



BUSINESS AND EMPLOYMENT NEWSLETTER

THIRD QUARTER, 2007

RECENT CHANGES TO WASHINGTON'S CONTRACTOR REGISTRATION LAWS

By Sallye Quinn

Washington's lawmakers recently passed Senate Bill 1843 and enacted significant changes to the contractor registration laws, found at RCW 18.27 et seq. The changes were effective July 22, 2007. The most notable changes for clients engaged in professions falling within the scope of the contractor registration statute are those that affect who must register as a contractor, increase the enforcement measures for failure to register and require contractors to obtain a customer's signature on required disclosure statements and retain that signature for a period of 3 years. The most significant changes for attorneys who pursue registered

contractors and their bonds are those that increase the fee from \$20 to \$50 for service upon contractors and their bonds and require notification to the Department of Labor and Industry (the "Department") of orders, judgments or dispositive settlement agreements involving a contractor's bond. These changes, and other changes, are discussed in-depth below:

CONTRACTOR NOTABLE CHANGES

Property - Owner - Developers, Cabinet Makers and Tree Removal Services Must Now Register. The Department describes changes

in the law broadening the scope of who must register as a contractor as "closing loopholes in the law that leave consumers vulnerable."¹ The definition of "contractor" was expanded to include those who "develop," perform tree removal services, and install cabinets; consultants acting as general contractors and anyone, whether or not required to register under RCW 18.27 or who is otherwise required to be registered or licensed by law (i.e. arguably realtors, teachers and firefighters) who offers "to sell their property without occupying or using the structures, projects, developments, or improvements

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RECENT CHANGES TO WASHINGTON'S CONTRACTOR REGISTRATION LAWS—CONTINUED

for more than one year from the date the structure, project, development, or improvement was substantially completed or abandoned." RCW 18.27.010(1). The intent of these changes is to require registration by individuals who own the property they are improving and act as contractors with the intent of building improvements for re-sale.

Prior exceptions to the law would not have required such individuals to register because they were "owner builders." Now, if you are firefighter with blocks of time off from work, who hopes to make additional money by subdividing land and building spec homes, you are going to have to register. *Even if you aren't a firefighter, if you simply develop land, you are going to have to register.* Notably, the exception to the contractor registration requirement regarding owner-builders who hire registered contractors is still in place, but no longer applies to "a person who performs the activities of a contractor for the purpose of leasing or selling improved property he or she has owned for less than twelve months." In other words, the exception no longer applies to developers and really just applies to homeowners. RCW 18.27.080(11).²

In reviewing the changes, I asked whether a developer who buys land and then contracts with a registered contractor to complete all development work was required to register. When I posed this question to one local Department office, the official answered with "no, clearly within the owner-builder excep-

tion." Another official I spoke with in the Department's Olympia office was not as equivocal, adamantly stating that developer-owners must now register. Ultimately, I was able to speak with Dennis Yonkers, the Department's technical specialist for the contractor registration program. He clearly stated that anyone who develops land *must register, even if that developer hires a registered contractor to do the work.* Mr. Yonkers had just returned from a week of educating local inspectors about the changes, including the requirement for developer registration. He believes the Department has done what it can to get the word out to the industry, but anticipates that there will be some lag time to allow people to get into compliance. After the first of the year, however, he stated that inspectors will start issuing fines (not warnings) to those who aren't registered, but under the new law should be. Those fines are \$1,000 per day. The ultimate word is, if you're a developer, you better get registered. If you represent developers, have them register.

Disclosure Statements Must Contain Customer's Signature.

The disclosure statement required by RCW 18.27.114, i.e. the "Notice to Customers" must now be signed by the customer and be retained by the contractor for three (3) years. *As before, failure to comply with the requirement to provide the Notice to Customer will prevent the contractor from pursuing his or her mechanic's lien rights.*

Other Changes

- It is now a gross misdemeanor to subcontract to, or use, an unregis-

tered contractor. RCW 18.27.020(2)(e).

- In lieu of a bond, contractors may file an assigned savings account. RCW 18.27.040(8).
- Contractors must file a \$200 bond when appealing an infraction.

ATTORNEY AND CONTRACTOR NOTABLE CHANGES

Filing Fees Increase. The fee for service upon a contractor and his or her bond increased from \$20 to \$50.

Prevailing Parties Must Notify Department of Orders, Judgments and Settlements. Within ten (10) days after resolution of a case, a certified copy of the final judgment and order, or in a settlement where a case is not disposed of by a court trial, a certified copy of the dispositive settlement documents, must be provided to the Department by the prevailing party. Failure to provide the necessary documents can result in a penalty up to \$250 against the prevailing party. RCW 18.27.040(10).

Although this article summarizes the changes to the contractor registration law, it is not a complete analysis of each and every change. To see the revised law, go to <http://apps.leg.wa.gov/billinfo/summary.aspx?bill=1843&year=2007>, where you can download the final house bill and review the senate bill report. If you have any questions regarding these changes or how they apply to you or your clients, feel free to give me a call.

¹ DEPARTMENT OF LABOR AND INDUSTRY, RECENT CHANGES TO THE CONTRACTOR REGISTRATION LAW.

² Additional exceptions are found at RCW 18.27.080.

ASSESS YOUR ORGANIZATION'S VULNERABILITY TO FRAUD

By Laura Preston, Acuity Group LLP

Likely you are familiar with the "Fraud Triangle," which is a simple depiction of the three conditions present when fraud in business occurs: motive, opportunity, and rationalization. Unfortunately, organizations of any size in any industry (including non-profit organizations) are at risk of loss through fraud. The common factors? People and their inherent shortcomings as human beings *and* business owners and managers who inadvertently make it easy for people to steal.

Motive

Contrary to the logical assumption that a fraudster is one with an amoral, flawed character, more than 90 percent of discovered fraud was committed by first-time offenders – regular people like you and me. The common motivators are addiction (escalating drug and gambling habits), high personal debt (never enough to make ends meet), personal crisis (sudden family illness or loss of an income stream), peer pressure (high family expectations), and attitudes of entitlement (employees who believe they are due more than what they are being compensated).

Opportunity

Most discovered fraud involved people in accounting or upper management positions. Makes sense, doesn't it? People in accounting have access to the organization's books and records, not to mention cash. Who better to manipulate accounting data,

set up fake vendors, steal inventory, or write checks to themselves.

On the other hand, upper management is encouraged to meet budgets or other financial goals by the promise of a bonus or incentive compensation, which creates a motive for management to bypass established internal controls or falsify financial reporting for personal benefit.

Rationalization

The advantage of being human is having the capacity to *think*, then act, and finally, to justify our actions. Many fraudsters claim they never *stole* from their employers, but *borrowed*, always with the intention to repay what they took. Others justify their theft as being owed to them for the work they performed.

Minimize Fraud Risk

Managing the books and records of a company is a necessary, tedious, and sometimes complex aspect of running a business that many business owners and managers entrust to personnel without providing oversight. The lack of oversight contributes to the opportunity for fraud to occur. This is particularly true for small businesses, which – by the way – are at the greatest risk of fraud. Small businesses generally run lean and typically do not invest in anti-fraud measures. It is common for a small business to trust its administration and bookkeeping to a one or two-person office staff. Some may outsource the

bookkeeping to an independent contractor. Often, one person is authorized to sign checks, pay vendors, create sales invoices, receive and deposit payments, reconcile the checking account, and manage system passwords and access. No wonder small businesses are at greater risk. The sad reality is that the smaller businesses are least able to absorb loss incurred through fraud.

You cannot change human nature, but as a business owner or manager you can minimize the risk of fraud by providing effective oversight, which is established through internal controls. The most basic and necessary control is setting an appropriate "tone at the top," communicating it to all employees, and consistently adhering to it. Many businesses set the tone through documented codes of ethics or standard operating procedures. That is not enough. The tone must be reinforced through example.

The second most basic control is segregating accounting functions. Easy and cost-effective measures include:

- Ensuring the person who writes company checks is not authorized to sign the checks.
- Ensuring the person who creates sales invoices does not make deposits and post receipts for those deposits to the accounting system.
- Having someone other than the bookkeeper receive the

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ASSESS YOUR ORGANIZATION'S VULNERABILITY TO FRAUD - CONTINUED

unopened bank statement each month and review cancelled checks, wire transfers, and deposit activity.

Rate Your Risk

Do a bit of self-assessment for your organization. Gauge your risk using the Fraud-O-Meter.

High risk: If your assessment places your organization into this sector of the meter, your organization may have already suffered loss through fraud. If not, the conditions are perfect for someone with the motivation to take advantage. The high-risk organization is an entity in which:

- No ethic or standard has been established or communicated to the employees.
- One or two people have daily control over all aspects of the financial operations including issuing checks, signing checks, posting transactions to the accounting records, and reconciling bank statements.
- The owner and/or manager relies on one or two "trusted" employees while pursuing other interests of the entity, such as product development or marketing.
- Employee training is a "sink or swim" on-the-job learning experience through trial and error rather than learning through formal tutoring and periodic performance assessment.

Medium risk: If your assessment

places your organization into the mid-sector of the meter, your organization has taken positive steps to minimize the risk of fraud:

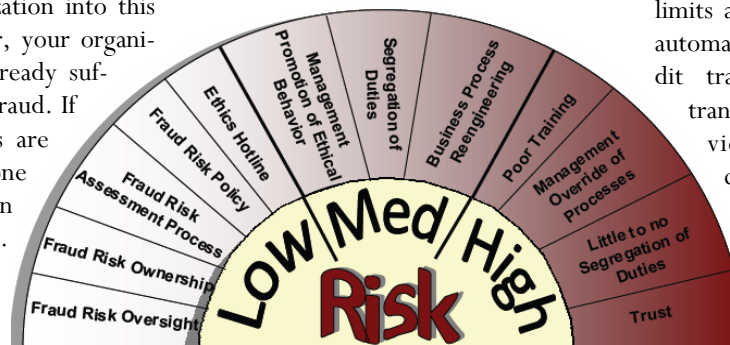
- An ethic or standard has been established and communicated to the employees, and is consistently promoted by management. Employees

responsibilities to be bonded provides a degree of protection and sends the message that you will not tolerate theft.

- Where possible, business processes have been designed to provide automatic controls. For example, using accounting software that limits and tracks user access automatically creates an audit trail for each posted transaction. Monthly review of cancelled checks provides opportunity to identify suspect payees, signatures, and endorsements.

Low risk: If you believe your organization falls into this sector of the meter, the following controls structure is in place:

- The overall tone has been established, is consistently managed, and management is held accountable by a separate governing body for maintaining the tone and mitigating fraud risk.
- Risks inherent in the organization's achievement of its objectives have been identified.
- Identified risks are actively managed by controls over revenues, expenses, and the financial statement close process.
- Business processes and controls are documented and have been clearly communicated to employees.



understand what behavior and actions are permitted, which ones are prohibited, and how they should seek advice when faced with uncertain job-related situations.

- Business processes are clearly documented, and key accounting and financial functions have been segregated. For example, the person or persons authorized to sign checks have no access to the books and records of the company. Cash receipts are tallied and deposit slips are prepared by someone other than the person who posts the receipts to the books. Computerized system administration is managed by personnel having no financial responsibilities. (Note, when it's difficult to segregate duties because of the limited size of an entity, requiring employees with significant financial re-

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FAMILY/MEDICAL LEAVE UPDATE FOR EMPLOYERS

By Amy Robinson

Over the summer months, we had a number of clients call about leave issues. We thought we would take this opportunity to remind you about the federal Family Medical Leave Act (FMLA) and Washington's parallel Family Leave Act (WFLA). The laws grant employees up to 12 weeks of time off from work for their own serious medical condition, to care for a family member with a serious medical condition or upon the birth or adoption of a child.

While these two laws generally apply to employers with 50 or more employees, there are certain provisions of the state laws that apply to employers with 8 or less employees. According to the regulations, employers with 8 or more employees have an obligation under state law to grant leave for the full amount of time needed if the employee is sick or temporarily disabled as a result of

pregnancy or childbirth and reinstate the employee to the same or an equivalent job upon their return. See Washington Administrative Code 162-30-020.

For employers who are generally not covered by the state and federal family leave acts but have 8 or more employees, these provisions apply to you. For employers who are covered by the FMLA and/or the WFLA, this means that you may have to grant leave beyond the twelve (12) weeks of FMLA or WFLA-designated leave where the disability and/or illness continues and/or when the FMLA or WFLA leave has already been exhausted. Failure to do so may be considered unlawful discrimination.

We hope this information is helpful to you. As always we are available to assist you as you navigate these challenging issues and are always happy to answer any

questions that you may have about this or any other topic.

We will be addressing in a future issue the law enacted earlier this year that provides that the employer pay for certain medical leaves.

In addition, for additional information, including "Frequently Asked Questions" related to pregnancy and/or disability leave visit the Washington Department of Labor and Industries website at <http://www.lni.wa.gov/WorkplaceRights/LeaveBenefits/default.asp>.

If you would prefer to receive this Newsletter by email, please call us at 360-733-0212.

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- The effectiveness of the controls is consistently monitored through periodic testing.

Closing Thoughts

Designing, documenting, and implementing internal controls may be time consuming and costly. Some organizations will not be able to avoid expending resources on internal controls. Beginning in 2007, private companies, not-for-profit entities, and government

agencies that seek independent auditor opinions regarding their financial statements must also receive an assessment of the adequacy of their controls design and implementation as part of the audit (Statement on Auditing Standards [SAS] 112). Many organizations have already addressed their internal controls gaps in preparation for the more stringent audits.

No matter the size of your organization or the impetus for minimizing fraud risk, if the concept of designing and implementing internal controls seems daunting, start small. Identify your greatest area of risk and design controls to reduce that risk. Document the controls. Implement the controls. Test the controls. Fine-tune the entire process and then apply it to the next greatest area of risk.

**To read past issues of our Newsletter—visit our website at:
www.barronsmithlaw.com (click on Links and Resources).**

ENFORCING FOREIGN JUDGMENTS

By Sallye Quinn

We work with many clients who transact business across state and national borders. Occasionally, clients have needed to execute in Washington on a judgment they obtained in another state or country. If you find yourself, or your client, in that situation, or if you are considering doing business across state or national borders, we wanted to provide you with a glimpse of the issues you would face and how we can assist in executing on a "foreign" judgment. Most think of a foreign judgment as a judgment obtained in a different country. In fact, foreign judgments include judgments from other states, as well as foreign countries, and even include federal judgments and judgments from other counties. I have always found it interesting that superior courts even consider judgments from district courts in the same county to be "foreign." Each type of foreign judgment can almost always be enforced in the state and county where the judgment debtor has assets, but the mechanism for enforcing those judgments is different depending on the court the judgment originated from.

JUDGMENTS FROM ANOTHER STATE OR COUNTY OR FEDERAL COURT

Washington has adopted its version of the Uniform Enforcement of Foreign Judgments Act, which provides that, in general, federal court judgments, decrees and orders and judgments, decrees and orders from other states and territories are entitled to "full faith and

credit" in Washington. RCW 6.36.025. In other words, Washington will treat such foreign judgments as if the judgment were issued by a Washington State court. If the foreign judgment is authenticated¹ it can be filed with *any superior court in any county in Washington* and it will be treated as if it is a judgment of that superior court. Judgments can also be filed with the district court, if jurisdiction and venue requirements are met. *Id.* Such judgments can be extended or renewed once they are filed, but cannot be extended beyond the expiration date allowed under the laws of the jurisdiction where the judgment originated. RCW 6.36.035.

At the time of filing the judgment, the creditor must file an affidavit setting forth the name and last known address of the judgment debtor and the judgment creditor and the filing and expiration date of the judgment in the original jurisdiction. The creditor must "promptly" give notice of the filing to the judgment debtor. The notice must include the name and address of the creditor and the creditor's lawyer in the state of Washington and the notice must be filed with the court. RCW 6.36.035.

In superior court, the creditor cannot execute on the judgment until 10 days after filing proof of mailing of the notice of filing to debtor. The time is 14 days in district court. RCW 6.36.035.

In addition to the requirements of

the Uniform Enforcement of Foreign Judgments Act, a standard judgment summary as required by RCW 4.64.030 is necessary. The standard form must be expanded in the foreign judgment context to include filing and expiration dates of the judgment under the laws of the original jurisdiction.

In the federal context, enforcing federal district court judgments from one federal district in another federal district is fairly easy and simply requires certification of that judgment by the clerk of the first court for registration of the judgment in the second court. 28 U.S.C. §1963.

JUDGMENTS FROM ANOTHER COUNTRY

Under Washington's version of the Uniform Foreign Money-Judgments Recognition Act found at RCW 6.40, et seq. most foreign judgments from other countries that grant or deny recovery of a sum of money, other than judgments for taxes, fines or other penalties or judgments for support in matrimonial or family matters are enforceable in the same manner as sister state judgments entitled to full faith and credit. RCW 6.40.010-030. Such foreign judgments will not be recognized if the judgment was rendered under a system that does not provide impartial tribunals, due process, or if the court lacked personal jurisdiction over the defendant or the subject matter. Additional circumstances, such as obtaining the judg-

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¹ In my experience, "authentication in accordance with the act of congress or the statutes of [Washington]" typically means a certified copy of the judgment. In other jurisdictions, an exemplification form may be necessary, which requires "triple certification" by the court clerk, the judge and again by the court clerk.

ENFORCING FOREIGN JUDGMENTS—CONTINUED

ment by fraud, can also prevent the judgment from being recognized. RCW 6.4.040.

The provisions of the Uniform Money Claims Act found at RCW 6.44, et seq. govern the conversion of the foreign money to United States dollars.

ENFORCING DISTRICT COURT JUDGMENTS IN SUPERIOR COURT

The main reason for transferring a district court judgment to superior court is to create a lien on real property owned by the debtor. In order to do so, you must obtain a certified copy of the

transcript of the docket of the district court and file it with the clerk of the superior court. RCW 4.56.200(3). To create a lien on homestead, you must obtain a certified abstract of the record of the transferred district court judgment from superior court and record it with the county auditor. RCW 6.13.090.

ENFORCING WASHINGTON STATE JUDGMENTS IN CANADA

Being so close to the border, it's likely that judgment debtors living in Whatcom County, or in Washington, may have assets in Canada.

In general, Washington State judgments will be enforceable in Canada. That issue is, of course, governed by the laws of Canada. For a good primer on enforcing Washington State judgments in Canada, check out an article entitled *Enforcing Your Washington State Judgment in Canada*, which appeared in the June 2003 Washington State Bar News. The article can be found at the following link <http://www.wsba.org/media/publications/barnews/2003/june03-jakeman-sullivan.htm>.

ALERT

SEPTEMBER 30, 2007 DEADLINE FOR NEW EMPLOYMENT SECURITY FILINGS

By Kirsten Barron and Debbie Nelson

The Washington state legislature enacted a new law which requires all businesses to report their owners, partners, members or corporate officers to the Washington state Employment security Department ("ESD"). The ESD has provided a form for providing certain information which is due **September 30, 2007**.

For forms and answers to frequently asked questions, go to www.wa.gov/esd and click on "Corporate-officer registration" in the middle of the page.

Please note that even though law requires reporting on owners, partners, members or corporate officers, ESD is only requiring businesses to provide the names of their officers and any ownership interest the officer owns in the corporation. We spoke with a representative in the Bellingham office of ESD and pointed out to

her that the ESD form stated "a new law requires all business to register their owners (including spouses), partners, members and corporate officers to the ESD."; however, there is no place on the ESD form to include that information. ESD's representative stated that at this time the ESD's position is that only the information requested on the form is required. While we do not believe that is an accurate statement of the new law, the ESD is nevertheless taking that position. Frankly, their position that a more limited amount of information is required is helpful to most of our clients.

Not only is the lack of clarity frustrating, but as you may know, as for corporations and limited liability companies, much of this information is already provided to the Secretary of State on the Annual Report each year. A more stream-

lined process for providing this information to the state would make much more sense.

We plan to continue to work on this issue with ESD as this issue evolves and hope to have some input on how this process works for our clients.

Public Information Officer Hilary Young states on the ESD website that "[w]e want to assure everyone that federal and state laws protect this personal information from public disclosure. We also maintain a secure data system and we encrypt our laptops so that this information can't fall into the hands of someone who might misuse it."

Of course, we are available to answer your questions, or assist you with filing the Corporate Officer Report. Please do not hesitate to call on us!

SERIES - "BOILER-PLATE" CONTRACT PROVISIONS

By Kirsten Barron and Bethany Allen

Arbitration/Attorneys Fees

Arbitration Clauses

Arbitration clauses are commonly used in contracts. An arbitration clause requires that the parties utilize a third party dispute resolution process outside of the court system. While it depends on the particular arbitration provision, the arbitrator's decision is usually final and binding on the parties to the dispute.

Some advantages of arbitration are that it can be, but is not always, faster, less expensive, and more flexible than litigation. The disadvantage to arbitration is that there is usually no appeal right. This means that whatever the arbitrator decides stands. If you proceed through the court system, there are many more opportunities for appeal of an unfavorable decision.

Arbitration clauses are generally held by the courts to be

enforceable. An arbitration clause may read: *All disputes, controversies, or claims arising out of or relating to this contract shall be submitted to binding arbitration in accordance with the applicable rules of the American Arbitration Association then in effect.*

Attorneys Fees

Another common contractual provision is an attorneys fees clause. The general rule under Washington law is that absent a contractual provision or statute, each party pays their own attorneys fees. An attorneys fee clause is a provision that states that the prevailing party in any dispute arising under the contract shall be awarded his or her reasonable attorneys fees and costs. The prevailing party is typically defined as the party who recovers the greater relief in any action to enforce his/her rights under the contract.

Attorneys fees provisions are good in that attorneys fees can be so expensive that pursuing a claim without hope of the recovery of those fees is economically nonsensical. An attorneys fee clause can help a party get relief for a claim. The downside of an attorneys fees clause is that it is often used as leverage in a lawsuit, with one party threatening another with attorneys fees in the event there is no settlement. Attorneys fee clauses have great ability to "raise the ante," which is ultimately good depending on which side of this two-edged sword you are on.

An attorneys fees clause may read: *In the event of litigation relating to the subject matter of this Agreement, the non-prevailing party shall reimburse the prevailing party for all reasonable attorney fees and costs resulting therefrom.*

UPCOMING EVENTS OF INTEREST

- ⇒ **September 25, 2007:** Varner Sytsma Herndon presents a CLE on tax issues, featuring Gary Tober, LL.M. from Lane Powell of Seattle. The seminar will be held at the Bellwether from 7:30—9:30 a.m., cost \$25.00.
 - ⇒ **September 28, 2007:** Amy Robinson to present recent trends in employment law at American Society of Woman Accountants ("ASWA") Fall controller's seminar. Event begins at 8:00 a.m. in the Fireplace Room at the Fairhaven Library. Contact your local ASWA chapter to register to attend.
 - ⇒ **September 28, 2007:** Kirsten Barron moderates Breakout Session 6: Building and Managing Strategic Relationships, at the Washington Women Lawyers 2007 Leadership Symposium. Bell Harbor International Conference Center, Pier 66, 2211 Alaskan Way, Seattle, WA 98121 from 2:30—3:30 pm.
 - ⇒ **October 11, 2007:** Lawyers Take Orders dinner and auction to benefit Law Advocates. 6 p.m. social hour & silent auction, 7 p.m. dinner and live auction at the Bellingham Cruise Terminal, \$60 per person. Reserve your place by October 5th by calling 360-671-6079 or emailing Jaime@lawadvocates.org.
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A PERSONAL NOTE FROM THE DEPARTMENT:

By Kirsten Barron

The fall is upon us all too soon and we find ourselves feeling a lot like all of the children once again in school – BUSY. You all are negotiating contracts, buying businesses, hiring new employees, entering new business ventures and the list goes on and on. We continue to appreciate the opportunity to work with you and share in your excitement and challenges.

Fall also finds us in the middle of a bit of a remodel, which is going beautifully. We are grateful to Mocerri Construction for their speedy and professional work. We hope that our accommodations will be a little more welcoming in a few weeks. Thanks for your patience during this time.

As always, if there is anything you would like to see us address in this newsletter, please let us know. We are always looking for new ideas and you all are our best inspiration. If you have one of those nagging questions, this is a great place to get it answered – no names revealed!

I would like to thank Laura Preston for her wonderful article. I have had a number of clients face “fraud” type issues. Her article reminds us of some of the steps we can take to make sure that we will not be the victims of such a crime. A little prevention goes a long way – especially in this arena.




CONTRIBUTORS AND EDITORS TO THIS PUBLICATION



Sallye Quinn is a senior associate in the firm’s business department and focuses her practice on business and real estate transactions and creditor’s rights.

Bethany Allen was a Rule 9 Intern with our firm over the summer. She has returned to Gonzaga University School of Law for her last year of law school and plans to practice in Bellingham once she graduates.



Amy Robinson brings employment and human resource experience to the firm and is invaluable to our department and the Litigation team in solving a myriad of complex legal issues. Her practice is focused on employment and civil litigation.

Debbie Nelson is a paralegal in the firm’s business department and has extensive experience in corporate legal services.



Laura Preston co-founded Acuity Group LLP, which specializes in forensic accounting and financial litigation support services throughout Washington and Oregon. For more information, visit www.acuitygroupllp.com or write to info@acuitygroupllp.com.