beneficiaries to nominate an alternate professional if the named one doesn't work out. This may be a good idea in
any case, because circumstances change. I include a provision in most of my trust documents that allows a majority of beneficiaries to change professional Trustees no more frequently than once every three years.

Choosing fiduciaries is often the most challenging issue for a client in organizing their estate plan. Good advice from the attorney can help give them peace of mind in their decisions and help ensure smooth administration in the future when it comes time to carry out the plan.
FEES FOR SERVICES

Partners In Care bills all cases at hourly rates ranging from $55 to $120 per hour\(^1\), depending upon the level of expertise required to accomplish the task. The following is a list of the services provided by Partners In Care and the hourly charges for each service. Not all accounts require all of the following services. To determine which services your account would require, please speak with a representative of Partners In Care.

Trust accounts are assessed a base fee of up to $90 a month, depending on the size of the trust corpus. Non-Trust accounts are charged separate Bookkeeping and Clerical\(^2\) charges based on the level of activity anticipated.

These standard fees include; the safekeeping of the account’s assets, collection of interest, dividends and earnings, reconciliation of bank accounts, processing distributions, maintaining corresponding files, and clerical duties necessary for the general maintenance of the account.

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<th>Function</th>
<th>Rate</th>
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<td>$120.00</td>
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<td>Senior Care Management</td>
<td>$115.00</td>
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<tr>
<td>Senior Financial Management</td>
<td>$115.00</td>
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<td>Property Management</td>
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Partners In Care is licensed, bonded and insured.

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\(^1\) Fees listed are effective 1/1/16. As costs increase over time, our fees are subject to change.  
\(^2\) No Clerical fee is assessed for accounts without liquid assets.
Full Name of Applicant Firm:  

Please complete this Supplement if any lawyer listed on the application shows a percentage in the Estate/Trusts area of practice.

1. Please list the five largest trusts to which any member of the firm provided legal services in the last 24 months.

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<th>Name of Attorney</th>
<th>Trustee/Personal Rep/Executor Y/N</th>
<th>Co-trustee? Y/N</th>
<th>Description/Type Of Trust</th>
<th>Size of Trust/Value of Assets</th>
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1. Does your firm have the authority to write checks, provide investment advice, make investments, or have discretionary control of funds?  
   If "Yes", please describe:  
   Yes  No

2. Does the firm use engagement letters that clearly define the scope of the services that will be provided?  
   Yes  No

3. Does a second firm member review all trust and estate documents drafted by a firm member?  
   Yes  No

4. Do firm members acting as Trustees/Personal Representatives/Executors engage in the following activities:  
   a) Use of Trust funds to invest in entities related in any way to the firm?  
      Yes  No
   b) Employment by the Trust of anyone related in any way to a firm member?  
      Yes  No
   c) Use of Trust funds as loans to any firm client, firm member or person related in any way to a firm member?  
      Yes  No
   d) Delegation of Trustee duties to others?  
      Yes  No
   If yes to any of the above, please explain: ________________________________

Signature of Officer or Partner of Firm  
Print name of Officer or Partner  
Date
Advisory Opinion: 946

Year Issued: 1986

RPC(s): RPC 1.8, 86-1

Subject: Lawyer Named as Beneficiary or Executor on Will Prepared for a Client

[Published Informal Opinion 86-1]

Questions:
1. Do the Rules of Professional Conduct always prohibit a lawyer from preparing a will in which the lawyer is a named beneficiary?
2. Do the Rules of Professional Conduct prohibit a lawyer from designating the lawyer as executor in a will prepared by the lawyer?

Conclusions:
1. RPC 1.8 prohibits a lawyer from preparing an instrument giving the lawyer or immediate relative any substantial gift from a client, except where the client is related to the lawyer.
2. Nothing in the RPC prohibits a lawyer, at the request of the client after full disclosure, preferably in writing, from being named as executor in a will prepared by the lawyer.

Discussion:
1. Lawyer as Beneficiary:
The first issue is governed by RPC 1.8(c), which provides:
"A lawyer who is representing a client in a matter shall not prepare an instrument giving the lawyer or a person related to the lawyer as parent, child, sibling, or spouse any substantial gift from a client, including a testamentary gift, except where the client is related to the donee."
The comments to the ABA Model Rules of Professional Conduct, from which this provision was taken without change, provide:
"A lawyer may accept a gift from a client, if the transaction meets general standards of fairness. For example, a simple gift such as a present given at a holiday or as a token of appreciation is permitted. If effectuation of a substantial gift requires preparing a legal instrument such as a will or conveyance, however, the client should have the detached advice that another lawyer can provide. RPC 1.8(c) recognizes an exception where the client is a relative of the donee or the gift is not substantial."
While the comments to the Model Rules were not adopted by our Supreme Court, they are relevant in determining the intended scope of the rules and the construction which should be given them.
The Committee reads RPC 1.8(c) to adopt a per se prohibition of the preparation of any instrument under which the lawyer, or a related person, receives a gift, subject to only two exceptions:
1. Where the gift to the lawyer is not substantial; or
2. Where the lawyer is related to the client.
The term "substantial" is defined in the Rules of Professional Conduct as follows:
"Substantial" when used in reference to degree or extent denotes a material matter of clear and weighty importance.

In determining whether the subject of a particular gift is "substantial" the Committee believes the lawyer should focus on the economic nature of the proposed gift when viewed from the perspective of both the client and the lawyer at the time the will is prepared. If the proposed gift is substantial when compared with either the size of the estate or the financial status of the lawyer, RPC 1.8(c) prohibits the lawyer from preparing the will in which the gift is made. If the primary nature of the gift is not economic, such as where a client wishes to bequeath an object of sentimental significance to a lawyer, the Committee is of the opinion that RPC 1.8(c) would not prohibit the lawyer from preparing the will in which the gift is made. Where a substantial cash bequest is proposed or where the object is of substantial economic value, the Committee believes that RPC 1.8(c) prohibits the lawyer from preparing the will in which the gift is made.

The second exception to the general prohibition applies in situations where the lawyer is a relative of the testator. While RPC 1.8 states the exception in absolute terms, it must be kept in mind that the lawyer’s conduct in preparing such an instrument would continue to be governed by the general conflict of interest rule, RPC 1.7(b), which provides in material part "A lawyer shall not represent a client if the representation of that client may be materially limited. . . by the lawyer’s own interests, unless: (1) the lawyer reasonably believes the representation will not be adversely affected; and (2) the client consents in writing after consultation and a full disclosure of the material facts . . ." The Committee is of the opinion that this rule is applicable in all situations in which a lawyer prepares a will in which the lawyer is a beneficiary, including where the bequest is not substantial or where the client is a relative of the lawyer. The Committee does not believe this construction of the relevant rules is inconsistent with the decision of the Supreme Court in Estate of Shaughnessy, 104 Wn.2d 89, 702 P.2d 132 (1985). While portions of the literal language of both the majority and dissenting opinions can be read to create an absolute prohibition against a lawyer preparing a will in which the lawyer is named as a beneficiary, the Supreme Court was addressing a situation in which the particular lawyer involved was both a specific beneficiary of $5,000 and the residual beneficiary of the estate. Together the specific bequest of $5,000 and the designation of the lawyer as the residual beneficiary clearly constitutes a "substantial" gift and thus a lawyer would be prohibited by RPC 1.8(c) from preparing a will containing them. The Committee does not believe that the opinion should be read to modify RPC 1.8(c) to prohibit a gift which is not substantial as described above or situations in which the lawyer has prepared a will for a member of his or her family which makes the lawyer a beneficiary.

2. Lawyer as Executor:
The second issue, whether a lawyer may prepare a will which designates the lawyer as executor, presents different issues. The Rules of Professional Conduct do not specifically address this issue. Under the former Code of Professional Responsibility, Ethical Consideration 5.6 provided:

"A lawyer should not consciously influence a client to name him as executor, trustee or lawyer in an instrument. In those cases where a client wishes to name his lawyer as such, care should be taken by the lawyer to avoid even the appearance of impropriety."

While this ethical consideration was not carried over to the Rules of Professional Conduct in express terms, the Committee believes it constitutes a sound and workable guideline for lawyers to follow in situations where their clients wish them to act as executors. The Committee does not believe the Rules of Professional Conduct prohibit a lawyer from
preparing a will in which the lawyer is named as executor where that designation is at the express wish of the client after the client has been fully informed by the lawyer as to the duties and obligations of an executor and of the costs likely to ensue.

While the Committee believes that the designation of a lawyer as executor in a will does not create a business relationship between the lawyer and the client, the considerations expressed in RPC 1.8(a) provide a useful guideline to a lawyer to designate himself or herself as executor. The lawyer should disclose to the client the duties and obligations of an executor, the fees which the lawyer will charge for performing those services, the fees alternative executors would probably charge, and should advise the client that he or she is free to seek the advice of independent counsel. This disclosure should be in writing to ensure that the client understands its significance and to establish conclusively that it occurred.

As with the first issue, the literal language of Estate of Shaughnessy can be read to establish a per se prohibition against lawyers preparing wills in which they are named as executors regardless of the desires of their clients. This language is dictum, however, since the majority opinion specifically held that the Code of Professional Responsibility was not violated by the lawyer’s actions. The Committee believes that both the majority and the dissenting opinions in the Estate of Shaughnessy must be read in light of the facts of the case presented to the court. In addition to the presence of substantial bequests to the lawyer, there is no indication that the lawyer fully advised the client nor that the client affirmatively decided that the lawyer should be the executor after being so advised. The Committee does not believe the Supreme Court intended to prevent a lawyer from preparing a will in which the lawyer is named as executor in situations where the client is fully advised and affirmatively desires the lawyer to so serve.

While undoubtedly it is the better practice for a lawyer not to be named as executor in a will which the lawyer prepares and such a course would preclude any questions arising later, the Committee believes that the ultimate decision is the client’s. If the client, after full disclosure, desires the lawyer to act as executor, a lawyer has no professional obligation to refuse to do so. We do not believe the Supreme Court would prohibit a fully informed client from choosing to have his or her lawyer both prepare the client’s will and serve as executor of the estate.

Advisory Opinions are provided for the education of the Bar and reflect the opinion of the Committee on Professional Ethics (CPE) or its predecessor, the Rules of Professional Conduct Committee. Advisory Opinions issued by the CPE are distinguished from earlier RPC Committee opinions by a numbering format which includes the year followed by a sequential number. Advisory Opinions are provided pursuant to the authorization granted by the Board of Governors, but are not individually approved by the Board and do not reflect the official position of the Bar association. Laws other than the Washington State Rules of Professional Conduct may apply to the inquiry. The Committee's answer does not include or opine about any other applicable law other than the meaning of the Rules of Professional Conduct.
THE PRACTICE GAP: A PRACTITIONER’S TOOLBOX FOR THEIR FIRST TRUST AND ESTATE LITIGATION CASE

MARK A. TRIVETT

THE PRESENTER

- Quickly, I have:
  - Three years experience as a practicing attorney representing both plaintiffs and defendants in commercial, real estate and probate litigations.
  - Two years experience as an intern criminal and civil prosecutor while attending Seattle University School of Law.
  - Four years experience as a ski-bum and rafting guide at Gonzaga University.
  - I am currently Of-Counsel to Han Santos Reich, PLLC as I look to transition my litigation practice to another small to medium sized firm.
THE NATURAL OPPORTUNITIES

- As elder law and estate planning clients age and your professional network grows, conflicts and disputes often arise which provide the opportunity for litigation.
- In probate and trust disputes, the existence of familial relationships between opposing parties lead to emotionally charged conflicts and high client expectations.
- Representing either a plaintiff or defendant can be rewarding, both personally and financially.

THE PROBLEM

- As attorneys taking on our first trust and estate litigation, we are often at a disadvantage to our opponents. The primary disadvantages are:
  - Less Experience
  - Less Practical and Doctrinal Knowledge
  - Fewer Resources (Financial and Staffing)

- To overcome these disadvantages, you have to be more creative, more efficient and more practical.
The Answer

- To overcome these disadvantages, we must be prepared with resources and tricks to quickly tackle new procedural processes and to demonstrate skill and qualification to our clients and opposing parties.
  - Ex. By demonstrating thorough knowledge of local court procedures and community standards, you can outmaneuver opposing counsels from outside your jurisdiction, thereby bettering your clients’ bargaining position.

- A Basic Premise:
  - Transactional practice primarily requires in-depth knowledge of relevant statutes and case law.
  - Litigation practice primarily requires in-depth knowledge of court rules and jurisdiction-specific procedures.

The Caveat

- The subject of this presentation is only one legal skill, and should not replace well-researched arguments and well-documented fact patterns.
- Pardon the self-indulging analogy, but the resources and tips provided in this presentation are only a few tools among many that you must have to successfully advocate for your clients.
THE DEFINITION

- The Webster definition: “Practical” *
  - “Of or concerned with the actual doing or use of something rather than with theory and ideas.”

- For the most part, law school is about theory and ideas.
- Litigation is about taking action and countering your opponents’ actions.

- * For the purpose of this presentation, I’m using the term “practical” to describe a wide range of legal knowledge and familiarity with subjects like filing, court calendar, and communication procedures, as well as local customs and best practices.

THE PROPOSAL

- As attorneys, we are all familiar with the hierarchy of authority
  - Ex. statutes are more controlling than case law, case law is more controlling than treatises, etc.

- I would propose that practical knowledge has its own unique hierarchy of practicality based on the ease of access to valuable knowledge and credibility of the resource.
**THE HEIRARCHY OF PRACTICALITY**

ALTERNATIVE TITLE: THE TOOLS

1. Published Secondary Sources *(The Quick)*
2. Local Court Rules *(The Slow)*
3. Clerks and Bailiffs *(The Down Low)*
4. Judge’s Webpage *(The Idiosyncratic)*
5. Other Attorneys' Oral Arguments and Filed Pleadings *(The Fantastic)*
6. Bar Association Sections and Journals *(The Demographic)*

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**THE SECONDARY SOURCES**

- As we all learned in law school, secondary sources are a wonderful source of context and synthesized discussion of statute and case law.
- Secondary sources are also a great resource when taking on entirely unfamiliar subject matters or practice areas, although they often lack local information specific to counties, courts and departments.
THE EXAMPLES

- KCBA Washington Lawyer’s Practice Manual
  - Chapter 4 – Courthouse Guidelines
  - Chapter 10 – Probate, Guardianship and Trust Act
  - Chapter 12 – Alternatives to Litigation
- Court Published Manuals – Available Free Online
  - KCSC Civil Department Manual
  - KCSC Ex Parte Motions and Hearing Manual
  - KCSC “Preparing for Your Day in Court”
  - KCBA Pro Se Handbook

TIP: Visit the Seattle University, University of Washington or local courthouse law libraries for free or low-cost access to these publications.

THE LOCAL RULES

- In law school, students learn the Federal Rules of Civil Procedure. These rules apply to all federal jurisdictions and do not take into account local culture, administrative resources, or judicial preferences.
- In contrast, local rules are drafted and approved by the judges and attorneys of local jurisdictions. These rules can vary drastically from county to county, so long as they don’t violate state court rules.
- All state and local court rules are available free online from:
  - https://www.courts.wa.gov/court_rules/
- Also available in paperback from Westlaw and other legal publishers.
  - (Note: not cheap.)
THE EXAMPLES

- Washington Civil Rule 6(d) – State Default (Snoco, Spokane, Kittitas)
  - “…notice of the hearing thereof shall be served not later than 5 court days before the time specified for the hearing.”
  - Followed by Snohomish and Spokane counties.
- King County Local Civil Rule 7:
  - “…moving party shall serve and file all motion documents no later than six court days before the date.”
  - Mirrors Pierce County local rule.
- Skagit County Local Civil Rule 6(d):
  - Notes for the Motion Calendar shall be filed with the clerk of the court and served on all parties at least nine (9) court days before the hearing.

THE FRUSTRATING LESSON

- King County Local Civil Rule 7(H)
  - “Confirmation is not necessary, but if the motion is stricken, the parties shall immediately notify the opposing parties and notify the staff of the hearing judge.”
- Snohomish County Local Civil Rule 7(b)(9)(a)
  - “…a party pro se or attorney for the moving party must confirm before 12 noon two (2) court days prior to the hearing; otherwise the matter will be stricken.”
    - This one is frustratingly unforgiving.
THE MITIGATION ATTEMPTS

- Called at 12:02 p.m. to attempt to confirm.
- Spoke to filing clerk and asked for advice.
- Per advice, called the Commissioner's clerk to discuss being added to the calendar.
- On noted hearing day, appeared one-hour early and retrieved case file and delivered to courtroom.
- Attended calendar with pro se opposing party.
- Waited until all other parties were called and respectfully requested the court hearing the quick matter.

THE ASYMMETRICAL CONFLICT

- When outmatched by resources and subject matter expertise, in-depth knowledge of local rules can provide a solo or novice practitioner with opportunities to demonstrate qualification and better your clients' bargaining position.
THE CLERKS

- At the trial court level, there are two types of clerks:
  - (1) In-Court – Assigned to an individual judge and responsible for managing caseload and research; and
  - (2) Filing Clerks – A member of the County Clerk’s Office and responsible for assisting attorneys to open cases and file documents.
- Both of roles have their own distinct areas of expertise and knowledge.

THE IN-COURT CLERKS

- In-court clerks spend most of their day working closely with a judge, researching legal issues and managing the judge’s docket.
- Because they have the judge’s ear, it’s important to maintain a good relationship with in-court clerks and treat them with courtesy, patience, and respect.
- They are often able to answer questions regarding a judge’s filing procedures, or evidentiary preferences, and can provide you the opportunity to deviate from the court rules in emergencies. (ex. setting a hearing with short notice).
- Recommendation:
  - Check the judge’s website before sending them a question.
  - Ask questions or make requests via telephone.
  - All other communications should be my e-mail and cc’ opposing counsel.
THE FILING CLERKS

- Filing clerks spend most of their day working a filing counter at the courthouse.
- Their responsibilities often include helping attorneys pay filing fees, helping members of the general public file ex parte pleadings, and answering general questions.
- They are knowledgeable about systematic court-practices and are best with ex parte and unassigned cases.
- They are constantly reminded that they cannot give legal advice, and as such, they are very hesitant to recommend paths of action.
  - Ex. King County’s clerk telephone number makes it nearly impossible to reach a real individual.
- Recommended Tips:
  - Introduce yourself as an attorney immediately.
  - Phrase questions as “this is the situation, how do I accomplish X task?”
  - Taking out your frustration on them is an easy way to get a bad reputation and have problems asking for favors, etc.
  - They are a great starting point if you need a general answer immediately “HOW DO I FILE X? AHHH!”

THE LESSON

KEEP THEM HAPPY
**THE JUDGES’ WEBPAGES**

- These webpages and resources are common in populated and urban counties (Read: King Co.)
- These websites provide information as to the idiosyncrasies of judges and their clerks.
- They often discuss delivery of working copies, filing requirements, or oral argument procedures.
- ProTip: don’t Facebook your judge.

**THE EXAMPLES**

“For all working papers for non-oral motions, hard copies and signed proposed orders are required. If the thickness exceeds 1.5 inches, working copies must be three-hole punched and/or bound in a notebook.”

“Judge Andrus prefers to receive electronic working copies submitted to the Clerk using the Clerk’s eFiling Application pursuant to LGR 30(b)(5)(C). If a party’s submission exceeds the 500 page limit, it may request prior permission from Judge Andrus’s bailiff to deliver the working copies in PDF format, either on disk or thumb drive.”
THE RECOMMENDATION

- After filing your complaint or notice of appearance, identify the assigned judge and review their individual webpage.
- Make a short list of their individual filing requirements and preferences.
- Place the list on the cover of your court file or digitally store the list next to your prepared calendar note forms.
- King County Superior Court judges webpages available at: http://www.kingcounty.gov/courts/SuperiorCourt/judges.aspx

THE ORAL ARGUMENTS AND FILED PLEADINGS

- Courts don’t care about plagiarism & imitation*.
- Although your clients are unique, the factual and legal issues of their case are not.
- In many cases, a judge will be assigned multiple cases with similar fact patterns or legal issues in the interest of judicial efficiency.
- Other attorneys’ oral arguments and pleadings provide insight in various styles and which styles offer the greatest likelihood of success.

* Obviously, if you are using language verbatim or presenting it as authority, always properly cite the source.
THE HEARINGS

- If you are very concerned about an upcoming hearing, I recommend attending a similar hearing or calendar.
  - Ex. Motions for Summary Judgment – Review court calendars and identify dates when courts hear dispositive motions. Attend the hearing date and take notes on judge’s procedures and style. Tailor oral arguments and presented evidence to match the judge’s style.
- Identify both successful and unsuccessful behavior and arguments.
- Court is theatre, imitate the best actors you watch.

THE PLEADINGS

- Pleadings and documents filed by other attorneys can provide a great resource for creative and well-researched arguments.
- Pleadings and documents filed by the opposing party in other cases can provide insight into their interests and motivation.
- Remember, almost all filed pleadings are public record and available to anyone.
  - Obvious exceptions include confidential settlements, family law disputes, etc.
- Never copy another attorney’s language verbatim, but use these documents as inspiration and roadmaps.
- Review granted orders to identify which arguments were successful and which weren’t.
THE CASE NUMBER

- To quickly and efficiently review pleadings, you must already have a relevant case in mind, including the case number.

- Method of Finding Case Number, No. 1:
  - Perform a name search on the Washington State Court Website: dw.courts.wa.gov
  - Click on the case number and review the docket, if available.

- Method of Finding Case Number, No. 2:
  - If attending a multi-party calendar, keep a pen and paper handy in case you hear a relevant fact pattern or legal issue.
  - If you identify a relevant case, write down the parties’ name and double check the posted calendar outside the courtroom to obtain a case number.

THE RETRIEVAL

- If you identify a pleading which is relevant to your case, use the jurisdiction’s document retrieval system to pull it.
  - In King County, the document retrieval system is ECR Online.

- If no electronic system exists, visit the Courthouse and ask to review the case file. Attorney’s can review case files for free, but you cannot take photos or copies without paying.
  - It is against the law to remove documents from a case file.
  - Municipal and District Court’s rarely have electronic systems.
THE BAR AND ITS SECTIONS

- It's important to maintain a large network of attorneys practicing similar subject matters to you. This provides a resource for getting simple questions answered or picking up strategic advice.
- Bar association sections also provide access to journals and listservs which provide local and current information.

THE SOCIAL NETWORK

- Experienced attorneys love helping out younger practitioners.
- Why, you ask? Because they have faced the same trepidation and anxiety that you currently feel taking on a new subject matter.
- Recommendations:
  - Remember that attorneys are very busy, so be prepared with focused and direct questions. If you could have gotten the same answer somewhere else, then you haven’t done enough research.
  - The best help they can provide is to point you in the right direction of where to look and what to do.
  - Always return the favor with coffee, drinks, or a tasty dinner (when you win the case).
  - If the complexity of your case far exceeds your experience, don’t be afraid to propose working together and sharing fees.
THE SECTIONS

- WSBA and county bar association practice sections provide great information relating to year-to-year changes in case law or statutes.
- Sections usually publish a journal or newsletter discussing the current state of the subject matter in the jurisdiction and identify common problems for local practitioners.
- Traveling attorneys from other counties or states rarely take the time to review these publications and identify these problems.
  - This is an area where you can use local knowledge to outmaneuver more experienced, yet less local attorneys.
- Many sections also operate email directories or listservs in which section members can ask questions.
  - Recommendation: Review the directory to opposing counsel will not receive your question. If your case is high profile, ask a friend to ask the question for you.

THE FINAL TIPS

- Tip: Schedule an early call with opposing counsel to set the tone for communications going forward.
  - These informal discussions can provide valuable insight into the opposing parties' true motives.
    - Ex. "His mother's Last Will and Testament passes his Tonka trucks to his brother. He only wants the trucks back. If not, he'll fight tooth and nail to have the will invalidated."
  - Establishing a constructive dialogue with opposing counsel promotes compromise and can put an end to expensive litigation.
- Tip: Anything put in writing never goes away.
  - If you're going out on a limb with a factual statement or assertion, make it during a phone call.
  - After a phone call and when favorable, send an email to opposing counsel confirming the contents of phone discussions.
THE FINAL ADVICE

FAKE IT ’TIL YOU MAKE IT

THANK YOU

• If you have questions, feel free to contact me by telephone or email:
  • Ph: (650) 491-9909
  • E: mark@hansantos.com