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Whatcom Watch is a volunteer print and online newspaper that covers issues of environment, media and government primarily in Whatcom County. It is supported by individual contributions and local advertising. While the paper presents views not often covered by other publications, it nevertheless endeavors to be as fair as possible in selecting a presentation of challenging ideas. It can only achieve this with the active involvement of its readership, and reader response is encouraged.

Toward this end *Whatcom Watch* serves as a community forum. Editors reserve the right to edit all submissions, including letters, for accuracy, length and clarity of expression. While opinions expressed in articles need not reflect the views of editors, the newspaper strives to present material that is of value and concern to the community. When *Whatcom Watch* editors spend time editing a submission, it constitutes our commitment to publish the submission and the author's tacit agreement with us that the submission will be published in the newspaper. If an article is accepted for publication in *Whatcom Watch*, it must not appear in another publication (print or Internet) before the Watch has appeared on newsstands.

Whatcom Watch is published monthly (except for the combined October/November issue). Subscription prices: see back page. Direct all correspondence to: *Whatcom Watch*, PO Box 1441, Bellingham, WA 98227-1441. Approximately 2,000 copies are printed. Free copies are distributed to more than 50 locations in Whatcom County. Funding comes from donations, subscriptions and local advertising.

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All submissions must be received by the first day of the month to be considered for the following month's edition (see Submission Guidelines at www.whatcomwatch.org for more details).

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Whatcom Watch is printed on recycled paper with soy ink. Volunteers make every effort to reduce the carbon footprint by distributing *Whatcom Watch* using SmartTrips (www.whatcomsmarttrips.org).

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Watch on Media

Washington Reporters Get Free Legal Help

Microsoft and Davis Wright Tremaine Protect Journalists

by Jennifer Karchmer

Freelance journalists and small newsrooms that lack funds to hire lawyers can get pro bono legal representation from Microsoft and Seattle law firm Davis Wright Tremaine.

The two companies joined forces in 2020 to launch the Protecting Journalists Pro Bono Program. Attorneys from Microsoft and DWT with media law training are offering pro bono assistance in three areas important to newsrooms and freelancers: 1) pre-publication review of articles, 2) Freedom of Information requests, and 3) quashing subpoenas that try to force a journalist to hand over their notes or confidential sources.

The partnership also relies on existing resources that three nonprofits known for their work defending press freedom offer: The Reporters Committee for Freedom of the Press (RCFP), the First Amendment Coalition (FAC) and the Washington Coalition for Open Government (WCOG). Each of these maintains a helpline to field calls from reporters so they will make referrals to the program for pro bono work.

Sima Sarrafan, a Senior Attorney at Microsoft who had worked at DWT and was drawn to First Amendment issues, came up with the idea to collaborate after attending a DWT seminar on how to defend a journalist from a subpoena.

"I knew that there was an opportunity there to take the investment of time that we're all frankly making in pro bono work and add another way to channel that," she said on Nov. 23 during a phone interview. The idea to provide pro bono help percolated for her as she noticed an imbalance of power between those who try to use the law to silence and censor voices, and reporters and newsrooms that lack the ability to pay attorney fees. "The specter that [a journalist] may get sued and financially taken down by the threat of someone who doesn't want that story to be told I think is unfair," she added.

Most law firms offer pro bono assistance as the American Bar Association recommends in its Model Rules of Professional Conduct (Rule 6.1) that lawyers provide at least 50 volunteer hours a year. The term pro bono comes from the Latin *pro bono publico*, which means "for the public good."

The seminar Sarrafan attended was led by DWT Partner and longtime newsroom attorney Thomas Burke, who has defended journalists and the First Amendment for close to 30 years. He also chairs the firm's Pro Bono and Social Impact committee, so when the two spoke in January 2020, they formed the program as a pilot starting in Washington and California with the hope to expand nationwide.

Threats Against Journalism

Such an initiative comes at an appropriate time in the industry. Journalists and newsrooms are under threat, pressured to

produce more content with less resources — including legal advice, and there's an increase in libel threats, subpoena requests, and physical assaults on reporters while covering demonstrations. Since 2017, at least 82 journalists have been subpoenaed or had their records seized, and some have received multiple subpoenas, according to the U.S. Press Freedom Tracker, maintained by the Committee to Protect Journalists. The tracker monitors arrests, physical attacks, border stops, equipment damage, subpoenas, legal orders and other violations against reporters.

For a local case of a journalist subpoena, we can look to last summer when *The Seattle Times* and four Seattle TV stations were being forced by the Seattle Police Department to hand over unpublished images and video from the May 30 racial justice protests. The SPD wanted the footage to aid in solving crimes that occurred in downtown Seattle that weekend.

With DWT as their legal counsel, the media outlets fought the subpoena for months, trying to convince the judge that the media is not an arm of the government. They had appealed a judge's decision that the subpoena was enforceable, but eventually the SPD dropped their pursuit (see *Whatcom Watch*, Oct/Nov. 2020, "A Win For Press Freedom").

Of course, an established news company like *The Seattle Times* has the resources to retain a firm like DWT that specializes in defending the First Amendment.

However, a freelance reporter or a community newsroom would have their hands full with a subpoena — facing the threat of jail time if they don't comply, a mountain of attorney fees, and confusing legalese to sift through.

"The first one was scary, but after that, we knew what our rights were as reporters, and that [the subpoena] could be quashed," said Illinois journalist John Kraft in a Dec. 23 email. Kraft, who has been served four subpoenas for his reporting for Edgar County Watchdogs, contacted the Reporters Committee for Freedom of the Press (RCFP) for pro bono assistance. He estimated attorney fees would be in the \$5,000 to \$10,000 range, effectively shutting down the nonprofit government watchdog blog he started with fellow muckraker Kirk Allen. "We would have faced financial ruin if we did not have support from nonprofits interested in assisting reporters with legal issues," Kraft added.

When Western Washington University Associate Professor of Journalism Carolyn Nielsen was subpoenaed years ago, she sought pro bono assistance from RCFP, which got her in contact with DWT attorneys. In 2010, the city of Chicago/Chicago Police Department were asking for her notes related to a story she wrote in 1994 while a graduate student at Northwestern University.

Nielsen, who has helped *The Western Front* student journalists fight subpoenas, was "outraged" about *The Seattle Times* subpoena case. "That this even happened showed the critical need for legal defense for journalists," she said in a Dec. 16 email.

For the Public Good

Journalists and newsrooms in Washington or California that seek pro bono assistance

in any of the three areas of the program: 1) pre-publication review, 2) FOI assistance, or 3) quashing a subpoena, can contact The Reporters Committee for Freedom of the Press (RCFP), the First Amendment Coalition (FAC) and the Washington Coalition for Open Government (WCOG). Go to their websites and locate their reporter's hotline.

Washington, D.C.-based RCFP, for example, has a 24/7 reporter's hotline, which has experienced an increase in requests the past few years, according to staff attorney Sarah Matthews, who spoke via phone interview on Nov. 19. The RCFP hotline has been in existence since the 1970s, she said, and calls and email requests have increased by about 30 percent from 2013, the latest data show. She expects the number for 2020 to exceed the prior year, because as of September, there were 350 requests — about the same amount for all of 2019.

Matthews, who worked on her high school and college newspapers and interned at *Newsweek*, says journalists need support to pursue their work holding government accountable. In its 2019-2020 Report to Donors, the RCFP said journalists and newsrooms would more aggressively pursue investigative reporting, "if they had access to an attorney to review sensitive stories before they are published and provide defensive support when reporters are served with subpoenas or threatened with lawsuits."

First Amendment Coalition Executive Director David Snyder is thrilled to be on board with the program because FAC's mission is to assist news outlets that don't have a legal department or regular access to a team of media lawyers. "Because we have so many more fledgling news outlets, and so many fewer newspapers with the budget to hire lawyers, there are too many journalists going without legal help," he said on Dec. 10 in an email interview.

Like RCFP, FAC maintains a helpline, which addressed more than 750 requests in 2019. FAC fields queries from reporters and members of the public alike, ranging from issues related to public records and public meetings to subpoenas to the First Amendment, according to Snyder. FAC doesn't offer pre-publication review for reporters.

To combat the threat to journalistic freedom a subpoena can pose, FAC has its Subpoena Defense Initiative, a referral network of attorneys specially trained in protecting journalists.

"When someone enlists the power of the courts to compel journalists to testify or turn over unpublished materials, they undermine the ability of the press to operate independently of the government," according to the FAC website.

Many states, including Washington and California, have shield laws to protect a journalist's privilege, and federal circuit courts have recognized a journalist's right to refuse to disclose their notes. The Seattle Police Department subpoena from last summer, which tried to compel *The Seattle Times* and the four TV news stations to provide unpublished material, was the first significant appellate test of Washington's 2007 shield statute, RCW 5.68.010, according to Eric Stahl, a DWT attorney who defended *The Seattle Times* and the TV stations. Stahl served as one of Nielsen's lawyers in her

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Reporters Get Free Legal Help

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subpoena case, too. He said the purpose of the shield law is not only to protect reporters from appearing like they are an arm of the state, but also to encourage the public and potential sources to confide in reporters.

“I think if the press had to respond [to a subpoena], any time they had potentially discoverable information in some lawsuit, the burden on their time would be extreme,” Stahl said in a Nov. 20 phone interview. “It would prevent them from doing their jobs. It would cause sources to dry up and be less and less willing to disclose information on matters of public interest.”

Resources for Journalists

Journalism organizations like the Committee to Protect Journalists, the Society of Professional Journalists and Reporters Without Borders each offer a unique perspective and resources to defend press freedom. The Protecting Journalists Pro Bono Program is not trying to replace

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– Sima Sarrafan,
Microsoft attorney

the work done by those organizations, but rather enhance journalist safety, according to Burke. Reporters should be able to do their work unencumbered and publish important stories, he added.

For the pre-publication service, the program provides trained media lawyers to review news articles, podcast scripts and other journalistic productions for potentially libelous or defamatory language. Burke emphasizes that their lawyers can provide guidance and advice, but ultimately, it’s the reporter in control of what goes to print.

“We don’t make a decision about what they publish or what they don’t publish,” said Burke, who also teaches media law at UC Berkeley Graduate School of Journalism. “We help them identify risks and we talk them through those based on the review that we’ve done.”

The second arm of the program, FOI assistance, can help journalists who are getting pushback from agencies on open government requests. The Washington State Coalition for Open Government makes referrals to the program specifically for journalists who are experiencing resistance by agencies to provide public records, according to WCOG President Toby Nixon. The WCOG helpline receives two to three requests per week, on average, he said in a Dec. 17 email, and those calls come from journalists and members of the public.

The third component of the program is the subpoena support. Receiving a subpoena can be daunting for a freelancer who’s focused on reporting and writing and not defending herself/himself in a legal battle nor considering the consequences, which as mentioned, could include jail time.

“Generally, any person who is asked or ordered to testify at a legal proceeding, or to produce documents relevant to one, is required to comply,” according to Jonathan Peters, Associate Professor of Journalism/Law at The University of Georgia. In his 2016 *Columbia Journalism Review* article, “Shield laws and journalist’s privilege: The basics every reporter should know,” Peters says the purpose of the penalty is not to punish, but to “extract compliance.”

Experts agree, a reporter who receives a subpoena requesting his/her notes, materials or sources should seek the help of an experienced media attorney and act quickly as a subpoena typically has a deadline to respond. **W**

Local Government on TV Channel 10

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January 11 and 25; February 8 and 22: 7 p.m.

Live telecast Monday

Committee meetings at 1 p.m. and regular meeting at 7 p.m.

Repeat telecast Tuesday

Committee meetings at noon and regular meeting at 7 p.m.

Repeat telecast Wednesday

Regular meeting at 8 a.m.

Repeat telecast Saturday

Committee meetings at noon and regular meeting at 7 p.m.

Whatcom County Council Meetings

January 12 and 26; February 9 and 23: 7 p.m.

Telecast: Wednesdays – 7 p.m.

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