Catching up with six artistic WSBA members to find out how they make time for their art, what inspires them, and more / p. 33

PLUS >

IP law and the arts / p. 40
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Editor’s Note

Aiming to Foster a Productive Dialogue

In light of recent protests in Washington and around the country sparked by the police killings of Breonna Taylor, George Floyd, Manuel Ellis, and others, as well as ongoing oppression and systemic racism, I feel it necessary to start by saying that the Bar News team condemns racism, white supremacy, and all forms of violence against Black communities. This magazine is meant to “inform, educate, engage, and inspire” by offering a forum for members of the legal community to connect and to enrich their careers, and we recommit to working to make sure that people of color and other marginalized members of the legal community have a consistent and equitable place for their voices to be heard.

We are also working with the WSBA Editorial Advisory Committee to brainstorm, while following the guidelines required of this forum, ways in which to cover important topics like police reform and systemic racism within the justice system, as well as how we can foster productive, imaginative dialogue around these issues.

With the deep pain so endemic in our communities, it can be difficult to turn attention toward anything else. But in such times it’s also necessary to highlight those things that strengthen our connections—and artistic expression is one of them. This issue of Bar News touches on art and creativity within the legal field—with articles about common legal issues experienced by artists and the attorneys who represent them (pages 40-46), interviews with six legal professionals who are also doing brilliant artistic work (pages 33-39), and book reviews and recommendations from members around the state (page 48). Many of the suggested books discuss topics such as anti-racism and social justice.

I also want to make a few other suggestions for continued learning and accountability on those topics:

- Sign up for the WSBA Diversity-Stakeholders list serve by emailing diversity@wsba.org. This newsletter contains helpful resources, articles, event notices, and more.
- Follow along with the American Bar Association’s 21-Day Racial Equity Habit-Building Challenge syllabus, available at www.americanbar.org/groups/labor_law/membership/equal_opportunity.
- Engage with the work of Dr. Kimberlé Crenshaw, an attorney and professor of law at UCLA and Columbia Law School. (She coined the term “intersectionality” in a 1989 article published in the University of Chicago Legal Forum. Her podcast, “Intersectionality Matters,” is a good introduction to this work.) Find more of her work here: https://law.ucla.edu/faculty/faculty-profiles/kimberle-w-crenshaw.

Kirsten Abel is the editor of Washington State Bar News and can be reached at kirstena@wsba.org.
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Mandatory Malpractice Insurance Back From the Dead

Forced insurance again lurches into the frame.

In May 2019, the Board of Governors rejected the so-called free market “Idaho Model” of mandatory malpractice insurance that was implemented there, and in no other state, in 2018.

Now, reminiscent of what Paul Krugman calls “zombie ideas”—i.e., “ideas that should be dead, but somehow keep shambling along, eating people’s brains”—the Idaho Model has risen from the grave yet again. The Supreme Court is now entertaining amendments to APR 26 that would make Washington only the second state in the country dedicated to the enrichment of commercial insurance interests at the expense of solo and small-firm lawyers and their clients. With limited exemptions (including, for example, my ADR practice and corporate lawyers), attorneys who don’t buy insurance will be disciplined by suspension under the amendment.

Before the Board rejected the Idaho Model, it sought input from the membership. Of 584 comments received, only 35 unambiguously favored following Idaho’s lead. This is like the result when mandatory insurance was put to a vote of the membership in 1986 and resoundingly thumped by 6,971 to 1,693 votes.

Now, apparently dissatisfied with lawyer responses to the Board last year, the justices say they again want input from lawyers. All at the behest of a disgruntled layperson, who participated fully in the deliberations of the Board but is unhappy with the outcome and has petitioned the court for enactment of the rejected Idaho Model. So far the justices have heard from a relative handful of Washington lawyers and from a Texas law professor, whose home state doesn’t require forced attorney insurance but who urges adoption of the nascent Idaho Model here. (The Longhorn professor paternalistically asserts that lawyers needn’t pass the substantial premium expense on to their clients but, instead, can either bill more hours or simply absorb the increase and take the resultant hit to their annual income.)

Those wishing to let the justices know that they want zombie forced insurance buried once and for all, particularly in this pandemic year, need to write to them before their Sept. 30 deadline. Address comments to Justices of the Supreme Court, P.O. Box 40929, Olympia, WA 98504-0929, or supreme@courts.wa.gov.

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Reenvisioning the Criminal Justice System

“If a man brings an accusation against a man, and charges him with a capital crime, but cannot prove it, he, the accuser, shall be put to death.”

The Code of Hammurabi, Line 3 (1772 BCE)

I will start by saying that I am not going to reenvision the criminal justice system in this article, despite its title. I will, however, acknowledge that the reenvisioning of our criminal justice system is the topic of the day, particularly following the killing of George Floyd and the resulting national discourse about racism, unlawful use of force, and demonstrations. The topic of reformatting the criminal justice system has long been an active topic in the legal community, especially in regard to prison reform and the use of confinement as a tool of the criminal justice system. Recently, COVID-19 has heightened our examination of jail conditions and the way people are housed in them. But the topic of reformatting the criminal justice system is not new. Indeed, our notions of what harms the government should be involved in as plaintiffs and what harms are exclusively private affairs have continually evolved over the course of written history. While I do not claim to have answers, I do believe that it is vital for our society to develop an understanding of the idea that change in our criminal justice systems has been a perpetual part of our legal history as a human race, and that lawyers are in a unique position to help build a functional consensus.

Our understanding of legal reform goes back as far as the legal code of Urukagina, last king of Lagash in Mesopotamia, which stated that under the new code that “the orphan or widow were no longer at the mercy of the powerful” (early 2400s BCE). Every society with an organized system of laws has had to address questions not only of how the government should deal with trespasses against its own authority, but to what degree it should become involved in people’s trespasses against each other. I would posit that it is a good use of our collective resources not to burden every individual with the investigation and prosecution of any harm that befalls them—to do so would inequitably disadvantage those victims without money, resources, or education. But the answer to the question as to what harms should remain in the civil realm, not subject to remedy by way of confinement or supervision by the government, and what should remain in the criminal realm, is a line that has continually shifted.

Rather than get into a lengthy discussion over actus reus and mens rea, let us just say that criminal law generally prohibits undesirable activity with the threat of punitive or rehabilitative treatment by the government. Under our system, criminal law and civil law began to differentiate during the establishment of common law after the Norman conquest of England as an increasingly centralized government wrestled with the problem of establishing consistent procedures across a divided realm rooted in different legal traditions: Roman, Germanic, Danelaw, French, local custom, etc. The Magna Carta specifically addressed the idea that there were harms between individuals that the king had no business in, laying the foundation for courts of law and courts of equity, and established the right of trial by a jury of peers and for judges to be qualified and neutral.

The idea of the state as a source of “justice” for the people at large, however, was a development of the Enlightenment. Part of what fueled the American Revolution was discontent with the crown’s lack of commitment to justice. One of the “Intolerable Acts” that led to the organization of the First Continental Congress was the Administration of Justice Act of 1774, which George Washington called the “Murder Act.” The act moved the trial venue of any officers accused of crimes to venues overseas, far from witnesses—effectively shielding officers from consequences of brutality. The official name of the act was actually, “An act for the impartial administration of justice in the cases of persons questioned for any acts done by them in the execution of the law, or for the suppression of riots and tumults,
in the province of the Massachusetts Bay, in New England.” The outrage of the members of the 13 colonies over this act is in striking parallel to the debate being held today. We are very directly wrestling with the same issues of government power that led the founders of our nation, many of them lawyers, into open rebellion against the government.

I will restate the point for emphasis: We are still wrestling with this issue of the government’s monopoly of force and its accountability 244 years later.

That political and philosophical wrestling, however, may not be a problem—it may be a healthy, functional, and permanent part of being a collective and democratic human society. As a person who represents both plaintiffs and defendants in the criminal courts of our state, I have a deep appreciation for both ideas: (1) that the government must be checked rigorously and our constitutional rights asserted and defended zealously; and (2) that the government has an important role to play through criminal justice in protecting the marginalized from those in power, protecting the disadvantaged from the privileged, and providing help and security to those who are victims. Further, our criminal justice system often is a route by which to provide resources in the form of rehabilitation, supervision, and education to perpetrators—how much we commit to those ends versus focusing on retribution, incarceration, and deterrence is another debate our society should have in perpetuity.

As I mentioned at the beginning, I do not have the answers, and I think that the criminal justice system cannot provide all the answers to what our society needs. Take, for example, the heinous and traumatic event of a sexual assault. Most of us think very directly about the criminal justice system and what it can do about sexual assault, but there is so much that the criminal justice system does not address. For that reason I invited Sexual Violence Law Center Executive Director Riddhi Mukhopadhyay to educate us (on page 10) about what lawyers can do for sexual assault survivors not only in the criminal justice system context, but in advocating for their rights and remedies in the civil context.

This is my penultimate President’s Corner column; my final column in the September issue will not be about the great work and role our profession has the privilege of bearing, but will be my report to you on the state of the Washington State Bar Association and its accomplishments, which is one of my required duties under the WSBA Bylaws as your president. I hope that over the last 10 months you have enjoyed our journey together discovering the varied ways our members are serving the public by strengthening the vulnerable threads present in the fabric of our society. While I am sure I will have closing thoughts in the September issue, my experiences as president of the WSBA, interacting with members near and far, has confirmed for me the vital role each and every one of you has in making our state, our nation, and our world a better one. I thank you for your service to the public and the role you play in our collective duty as officers of the court to advance the rule of law and bring accord to society when there is strife.

NOTES
2. 14 Geo 3 c 39 (1774).
3. WSBA Bar No. 42759.
4. WSBA Bylaws §IV.B.1.
Reimagining Legal Representation for Survivors of Sexual Assault

BY RIDDHI MUKHOPADHYAY

A sexual assault is devastating, leaving psychological, financial, emotional, and physical scars, often for a lifetime. Washington recognizes this impact, identifying sexual assault as one of the most heinous crimes, aside from murder. Despite increased awareness through the #MeToo movement, rates of sexual assault have increased in recent years. When survivors do seek help from the legal system, many are unaware that the system can cause further trauma and re-victimization, requiring a painful, private act to be dissected and analyzed in an adversarial and very public process. As legal professionals, we often focus on the single legal issue at hand, forgetting our clients are whole, complex persons with multifaceted needs. Even a zealous, single-issue approach does not address the many other legal needs that are a consequence of the sexual assault, often further complicated by a survivor’s race, gender identity, immigration status, disability, or past traumas. But it is at this moment, when a survivor seeks legal relief, that approaching the case preemptively to address the many collateral legal consequences of the sexual assault can provide for more compassionate and reparative long-term outcomes.

The Sexual Violence Law Center (SVLC) aims to address the multiple legal needs of indigent survivors of sexual violence in Washington through a model of holistic legal services that is centered in trauma-informed practices and race and gender equity principles. SVLC was first established over 10 years ago to provide legal assistance to indigent victims of sexual violence who did not qualify for domestic violence services, where the sexual assault was perpetrated outside of the family law context. The scope of conduct included in the program’s definition of sexual violence includes rape and non-penetrative sexual assault as well as severe sexual harassment, abusive use of technology, interfering with a victim’s rights regarding sexual self-determination, stalking, and commercial sexual exploitation. In developing a model of holistic legal services, SVLC’s goal has always been to ensure that a client will be able to work with one trusted attorney to address many, if not all, of their legal needs, instead of having to work with multiple attorneys, continuously repeat the painful narrative of their sexual assault, and establish trusted relationships for each new case.

THE HOLISTIC CIVIL LEGAL SERVICES MODEL

The holistic civil legal services model emerged from criminal public defense, first developed over 20 years ago in response to the traditional public defense model, with many of the New York-based public defender offices leading the way. The traditional practice emphasized representation and courtroom advocacy by a single lawyer on a single case. The holistic model was based on the idea that to be a truly effective advocate for clients, defenders needed to adopt a broader understanding of the scope of their legal needs beyond the criminal case—not only addressing the immediate case at hand but also the collateral legal consequences of the criminal charges—such as loss of employment, housing, or child custody or impacts on immigration status—along with the underlying non-legal consequences, such as addiction, mental illness, or other traumas. In Washington, some public defense offices have applied a holistic approach, such as the King County Department of Public Defense expanding to include civil collateral consequence attorneys. A more holistic approach not only has allowed for better immediate outcomes in criminal cases, but has also addressed the “revolving door” many indigent defendants experienced as interconnected legal issues continue to compound.

SVLC has adapted the holistic model to civil legal aid. A core component of the model is a commitment to being “client-centered”—educating the client on all their legal options and empowering them to identify and prioritize their legal needs. By focusing on the survivor instead of a specific issue, we adjust our advocacy based on the client’s necessities. Therefore, even if the client has reported to law enforcement or has a civil protection order pending, the SVLC attorney will prioritize the cases the client decides are most urgent (such as housing or immigration), while continuing to assist in other pending issues. Additionally, because
SVLC exclusively serves victims of sexual violence, our client-centered approach includes trauma-informed practices, which means understanding how trauma may manifest while working with a survivor and adjusting our advocacy style to the client’s needs. Through the holistic civil legal services model, a survivor can plan their own path toward justice, accountability, and, hopefully, healing.

THE LEGAL NEEDS OF SURVIVORS
Survivors of sexual assault face unique challenges that stretch beyond the traditional personal injury, criminal, or protection order case. Although some victims need assistance with only one emergency legal issue, SVLC attorneys typically represent a single client in five to seven separate legal cases related to their victimization, at times assisting in as many as a dozen legal matters for a single survivor. The compounded legal needs of sexual assault survivors was confirmed in Washington’s 2015 Civil Legal Needs Study, which documented that the average low-income individual experiences seven to eight legal issues; experiencing domestic or sexual violence often skyrockets the number of legal needs to 18 or 19.6

The needs that SVLC attorneys address include, but are not limited to:

- **Safety**, such as obtaining the appropriate civil protection order;
- **Privacy**, such as protecting the survivor’s information from media or public access;
- **Immigration**, such as seeking asylum or Violence Against Women Act-related relief;
- **Education**, such as assisting K-12 and college students through the Title IX process;
- **Housing**, such as addressing the victim’s safety-related rights as a tenant;
- **Employment**, such as ensuring that an employer appropriately investigates a claim and accommodates a survivor;
- **Financial**, such as appealing crime-victim compensation or public-benefits denials;
- **Victim Rights**, such as ensuring a victim’s rights are protected through criminal proceedings; and
- **Criminal**, such as when the survivor is investigated, arrested, or charged for conduct in response to the assault or trauma, or vacating convictions.

Often, these cases are even further complicated by the opposing party’s position in the community or the biases inherent in the legal system (e.g., blaming the survivor for the sexual assault, minimizing their experience, or treating survivors of color as less credible). Especially with sexual assault cases, survivors often face defamation suits, including gag orders. Anecdotally, attorneys representing victims of sexual and domestic violence observe a higher rate of abusive litigation: filing frivolous motions, requesting multiple hearings, or submitting information meant to humiliate and embarrass, such as past sexual history or nonconsensual explicit images.

A COMMUNITY APPROACH IS NEEDED
Holistic legal services require pivoting away from the traditional concept of single-issue advocacy to a broader and more humane approach that focuses on the client. A core part of holistic assistance is also checking our own egos and recognizing the limitations in our expertise and ability to serve some survivors. Though SVLC has focused on the many legal needs of sexual violence survivors, we cannot always address every identified issue. In these cases, our network of pro bono and community partners permit a truly holistic approach. For example, turning to our colleagues at Legal Voice for their appellate and legislative expertise has allowed for development of case law and policy reform that has been informed and led by the survivors we serve. Similarly, partnerships with pro and low bono family law, personal injury, employment, and criminal defense attorneys have allowed for specialized meaningful advocacy for our clients. Such collaborations across the spectrum of the profession are essential to changing how the legal community identifies and responds to sexual assault.

We have seen firsthand how holistic civil legal services are a powerful response to the realities survivors face every day. This approach can fundamentally alter the way justice is experienced by survivors, by improving the legal system and finally delivering on the promise of survivors being treated with dignity and accessing justice.

SVLC’s holistic approach to addressing the wide range of legal issues sexual assault victims experience has meant that a sexual assault, despite its devastation, no longer becomes a trauma that fundamentally and irrevocably disrupts every aspect of their life and future.

NOTES
1. “Sexual assault is the most heinous crime against another person short of murder,” RCW 7.90.005.

Riddhi Mukhopadhyay is the executive director of Sexual Violence Law Center. She serves by appointment on Washington State’s Gender and Justice Commission and the City of Seattle’s Immigrant & Refugee Commission. She is on the board for the Coalition Ending Gender-Based Violence and is adjunct faculty at the University of Washington School of Law. She received her J.D. from Seattle University School of Law and her B.A. from Duke University. She can be reached at riddhi@svlawcenter.org.
Building the 2021 Budget: Successes and Updates

Happy summer. As the daily temperature heats up, so does the work of the WSBA’s Budget and Audit Committee and Board of Governors regarding next year’s (fiscal year (FY) 2021) budget. At this point in the budget process, I want to update you about various matters in the current year’s budget and how those may impact the FY 2021 outlook.

MAY 2020 WSBA FINANCIALS
May marked the two-thirds point in the FY 2020 budget and the most current financial data available at the time of writing this report, as reflected in the chart below.

The WSBA’s FY 2020 actual net balance increased from $1,143,086 to $1,186,669 from April to May, which is a monthly gain of $43,586. What’s more remarkable is that the WSBA’s original FY 2020 budget anticipated a negative balance of $591,915; to be in the black is quite a feat, let alone by $1,778,584.

Looking ahead, however, we can certainly predict increased costs given operational changes and requirements to respond to COVID-19. What those budget impacts may total, given the uncertain future, is yet to be determined. We may very well rely on our encouraging gains up to this point in the fiscal year to offset some of what is to come, even into FY 2021. WSBA Chief Financial Officer Jorge Perez, the Budget and Audit Committee, and I are actively tracking COVID-19-related impacts while monitoring and preparing the FY 2021 budget.

SIGNIFICANT FY 2020 ACCOMPLISHMENTS TO DATE
The WSBA staff and Budget and Audit Committee members have been working hard during FY 2020 to get as much value and efficiency out of our operations budget as possible. We’ve accomplished tremendous goals so far, including successfully completing the first comprehensive “deep dive” expense audit of the organization in the history of the WSBA. We’ve also completed and successfully passed our traditional annual audit with no significant finds. In the midst of these important independent audits, we have conducted a budget reforecast for the current fiscal year, in which we accounted for many of the cost-saving efficiencies we have put in place, such as reducing three previously budgeted WSBA employee positions.

We also have purchased and implemented innovative, state-of-the-art financial software with forecasting and budgeting tools that has already, and will continue to, greatly help with the productivity of WSBA staff while allowing the Board of Governors to have much more reliable and responsive tools to do future financial forecasting for the organization.

Stay tuned as we continue more exciting accomplishments with the goal of improving the transparency and efficiency of WSBA financial matters on behalf of the membership and the public that the WSBA serves.

LIMITED LICENSE LEGAL TECHNICIAN PROGRAM SUNSET
I was asked by the Washington Supreme Court to attend its annual meeting with the Limited License Legal Technician (LLLT) Board on May 12 to present the historical budget performance of the program. I provided the court with a PowerPoint presentation and written analysis of the LLLT Board’s business plan, which included potential expansion into new practice areas. To summarize what I presented: The program has cost the WSBA just under $183,000 each year since its inception, including direct and indirect costs. The result is a total of approximately $1.4 million to the operations budget to date. If the court had passed the LLLT Board’s proposed business plan, I anticipated the cost would have been more than $2.4 million through at least FY 2029.

With this analysis in hand, the Budget and Audit Committee on May 13 unanimously voted to reject the LLLT Board’s business plan and to refer it to the whole Board of Governors for consideration. Before that could occur, the Washington Supreme Court voted on June 5 to sunset the

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**Summary of WSBA Financials General Fund**

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<th>Actual Revenues (YTD)</th>
<th>Budgeted Revenues (full year)</th>
<th>Actual Indirect Expenses (YTD)</th>
<th>Budgeted Indirect Expenses (full year)</th>
<th>Actual Direct Expenses (YTD)</th>
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<td>$13,533,455</td>
<td>$20,991,783</td>
<td>$1,186,669</td>
</tr>
</tbody>
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Daniel D. Clark

**WSBA Treasurer**

Clark is a senior deputy prosecuting attorney with the Yakima County Prosecuting Attorney’s Office, Corporate Counsel Division. He can be reached at DanClarkBOG@yahoo.com.
HOW TO REACH US

If you have any questions, comments, or concerns, please do not hesitate to contact me (DanClarkBOG@yahoo.com) or Chief Financial Officer Jorge Perez (jorgep@WSBA.org).

LLLT Program for new applicants after the July 2021 exam. The court also decided to reject expansion of the program requested by the LLLT Board. (See page 14 for more information.)

FY 2021 BUDGET
The Budget and Audit Committee will start examining a draft FY 2021 budget on July 10, with a first read at the July Board meeting. The Budget and Audit Committee will aim for final adoption at the Board’s September meeting. All Budget and Audit Committee meetings are open to the public, and every member is encouraged to attend. They are currently being held virtually.

CLIENT PROTECTION FUND 2021 MODIFICATION
The Budget and Audit Committee has unanimously recommended a one-time $15 reduction to the Client Protection Fund fee; that means the current rate of $25 per member would drop to $10 for 2021. The Board of Governors voted at its June meeting to make this recommendation to the Supreme Court for implementation. If you remember, the Board of Governors successfully asked the court to lower the original $30 assessment to $25 starting next year, so if this new reduction is approved by the court, it will be a $20 total savings for all lawyer and LLLT members.

FY 2022 AND 2023 LICENSE FEES
Beginning in June, the Budget and Audit Committee began discussing proposed recommendations to the Board of Governors for the FY 2022 and FY 2023 license fees. Tune in to future meetings of the Budget and Audit Committee and the Board of Governors to take part in the discussion.
Supreme Court Sets End Date for LLLT Program

High costs and low interest prompt court to sunset the program; no new licenses to be issued after July 31, 2022

Citing costs and lower-than-expected participation, a majority of the Washington Supreme Court on June 5 voted to sunset the Limited License Legal Technician (LLLT) program, rejecting requests by the LLLT Board to expand the program’s practice areas and to revise its rules.

In a letter explaining the decision, Chief Justice Debra Stephens noted that the LLLT program “was created in 2012 as an effort to respond to unmet legal needs of Washington residents who could not afford to hire a lawyer,” but went on to say that “after careful consideration of the overall costs of sustaining the program and the small number of interested individuals, a majority of the court determined that the LLLT program is not an effective way to meet these needs, and voted to sunset the program.”

The decision came after a May 12 meeting of members of the LLLT Board, the WSBA treasurer, and the Supreme Court that focused largely on costs associated with keeping the program afloat.

WSBA Treasurer Dan Clark, in written and verbal statements to the court, asserted that historic growth rates predict fewer than half the number of new LLLTs (128) than the LLLT Board’s business plan forecasted. (Since 2015, the WSBA has licensed 45 people, 39 of whom are active. Assumptions outlined in a 2020 LLLT Board business plan forecast that the number of LLLTs could have increased to 338 by 2029.) Clark further contended that the program was in violation of the 2012 court order requiring it to be self-sustaining within a reasonable period. The LLLT program has accrued a $1.4 million deficit since the first LLLT was licensed in 2015; it would have required another $1 million investment before it would begin generating revenue.

The LLLT Board countered that the program is the first of its kind, with no model for the amount of fiscal support and the length of time needed to become self-sustaining. It further contended that much of the cost was indirect staff time and, even so, the full cost amounts to just 1 percent of WSBA General Fund expenditures.

Justice Barbara Madsen dissented from the June 4 majority decision to sunset the LLLT program. In a letter, Madsen denounced “the elimination of an independent legal license” that was conducted “at a single meeting, without question or comment from LLLT license holders, legal practitioners, or the public at large.”

The court has provided assurance to current LLLTs in good standing that they “may continue to provide services” and that those “in the pipeline” to become licensed can still do so. On July 10, the court announced that it had updated some aspects of its decision. Notably, it reduced the substantive law-related work experience requirement for licensing from 3,000 to 1,500 hours, which candidates will have until July 31, 2022, to complete so long as they have met all other requirements by July 31, 2021.

MORE FROM THE COURT > Read the Washington Supreme Court’s letter on racial justice. p. 12

NOTES
2. Other states, including Utah, have adopted similar license types, and a handful of populous states like California and Connecticut, as well as Canadian provinces, are considering the license. Earlier this year the American Bar Association adopted a resolution encouraging states to adopt innovative approaches toward developing more affordable and accessible legal assistance.
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Dear Members of the Judiciary and the Legal Community:

We are compelled by recent events to join other state supreme courts around the nation in addressing our legal community. The devaluation and degradation of black lives is not a recent event. It is a persistent and systemic injustice that predated this nation’s founding. But recent events have brought to the forefront of our collective consciousness a painful fact that is, for too many of our citizens, common knowledge: the injustices faced by black Americans are not relics of the past. We continue to see racialized policing and the overrepresentation of black Americans in every stage of our criminal and juvenile justice systems. Our institutions remain affected by the vestiges of slavery: Jim Crow laws that were never dismantled and racist court decisions that were never disavowed.

The legal community must recognize that we all bear responsibility for this on-going injustice, and that we are capable of taking steps to address it, if only we have the courage and the will. The injustice still plaguing our country has its roots in the individual and collective actions of many, and it cannot be addressed without the individual and collective actions of us all.

As judges, we must recognize the role we have played in devaluing black lives. This very court once held that a cemetery could lawfully deny grieving black parents the right to bury their infant. We cannot undo this wrong—but we can recognize our ability to do better in the future. We can develop a greater awareness of our own conscious and unconscious biases in order to make just decisions in individual cases, and we can administer justice and support court rules in a way that brings greater racial justice to our system as a whole.

As lawyers and members of the bar, we must recognize the harms that are caused when meritorious claims go unaddressed due to systemic inequities or the lack of financial, personal, or systemic support. And we must also recognize that this is not how a justice system must operate. Too often in the legal profession, we feel bound by tradition and the way things have “always” been. We must remember that even the most venerable precedent must be struck down when it is incorrect and harmful. The systemic oppression of black Americans is not merely incorrect and harmful; it is shameful and deadly. Finally, as individuals, we must recognize that systemic racial injustice against black Americans is not an omnipresent specter that will inevitably persist. It is the collective product of each of our individual actions—every action, every day. It is only by carefully reflecting on our actions, taking individual responsibility for them, and constantly striving for better that we can address the shameful legacy we inherit. We call on every member of our legal community to reflect on this moment and ask ourselves how we may work together to eradicate racism.

As we lean in to do this hard and necessary work, may we also remember to support our black colleagues by lifting their voices. Listening to and acknowledging their experiences will enrich and inform our shared cause of dismantling systemic racism.

We go by the title of “Justice” and we reaffirm our deepest level of commitment to achieving justice by ending racism. We urge you to join us in these efforts. This is our moral imperative.

Sincerely,

Debra L. Stephens, Chief Justice
Charles W. Johnson, Justice
Barbara A. Madsen, Justice
Susan Owens, Justice
Steven C. González, Justice
Sheryl Gordon McCloud, Justice
Mary I. Yu, Justice
Raquel Montoya-Lewis, Justice
G. Helen Whitener, Justice
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Money Mysteries

Understanding the crucial difference between deposited funds and collected funds for lawyer trust accounts

BY CHERYL M. HEUETT

In the June issue of Washington State Bar News, attorney and regular columnist Mark J. Fucile wrote an article about scammers posing as clients who target lawyer trust accounts. One of the reasons lawyers get taken by these scams is that they do not wait for the deposits made on behalf of the scammers to be processed and rejected by the bank before disbursing funds to the scammers. In those cases, lawyers have disbursed funds that the bank has made “available” but are not yet in the account.

But what if there is no scam? Even then, disbursing funds based on availability alone puts lawyers at risk. This article takes a look at how making disbursements based on the availability of funds—rather than on funds that have actually been collected by the bank—can affect a lawyer in everyday practice.

WHAT ARE AVAILABLE FUNDS?
When you make a deposit inside a bank, the teller may inform you that a portion of the deposited funds is available immediately. Essentially, the bank is advancing funds to you against the funds that have been deposited but not yet collected by the bank. Sometimes, if you are a good customer, the bank may make the entire amount available to you.

A bank does not make funds available to its clients out of the goodness of its heart. Sometimes banks make deposited funds available immediately because the bank is required to do so. Under Federal Reserve Board Regulation CC, banks must make a portion of each deposit available to the depositor. Typically, a bank will allow $100 of a large deposit to be available the first day, $5,000 one week after the deposit, and the remainder of the deposit two weeks after the deposit. As stated earlier, the bank may not place any restrictions at all on the deposit and may make the entire amount available to you.

When a bank makes funds available to you sooner than required, that decision is partly based on the assumption that the deposit is going to be collected. If something happens to interfere with the bank’s ability to collect a deposit, those funds will no longer be available. Typically, if a deposit has been made that is not collected, the lawyer will be responsible for replacing any funds that have been disbursed against that deposit until the deposit can be made good.

Scenario 1:
You receive settlement funds of $100,000 from an insurance company on behalf of your client. You deposit the instrument into your trust account and ask the teller when the funds will be available. The teller replies that all of those funds are available immediately. Great! You go back to the office and call the client who runs down to pick up a check drawn on your trust account and takes it to his or her bank for deposit. Within a couple of days, the check to the client is paid by your bank. Then you get a call from your bank notifying you that your trust account is overdrawn. How is that possible?

Scenario 2:
A client gives you a check for an advance deposit for fees and costs of $5,000. You deposit the check into your trust account and ask the teller when the funds will be available. The teller replies that all of those funds are available immediately. Great! You go back to the office and call the client who runs down to pick up a check drawn on your trust account and takes it to his or her bank for deposit. Within a couple of days, the check to the client is paid by your bank. Then you get a call from your bank notifying you that your trust account is overdrawn. How is that possible?
WHAT HAPPENED?
In Scenario 1, there are a couple of possible causes for the overdraft. Most likely, the bank decided to put a hold on the deposit after you left and sent you a notice through the mail that you haven’t received yet. In that case, the bank has essentially reversed the availability of the funds. If the bank decides to hold the deposit, the checks written against it may not clear.

It’s also possible that the deposit was not collected by your bank because the issuer of the payment rejected the endorsement. Insurance companies still use drafts, where the endorsement must be approved by the issuer before the bank will release the funds. Before your bank can collect those funds, you will need to obtain the proper endorsements on the draft and re-deposit it. As an auditor, I’ve seen it happen many times that the endorsement on the back of a settlement check or draft is rejected because the lawyer forgot to get the client’s signature.

Regardless of the reason for the overdraft, your trust account balance is now negative, and by a large amount. Whatever other client funds you had in trust are gone. Are checks written on behalf of other clients going to bounce? The WSBA Office of Disciplinary Counsel (ODC) is almost certainly going to open a grievance against you, whether the overdraft is reported by the bank or you. Although the type of overdraft that occurred in Scenario 1 is one that a lawyer can probably correct by obtaining the client’s endorsement and re-depositing the draft, you need to consider what actions you must take in order to prevent additional overdrafts in the meantime.

In Scenario 2, the lawyer has simply disbursed funds from the trust account that were not there. This is another example of the lawyer relying on the available funds as though they were actually collected. The lawyer will have to replace the $3,000 that was disbursed to the expert witness and attempt to get the client to replace the initial deposit.

The first reaction many lawyers have is to be angry. Why did the bank say those funds were available and then change its mind? What lawyers have to understand is that even though a bank makes funds available, if the bank cannot collect the funds, the amount of the deposit will be reversed out of the trust account. If disbursements were made from the funds that were previously available but were uncollectable, those disbursements cause a shortage in the trust account.

A shortage means that there is not enough money in the trust account to cover the total of all client balances that should be held in trust. A shortage can occur even when there is no overdraft. That happens when a lawyer disburse more funds on behalf of a client than the client has on deposit, but the trust-account balance overall is not negative. This type of shortage is usually demonstrated by a negative client balance. Disbursing more funds on behalf of a client that are in the trust account is a violation of RPC 1.15A(h)(8).

Whenever a deposit is not collected and is charged back against a trust account, the lawyer must review the trust account records immediately to determine whether he or she has spent any of the deposited funds. In both scenarios above, the lawyer spent some of the deposit before it had been collected from the bank it was drawn on.

WHAT TO DO ABOUT IT?
Any funds that a lawyer has disbursed against an uncollected deposit must be replaced by the lawyer until the funds he or she deposited can be collected.

Under Scenario 1, if the lawyer has to replace funds approaching $100,000, he or she may have difficulty. In my time as an auditor, I have seen lawyers who have had to take out mortgages on their homes or borrow money from family members in order to replace funds that were disbursed from a deposit the bank made available but could not collect.

In Scenario 2, the lawyer’s shortage is limited to the $3,000 used to pay the expert witness and is probably easier to replace, even though $3,000 is still a significant amount of money. Those funds must be replaced even though there may have been enough funds in the trust account overall to cover that deposit. The funds paid to the expert witness belonged to other clients.

If the $3,000 in the above scenario is promptly replaced, would the lawyer be subject to discipline? It seems clear that there was a violation of RPC 1.15A(h)(7) because the deposit was, in fact, not collected before funds were disbursed against it. The circumstances of each shortage must be evaluated on a case-by-case basis, but generally the restoration of funds would be taken into account in determining what, if any, disciplinary action was appropriate.

HOW DO YOU KNOW WHEN FUNDS ARE COLLECTED AND CAN BE DISBURSED?
It is understandable, of course, that lawyers are eager to disburse funds that have been received. Clients are usually aware that funds are coming in and may be calling. Labor & Industries (L&I) clients may be lined up outside the lawyer’s office on the days that L&I payments are due. Even so, a lawyer must resist the urge to disburse funds from a deposit before the deposit is collected by the lawyer’s bank.

RPC 1.15A(h)(7) says a lawyer “must not disburse funds from a trust account until deposits have cleared the banking process and been collected.” That rule can be difficult to follow. Most banks are unable to tell you when a deposit has been collected. The teller may say the “funds are available” or “it looks like the deposit has cleared,” but they are usually looking at a screen that shows the deposit was made. If a lawyer makes a deposit and then goes back to the office and looks online, the lawyer may also see that the deposit was posted to the account, but that does not mean the funds have been collected and are in the account ready to be disbursed.

I have had countless lawyers tell me—while explaining an overdraft in their trust account—that the bank said it was all right to go ahead and disburse the funds. But you...
should keep in mind that the bank is not familiar with the RPC requirements. Disbursing funds as soon as they are deposited is a gamble. You are betting that the deposit is going to go through the banking process without any problems, and in most cases you would win that bet. However, the consequences of losing can be catastrophic, and disbursing funds too quickly is not worth the risk. If the $100,000 deposit fails to be collected for some reason, do you have enough of your own funds to replace that deposit while you try to fix the problem? In the case of a scam, the problem may be unfixable. What if there were no rule requiring you to wait before disbursing funds? Wouldn’t you want to wait anyway to protect yourself?

What should lawyers do if they are not able to clearly determine when funds have cleared the banking system and been collected? Determining the status of a deposit should be done on a deposit-by-deposit basis. You should consider the types of deposits that come into your office and establish a policy for how long you wait for each particular type of item to clear; then you should consider each deposit. You may feel more comfortable about a deposit that comes from someone you know and is drawn on a local bank. If you have a feeling that something is a “off” about a particular deposit, why not wait a day or two longer than you normally would to disburse against that deposit? In most of the cashier check schemes described by Mark Fucile, if the lawyer had only waited a day or two more, he or she would have discovered the scam before disbursing the funds.

Deposits come in all different forms. There are different types of checks, such as those drawn on someone’s personal or business account. Credit card deposits may take 2-4 days. (Contrary to what some people believe, the money does not appear in the account at the time the card is swiped.) Payments from Labor & Industries are not checks drawn on a bank; they are warrants that are demands on the State Treasury and are payable upon presentment. (You still have to wait for the funds to be collected, which usually occurs the day after being deposited.)

All other manner of payments, such as cashier checks, certified checks, and money orders, must go through the banking system before they can be disbursed. You may want to wait a substantially longer period of time before disbursing funds from these kinds of deposits because of their common use in scams against lawyer trust accounts.

The Oregon State Bar Professional Liability Fund (PLF) website offers some helpful guidelines that Washington lawyers may want to consider when developing their own procedures related to waiting for deposits to clear before disbursing.

For an ordinary transaction with an established client or known third party, wait three banking days for locally written checks, five banking days for checks written within Oregon, but outside your local area, and ten or more banking days for out-of-state checks. Note, that checks for $5,000 and over may be held by banks for seven banking days, whether drawn on a local, in-state, or out-of-state bank, therefore allow sufficient time for these checks.

To avoid the growing problem of check scams, wait at least ten banking days before disbursing funds in the following circumstances: (1) the transaction is with a new client or a client you are unsure about; (2) the check is very large; (especially compared with the extent of legal services provided, if the check is a retainer); (3) the check is from an unknown third party; or (4) any aspect of the transaction raises (or should raise) your suspicions. Remember that drafts or other instruments may take longer than ten days to process. To verify that funds have been collected, ask your bank to contact the issuing bank.

EXERCISE PATIENCE

One of the best pieces of advice I can give is to be patient. We understand that clients want their settlement money or L&I payments. We understand that lawyers need to be paid as well. Lawyers should try to manage client expectations about when they will receive their money before deposits come in. A bank may make deposited funds available or say it’s all right to disburse those funds, but if something happens and the deposit is not collected, most banking agreements between banks and their customers hold the customer liable for any checks returned as a result. No matter what the bank tells you about the availability of funds, as lawyers you are ultimately responsible for funds you deposit and disburse from your trust accounts.

NOTES

1. This applies to other legal professionals, such as LLLTs, who may deposit funds into an IOLTA account.
2. Lawyers are required to self-report overdrafts of their trust accounts under Rule for Enforcement of Lawyer Conduct (ELC) 15.4(d).
3. That is why the Rules of Professional Conduct (RPC) require you to maintain client ledgers and reconcile the total of all ledger balances to the reconciled checkbook register. This process reveals whether or not you have enough funds in the trust account.
4. RPC 15.5A, Comment [11] states that a lawyer may enter into a written agreement with their bank where the bank agrees that any uncollected deposits will not be charged back against the trust account. Instead, the bank agrees to charge the uncollectable deposit against a line of credit or other account belonging to the lawyer. The lawyer is still responsible for replacing any funds that were disbursed against the uncollected deposit.
5. RPC 15.5A(h)(8) prohibits lawyers from disbursing funds on behalf of a client that exceed the amount of funds on deposit for that client, and also prohibits using one client’s funds on behalf of someone else.
7. Waiting an appropriate amount of time for deposits to clear, such as those periods suggested by the Oregon PLF, is not inconsistent with Washington RPC 15.5A(f), which requires a lawyer to promptly pay funds to clients or third persons who are entitled to receive them.

MORE ONLINE

For more information on available funds and other trust-account issues, review the publication “Managing Client Trust Accounts,” which can be found at www.wsba.org/for-legal-professionals/ethics/iolta.
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Jeff Boyd, Esq.

JULY/AUG 2020 | Washington State Bar News 23
When I first met Professor Robin Chapman Stacey, a distinguished medieval historian at the University of Washington, she had just published *Law and the Imagination in Medieval Wales* (University of Pennsylvania Press, 2019), a study of the political and literary aspects of 13th-century Welsh law books.

I remarked that we don’t often hear the words law and imagination mentioned in the same breath. She explained, however, that literature, rituals, myth, and other imaginative endeavors influenced the law at this long-ago time in Wales, with laws reflecting bizarre humor, flights of whimsy, and even bawdy tales.

For Stacey, this era of Welsh law was actually a complex political fiction best read not as an objective record of native custom but as an important and often humorous commentary on the politics of a nation facing challenges from within and without. At the time, the encroaching English threatened native customs and stability, while Welsh lawmakers strived to preserve domestic tradition.

Stacey spent years on this ambitious project, which required painstaking translation from medieval Welsh and Latin, extensive research, and a perceptive sense of humor. Examples of medieval Welsh humor and irreverence pepper the book, which has been honored with two prestigious awards: the Francis Jones Prize in Welsh History (awarded by Jesus College, Oxford) and the Vernam Hull Prize (awarded by the University of Wales Centre for Advanced Welsh and Celtic Studies).

Stacey describes her academic focus as Ireland, Wales, and England from the Iron Age through the 13th century. She is a recipient of the UW Distinguished Teaching Award, has graduate degrees from Yale and Oxford, and understands the medieval Welsh and Irish languages. Her other books include two award-winning volumes: *The Road to Judgment: From Custom to Court in Medieval Ireland and Wales* (1994); and *Dark Speech: The Performance of Law in Early Ireland* (2007). She has served as a leader in organizations on medieval history and Celtic studies.

I conducted an extensive interview with Stacey for the History News Network last year, found at https://historynewsnetwork.org/article/172591. Some excerpts follow:

**Q. How did a historian come to study medieval law?**
**A.** I am intellectually interested in legal issues and always have been. However, the fact that law emerged as my professional focus was the result of an entirely random event: When I went in to consult [Yale linguist] Professor [Warren] Cowgill about a paper topic for Old Irish, he pulled a legal text down off the shelf and told me to work on it. That text, *Berrad Airechta*, a tract on personal suretyship, ended up being the basis for both my Oxford and Yale theses. ... Had he chosen a literary rather than a legal text, my career might have been altogether different.

**Q. What is the historical problem addressed in *Law and Imagination*?**
**A.** The Welsh law books are the most extensive body of prose literature extant from medieval Wales. They are preserved in approximately 40 manuscripts, both in Welsh and in Latin, and were clearly extremely important to the people who wrote and made use of them. One can read them as law is traditionally read, as more or less straightforward (if stylized) accounts of legal practice. Reading them in this way gives us a sense of how Welsh law worked and developed over time. However, these law books were written in the 12th and 13th centuries—the last two centuries of Welsh independence and a time of rapid internal change and heightened external conflict with England. It is my belief that these texts reflect the period in which they were composed in very direct ways, and that reading them in the way we read literature, with close attention to theme and symbolic detail, reveals them to be a sophisticated, opinionated, occasionally even humorous commentary on contemporary political events.

**Q. How do you view law and the role of imagination?**
**A.** The law books of medieval Wales were not legislative in nature, and their authors had extensive family connections with poets, storytellers, and other more overtly literary artists. There is a rich body of political poetry extant from this period, as well as a number of fabulous tales and a considerable corpus of erotic verse. The law book authors are aware of all of these and, I argue, deploy...
many of the same tropes and symbols in their own work. If we abandon the idea that law is always factual and instead approach these law books in the way we might a tale, I think we will see that these texts also are meant to be read on more than one level.

Q. What was Wales like in the 13th century?
A. The unity of Wales in the 12th and 13th centuries was vested primarily in language, culture, law, and a shared mythology. ... Native law was an important factor in defining Welsh identity in the period, but it was already the case that individual Welshmen—and even some Welsh rulers—were beginning to adopt common law ideas and procedures even before the final conquest of Wales by Edward I in 1282-1283.

Q. How does even the ridiculous have meaning in law when read as political literature?
A. My favorite examples are the “burlesques”—ridiculous and even obscene rituals described by the jurists as taking place in the court or localities. For example, one of the things the authors of the law books were concerned about was the degree to which native Welsh rulers were enlarging their jurisdiction by intruding on the traditional prerogatives of the “uchelwyr”: noble or free classes from which the law book authors came.

The manner in which they described the royal officers taking part in this process was intended, I think, to convey their contempt for them. The royal sergeant or tax collector, for example, is depicted in the law books as wearing ridiculously short clothing with boots better suited to a child than to a full-grown man; additionally, he is wrongly dressed for the season, wears his underwear on the outside, and goes about trying to do his dirty business holding a short (and flaccid) spear in front of him in a gesture that certainly looks sexual to me in the manuscript illustration we have of it. Similarly, the judge is said to sleep at night on the pillow the king sits on during the day (imagine the odors here, not to mention the posterior as a source of royal justice); and the porter (who guards the entrances and exits to the court) is imagined as receiving all the bovine rectums from the court as his due. If this isn’t satire, then I don’t know what is!

Q. What was the division of court and country in Welsh law?
A. The court is where the prince and his entourage and servants live, and the country is all the rest. ... Part of the idea here is, I think, to create a sense of spatial politics moving outwards from the royal court to encompass the settled and wild parts of the “gwlad” (kingdom). Opposed to this (at least in one redaction) is the “gorwlad”: the lands outside of gwlad which are portrayed as regions of danger and predation.

Q. How did Welsh law reflect past stories and myth?
A. There are certain myths reflected in the law books, again with political intent. Perhaps the most obvious of them is the harkening back to a (mythical and politically motivated rather than historical) time before the coming of the English when Britain was ruled by a Welsh-speaking king residing in London. But another, I think, is the image of Wales itself created in these law books: as timeless, set in the reign of no particular king and thus of them all, and enduringly native.
BREAKING THROUGH THE WALL

Viewpoint on the 30th anniversary of the Americans with Disabilities Act from a disability rights attorney with a disability

BY REISHA ABOLOFIA

In 2013, as I was entering my third year of law school, I woke up one morning feeling a tingling sensation in my left hand and arm. Days went by and the sensation turned to numbness. When I attempted to type some notes for a class, I couldn’t make my brain move my fingers. After seeking medical treatment it became clear that there wouldn’t be a quick fix for my situation. The diagnosis was indisputable: I have multiple sclerosis.

I am not someone who has lived with a disability my entire life; I was an adult when I first thought about what disability meant to me. Many people have a disability or will experience disability during their lifetime, whether it’s permanent or temporary, through a medical condition, an accident, or the aging process. Whether you were born with a disability or acquired one, whether you have had years to come to a nuanced understanding of the social and legal ramifications of your particular disability, or whether you have not yet become disabled, we all benefit from creating the inclusive society the Americans with Disabilities Act (ADA) intended.

I learned of my disability 23 years after the passage of the ADA, yet despite its long existence, I knew very little about this wide-sweeping civil rights law. The ADA defines disability as “a physical or mental impairment that substantially limits one or more major life activities ...”¹ That definition applies to a lot of people who may not even know they are covered by the law—or if they do know, they may not know how to access its protections.

President George H.W. Bush signed the landmark disability civil rights law on July 26, 1990. Bush described the legislation as taking a “sledgehammer to another wall, one which has for too many generations separated Americans with disabilities from the freedom they could glimpse, but not grasp.”² He proclaimed that Americans would not tolerate discrimination, and that the “shameful wall of exclusion” would finally come tumbling down.³

The problem is that people who need the sledgehammer aren’t always aware of the tool or how to use it to break down walls, and the walls certainly aren’t going to say where they are or how to wield the sledgehammer best.

For people with disabilities, the intent of the ADA is to level the playing field of everyday life in a society that is built and structured without them in mind. It prohibits discrimination against people with disabilities in employment, transportation, and while accessing places that are open to the general public. People who use wheelchairs can roll on and off sidewalks thanks to curb cuts. Auditory crosswalks indicate to people who are blind or low vision when
it is safe to cross the street. People can bring their service animals inside businesses and government buildings. Students are provided with accommodations in all levels of education, including quiet rooms for exams, assistive technology, and materials in alternative formats.

However, the sledgehammer of the ADA does not swing itself. In order to finish law school, I needed to find new and creative ways to navigate school and my community. The ADA backed my accommodation request for a classroom note-taker because I couldn’t type notes for myself. But I still needed to face my new reality of life with multiple sclerosis, manage the harsh side effects of treatment, meet the 80 percent in-person attendance requirements to graduate, and learn different ways of studying and test-taking—all at the same time.

Moreover, I feared the “wall of exclusion”—that employers wouldn’t welcome my ADA “sledgehammer” after I graduated and passed the bar. On paper, the ADA would protect me from discrimination from employers, but in reality, I worried about the possibility of a law firm’s hiring manager learning about my multiple sclerosis and making false assumptions about the strength of my legal skills or work ethic. The ADA only prohibits the most crude, obvious forms of discrimination and the onus is on the person with a disability to file a complaint and prove the intent of the hiring manager. Like any civil rights legislation, the ADA simply cannot change how people think or relate to one another.

The ADA was revolutionary, but it did not dismantle oppressive systems, explicit and implicit negative bias, or widespread disability stigma. The law is difficult to enforce, and inclusivity is still the exception, not the norm. Preventing people in wheelchairs from eating at a restaurant because of the wall of exclusion still exists, and people with disabilities are still denied the opportunity to create the network of social supports they need to be safe.

I share my story because we often don’t pay enough attention to even landmark civil rights cases; we often think of disabilities as “things” that “others” have or experience. My abrupt introduction to multiple sclerosis was what led me to learn more about the disability rights movement and disability culture. I cannot celebrate the ADA without recognizing the privileges I have—a strong network of support, access to excellent medical care and treatment, and the status that comes with being an attorney. I safely live and work in a community with opportunities, and I have a platform to be heard. On the 30th anniversary, let’s recall the promises the ADA made, and challenge the assumptions and biases that pervade our communities every day.

Reisha Abolofia is an attorney and the director of Disability Rights Washington’s Rights Investigation and Accountability Program, a team created to ensure that people with disabilities retain their right to make personal and financial decisions. She can be reached at reishaa@dr-wa.org.

When it comes to equality, equity, and inclusion for people with disabilities, there is so much more to be done. The wall of exclusion still exists, and people with disabilities have to actively use the ADA at each turn to remove one barrier after another. That’s why I have dedicated my legal career to disability rights law. I work at Disability Rights Washington, the protection and advocacy agency for the state. We exist because society and its service systems are not always equitable, and people need help to actively enforce their rights on a daily basis. The program I run at Disability Rights Washington protects people in their day-to-day lives from being exploited or mistreated by other people who manage their money or otherwise provide support. The irony is that when you have a disability, not only do you have to fight against a system designed to exclude you, but very often the people paid to “help” you are exploitive or abusive, or otherwise mistreat you. Due to social and economic exclusion from many aspects of the dominant culture, people with disabilities are still denied the opportunity to create the network of social supports they need to be safe.

In response to cases of abuse, neglect, and financial exploitation, legislation was signed into law in April 2018 to increase oversight and protection. The bill, called the Strengthening Protections for Social Security Beneficiaries Act, specifically authorizes the nation’s Protection and Advocacy system to monitor and investigate how representative payees are administering Social Security funds. For more information, visit www.ndr.org/issues/representative-payees/.

NOTES
1. See 42 U.S.C. § 12102(1)(A). Under this section, there are two other possibilities that meet the definition of disability: “(B) a record of such an impairment; or (C) being regarded as having such an impairment.” 42 U.S.C. § 12102(1)(B)-(C).
3. Id.
9. To learn more about Disability Rights Washington’s advocacy to advance the dignity, equality, and self-determination of people with disabilities, and the agency’s work for justice on issues related to human and legal rights, visit www.disabilityrightswa.org.
10. In response to cases of abuse, neglect, and financial exploitation, legislation was signed into law in April 2018 to increase oversight and protection. The bill, called the Strengthening Protections for Social Security Beneficiaries Act, specifically authorizes the nation’s Protection and Advocacy system to monitor and investigate how representative payees are administering Social Security funds. For more information, visit www.ndr.org/issues/representative-payees/.
The COVID-19 pandemic has forever transformed the world in innumerable ways, and the health crisis has hit Washington in punishing fashion. As this issue went to press, over 42,000 Washingtonians have tested positive for the virus and over 1,400 have died. In January, the Washington State Department of Health and the Centers for Disease Control and Prevention announced one of the first documented cases of COVID-19 in the United States. Fast forward to March 23, when Gov. Jay Inslee announced a statewide stay-at-home order. As a result of this sweeping altered state—this “new normal”—lawyers have been forced to adjust their approach to providing professional services to their clients. A visit to the WSBA website for COVID-19 information (www.wsba.org/covid-19) displays the myriad ways practicing law is now different—and may remain so for the foreseeable future.

Remote legal services and incorporating technology into a practice management plan are nothing new; however, the issue of securing the remote work environment is more important now than it has ever been. As lawyers previously unaccustomed to remote work are being integrated into this new reality, the need for a safe remote work environment is imperative; lawyers simply must adjust and learn ways to reduce their cyber risks.

Lawyers are an attractive target to malicious cyber actors because of the reams and reams of sensitive documents they generate every day. Confidential memos between lawyers and their clients, sensitive financial documents such as profit-and-loss sheets, and employee compensation figures are all components of a law firm that could be damaging if exposed.

What follows is a primer on critical security recommendations lawyers can follow to reduce cyber risk and protect their clients. These recommendations take into account a lawyer’s obligations under Washington’s Rules of Professional Conduct (RPC), particularly the obligation of confidentiality (RPC 1.6) and the obligation to maintain competence by keeping abreast of the benefits and risks associated with relevant technology (RPC 1.1, Comment [8]).

**Email Protections**

The most pervasive cyber threat continues to be phishing: the act of a malicious cyber actor sending an email that may contain a harmful website link or document to an unsuspecting user.1 If the user clicks on the link or opens the document, malware could be launched onto the user’s computer, or the user could be tricked into providing a username and password, allowing the sender unfettered access to the user’s computer. Phishing has remained effective because no matter how many layers of security are in place, and no matter how many pricey network appliances are installed, lawyers must still interact through email with humans, and humans are still the weakest link. Those behind phishing can be nation-state actors trying to delve into the deepest bowels of the United States government or novice scammers attempting to commit a variety of frauds.

One of the largest schemes out there is called the “Business Email Compromise” (BEC), whereby a malicious cyber actor phishing a user’s email account and subsequently attempts to defraud the user or the user’s company by requesting phony wire transfers, stealing sensitive tax data, or generally wreaking havoc (e.g., by threatening to delete a user’s email content unless paid a ransom). In 2019, the FBI reported that BEC attacks led to over $26 billion in losses in the prior three-year period.2

To protect email communications with clients, and to avoid the pitfalls of being phished, lawyers should use an email service that has multifactor authentication, which works by requiring not only a username and password, but also a text message code sent to a user’s phone or a key fob with rotating codes. A key fob, which could be affixed to a keychain or an access control card (or even a downloadable mobile application), creates the “code” the user would need to enter as a part of the “second factor.” Many of these codes change every 30 to 60 seconds.3 An email system with multifactor authentication mitigates unauthorized access to emails and also limits exposure if unauthorized access occurs.

**Cloud Service Providers**

Another threat lawyers must protect against is ransomware. Whether through a phishing attack, “dirty” web browsing, or remote access scanning, ransomware can encrypt thousands of files, computers, and servers within minutes, rendering access to the files nearly impossible and the contents—including backups connected to the network—unreadable. The attack is followed by a ransom note requesting payment, sometimes as high as six figures, in exchange for unlocking the encrypted files.

And the threat doesn’t necessarily have to come from an external source. In 2017, for example, DLA Piper fell victim to a devastating ransomware attack after a firm information security administrator launched “NotPetya” ransomware on the firm network by mistake.4 It took only three minutes for the ransomware to spread, putting “the future of the entire business” in jeopardy, according to DLA Piper’s chief information officer at the time.

A common best practice for mitigating...
this threat is backing up data following what is called the “3/2/1” rule: three copies of the data in two different locations or two types of media (disk versus tape), with one location physically or logically separate from the other location. Cloud services like Amazon Web Services, Google Cloud, and Microsoft Azure offer both a secure way to back up data and remote-access capabilities that are especially necessary these days. A lawyer can be anywhere in the state and, with access to a working internet connection, can work on “live” documents in the cloud with little to no risk—even from a mobile device. Moreover, the cloud counts as a second location, so if for some reason a document is lost on a local computer, automatic sync features would allow a copy to be pulled from that cloud server.

These services offer other controls such as audit logging and multifactor authentication that can be run on encrypted servers to preserve client confidentiality. Many of these services also offer email and web-hosting services, so a lawyer can practically run an entire firm from the cloud. In terms of storage capacity, these services offer terabytes worth of service at reasonable rates. Other law-specific solutions (e.g., Clio or NetDocuments) are also cloud-based and mimic some of the features mentioned above.

**VIDEOCONFERENCING TECHNOLOGY**

Before stay-at-home orders were even in full effect, technology was already taking a public flogging. Professional services aside, school districts across the country experienced hicups such as network outages, inaccessible services, and overwhelmed software applications. The video technology space was hit even harder and “zoombombing” became a household term.⁵

Despite the early issues and pitfalls, lawyers should still be able to safely take full advantage of available technology to “see” their clients and interact with the legal community to further the profession. Taking some simple, commonsense steps will allow lawyers to maintain confidentiality with their clients, reduce the likelihood of unwanted or unauthorized access, and make communication run as smoothly as possible to ensure that information is not lost in translation, as it often can be when parties are not “face to face.”

First, all major videoconferencing technologies—such as BlueJeans, Google Hangouts, Microsoft Teams, or Zoom—contain the capability to password protect meetings and to allow organizers the ability to invite only select individuals. They also possess the ability to utilize multifactor authentication. If the technology a lawyer wants to use does not contain these elements, it is best to shop elsewhere—there are plenty of options.

Second, all these options allow the meetings to be recorded. Since Washington’s wiretapping legislation requires two-party consent to record any conversation, it is critical to remember that if any part of the meeting is being recorded, all parties to the meeting must consent to the recording. Video recordings are arguably “written” notes of a meeting, so the concepts of attorney-client privilege and work product still apply.

**MOBILE DEVICES**

Remaining secure while working remotely requires legal professionals not to become complacent and assume there is less risk when using a mobile device. The cloud solutions mentioned above are all compatible on mobile devices, but the rise of mobile malware requires that professionals pay attention to what apps they are using. Mobile malware can connect to remote servers and steal a user’s browser data or passwords, or even send malicious text messages from the victim’s phone to others. The data suggest iOS-based phones, on average, have less risky apps than Android phones, mostly because the vetting process to put an app on an iOS device is more stringent; however, if lawyers are communicating via email or text message with clients, the threat of phishing or “smishing”⁶ still exists.⁷

**RESOURCES**

There are plenty of excellent and authoritative resources available online. In July 2016, the National Institute of Standards and Technology (NIST) published the Guide to Enterprise Telework, Remote Access, and Bring Your Own Device (BYOD) Security.⁸ While many of the NIST publications are geared toward government security levels (think Department of Defense), they offer a reasonable guide any practitioner can use as a baseline.

Not surprisingly, the best resources a lawyer can access for ideas are data security or data privacy lawyers, or IT professionals, at their own firms. Consulting firms are also an excellent resource, as technology solutions, and in particular “software as a service” options, allow small-firm or solo practitioners to utilize the expertise of these professionals without expending excessive financial resources. The Small Business Administration and the Federal Communications Commission have online resources geared toward cybersecurity best practices for small businesses.⁹ The American Bar Association also has a Cybersecurity Legal Task Force that offers a variety of resources, including The ABA Cybersecurity Handbook: A Resource for Attorneys, Law Firms, and Business Professionals.¹⁰

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**NOTES**

1. See https://enterprise.verizon.com/resources/reports/dbir/ for more details.
3. See www.yubico.com for an example of a “key fob” device commonly used by service providers such as Google to enforce multifactor authentication.
6. “Smishing” is the term used for phishing via SMS or text message.
10. Available at www.americanbar.org/products/inv/book/309654847/
Gov. Jay Inslee signed (with a partial veto) SB 6280 on March 31, 2020, establishing new statutory regulations on the use of facial recognition technology by state and local government agencies. The new law, which takes effect on July 1, 2021, imposes an array of requirements designed to ensure that the technology is used in an open, accountable manner that protects civil liberties while permitting legitimate governmental uses. (The veto only applied to an unfunded legislative task force and does not affect the substance of the bill.)

ACCOUNTABILITY REPORTS

Once the new law takes effect, no state or local agency will be permitted to “develop, procure, or use” facial recognition technology without first preparing a detailed “accountability report” that provides at least the following:

• The name of the vendor providing the service, along with a description of its general capabilities and limitations.
• The types and sources of data the service uses.
• A description of the service’s purpose and proposed use.
• A “clear use and data-management policy” addressing how the service will be used, how to avoid inadvertent data collection, data integrity, data security, and training systems.
• Information on the service’s “rate of false matches, potential impacts on protected subpopulations” and how the agency will deal with significant error rates (1 percent or greater).
• A description of the impact of the service on civil rights and civil liberties, including impacts on privacy, steps to prevent unauthorized use, and potentially disparate impacts on marginalized communities.

The accountability report must be subject to public review and comment, including at least three community meetings, before being finalized; the final report must be communicated to the public and included on the agency’s website, and it must be updated every two years.

However, an “accountability report” is not required for facial recognition services that are “under contract as of the effective date of this section,” although it does apply to contract renewals or extensions. This language could lead to a spate of state and local agencies entering into new contracts with facial recognition services prior to the law’s effective date—more than a year away—which would seem to effectively exempt those contracts from the “accountability report” requirements until some future point when they are renewed or extended. This was likely one of the factors that led civil liberties groups to urge the Legislature to impose a ban—at least temporarily—on the deployment of facial recognition services.

MEANINGFUL HUMAN REVIEW

The law requires agencies using facial recognition technology “to make decisions that produce legal ... or similarly significant effects” to provide “meaningful human review,” which means “review or oversight” by appropriately trained individuals “who have the authority to alter the decision under review.” So, “review” of decisions driven by facial recognition cannot be delegated to low-level employees.

The “meaningful human review” requirement applies to decisions affecting “provision or denial of financial and lending services, housing, insurance, education enrollment, criminal justice, employment opportunities, health-care services, or access to basic necessities ... or that impact civil rights of individuals.”

TESTING AND VALIDATION

An agency’s facial recognition service must have an application programming interface (API) or similar capability to allow independent third parties to test the service to ensure it does not produce inaccurate or unfair results for “distinct subpopulations,” defined as groups having “visually detectable characteristics” such as age, skin tone, gender, race, or disability status.

NOTE: This article was originally published on Davis Wright Tremaine’s Technology + Privacy & Security blog on April 9, 2020. Visit the blog here: www.dwt.com/blogs/privacy--security-law-blog.
If the tests show problems in this regard, within 90 days, the vendor must “develop and implement a plan to mitigate” them. At the same time, the vendor must be given the “methodology and data used” in the independent testing so that it can reproduce the results and fix the problems.

**TRAINING**

Any agency deploying a facial recognition system has to ensure that anyone who operates the system is adequately trained, including coverage of the capabilities and limitations of the system, how to interpret and act on the system’s output, and how the “meaningful human review” requirement will be met.

**CRIMINAL JUSTICE ISSUES**

If a criminal case relies on facial recognition, the prosecution must disclose that “in a timely manner prior to trial.” Also, an agency may not use “the results of a facial recognition service as the sole basis to establish probable cause in a criminal investigation,” although they may be used in combination “with other information and evidence lawfully obtained.” Moreover, agencies may not use facial recognition to identify someone based on a sketch or “other manually produced image.”

An agency must obtain a warrant before using facial recognition for ongoing surveillance (tracking someone’s movements, either in real time or based on stored data); for “identification” (matching someone with a known individual); and before initiating “persistent tracking” (tracking someone’s movements for more than 48 hours, or linking someone being tracked to other information, making them identifiable).

Both state judges who issue warrants and agencies that apply for them must provide reports, including the number of those applications and denials.

Warrants are not required in “exigent circumstances,” which is undefined but would cover commonly imagined extreme scenarios, such as kidnapping. A court order is required to use facial recognition to locate or identify missing persons or to identify deceased persons.

**CIVIL LIBERTIES PROTECTIONS**

Agencies may not use facial recognition “based on” a range of factors, including someone’s religious, political, or social views or activities; participating in noncriminal organizations or lawful events; or race, ethnicity, immigration status, gender identity, or sexual orientation. The law states that it does not “condone profiling, including … predictive law enforcement tools.”

It is not clear what “based on” means in this context, what this will mean in practice, or what particular practices are not “condoned” as “profiling” or “predictive law enforcement tools.” An agency also “may not use a facial recognition service to create a record describing” someone’s exercise of their First Amendment rights. Only time (and, likely, litigation) will clarify what these provisions mean in practice.

**EXCLUSIONS**

The law does not apply to:

- Using facial recognition pursuant to a federal regulation or order, or in partnership with a federal agency to fulfill a congressional mandate; or
- Using facial recognition to verify the identities of people at airports or seaports.

However, when an agency uses a facial recognition service for those purposes, it must still report that use to the relevant “legislative authority.”

**OBSERVATIONS ON THE NEW LAW**

The new law compromises between those opposing new restrictions on governmental use of facial recognition and opposing any use of the technology at all. It will be interesting to see how agencies respond to the forthcoming July 1, 2021, effective date, and whether there is a rush to get facial recognition services up and running before then.

Interestingly, Washington already bans commercial entities from identifying people using “biometric identifiers” without notice and consent through Revised Code of Washington 19.375.010–900. That law is written broadly enough to cover facial recognition by private entities (with some exceptions, including “a security or law enforcement purpose”), although there are no reported cases holding that it specifically covers facial recognition technology.

Washington thus appears to be the first state to address the use of facial recognition technology by both the public and private sectors. It remains to be seen what effect taking this leading role may have, either on how Washington’s citizens are affected by facial recognition technology or on what other states may decide to do in this area.

Firms offering facial recognition technology should carefully review the new law as part of developing and improving their services, with a focus on at least three areas:

- First, vendors should consider how to provide the API the law requires to facilitate independent nondiscrimination (and other) testing. (Of course, vendors should also do their best to develop products that perform in a nondiscriminatory manner, irrespective of the new law.)
- Second—while the law does not specify that training for state and local agency users of a facial recognition service would be provided by the vendor—vendors are the logical place for agencies to look, so they should develop training programs to permit the agencies to meet their training obligations.
- Third, and relatedly, the law requires agencies to “ensure best quality results by following all guidance provided by” the technology’s “developer.” This gives vendors an opportunity to craft and provide such “guidance” to state and local agencies.
The following Academy Members are recognized in 2020 for Excellence in the field of Alternative Dispute Resolution

Colleen Barrett Seattle
Thomas J. Brewer Seattle
Hon. Charles Burdell Jr. (Ret.) Seattle
Stew Cogan Seattle
Clifford Freed Seattle
Dr. Patricia Galloway Cle Elum
Frank Hoover Spokane
Hon. Paris Kallas (Ret.) Seattle
Keith M. Kubik Seattle
Nancy Maisano Seattle
Nina Meierding Seattle
James A. Smith, Jr. Seattle
Teresa A. Wakeen Seattle

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A study carried out by psychologists at San Francisco State University and published in 2014 shows a correlation between having a creative outlet, performing well at work, and recovering from “a demanding work environment.”

That last bit sound familiar, legal professionals?

For this issue, Bar News tracked down six WSBA members who are also active creatives—two musicians, a poet, a photographer, a podcaster, and an actor/director—to find out how they make time for their art, what inspires them, and more.

NOTES
2. The legal professionals featured here were chosen with help from the WSBA Editorial Advisory Committee, Washington Lawyers for the Arts, and other WSBA members.
Tell us about your day job. I’m the founder and CEO of Boggs Media LLC, a corporate structure supporting a range of creative endeavors including Paula Boggs Band, public speaking, the memoir I’m currently writing, support for Puget Sound’s public radio ecosystem, and Seattle Symphony.

Could you talk a bit about your music career and what it entails? Though I started playing guitar and writing music at age 10, by 30 I’d abandoned both while climbing a professional ladder, culminating in becoming Starbucks general counsel for a decade. I returned to music while at Starbucks, grateful it was a corporation that supported my journey.

When and why did you get into music? My parents started me on piano at age 8—not a good fit. Attending Catholic school and church when folk music emerged there, I fell in love with guitar—a primary folk music instrument.

Did you ever consider pursuing music as a full-time career? Why did you decide to go to law school? Well it’s a full-time career now! I considered music school or conservatory while a high school junior figuring out [my] next steps. I convinced myself, though, it needed to be music school or a school strong in athletics (I was a 400m runner in high school) or a school strong in academics. It never occurred to me I could do all three or even two of the three. I ended up at Johns Hopkins University, door number three. Law school was a senior year decision. I wasn’t ready for active duty—I was a four-year Army ROTC scholarship cadet—so law school bought me a three-year delay (smile).

What is the best part about being a musician? The songwriting process, the sense of team with my fellow band members, the fans.

How do you hope your music might develop or change over the next five years? Are there any goals or milestones you hope to hit? Yes. We have three studio albums and I’d love for us to release a fourth in the next 18 months. Currently, we have three sponsors: Deering Banjos, Breedlove Guitars, and Radial Engineering Ltd. I’d love for us to pick up a few more. Finally, this past year our music was placed in two documentaries and one indie film. It’d be cool to get more licensing opportunities, particularly a TV placement.

Do you feel like your legal background or education makes you a different kind of musician than others working in your genre? If so, in what ways? Yes. I’m more organized and metrics-oriented than some musicians I meet.

Where do you find the inspiration to create? Any of a number of places: riding a bus, reading a newspaper, attending a concert, current events, taking a walk—life in all its messiness and beauty.

Where can readers find some of your work? Please check out the band’s website at www.paulaboggsband.net. We do several shows across Washington state each year and (will) reprise a show benefiting the Legal Foundation of Washington on Nov. 12 at St. Mark’s Cathedral. More details to come soon.
Tell us about your day job. When I’m not writing poems or participating in community organizing, I work at a nonprofit supporting people returning from prison to succeed in careers in tech. We offer wrap-around re-entry services, technical education guided by industry professionals, and internship placement at prominent Seattle tech companies.

Could you talk a bit about your artistic career and what it entails? Growing up in spoken-word poetry, I had the opportunity to participate in competitive poetry and travel for national competitions. Most recently, I’ve been focusing on creating a chapbook-length manuscript of poetry. I also share my work and conduct writing workshops for interested audiences around Seattle and beyond. This past spring I had my first livestream performance for a university—it was really wonderful connecting with students even while social distancing.

When and why did you get into poetry? In my 10th grade English class at Garfield High School, I found my heart of hearts when I was introduced to poetry and Youth Speaks Seattle, a youth spoken-word poetry organization. I began attending writing circles at Seattle’s Downtown Public Library, open mics at Cafe Allegro in the University District, and poetry slams around Seattle. I dove into as much poetry as possible. Unexpectedly, that school year became a tough period for the city. In the span of several months, a classmate of mine was shot and killed on campus while a total of five young people were gunned down in Seattle. Poetry helped me navigate all of what was difficult to understand. I later learned that poetry has the power to change people’s hearts and minds. I now write poetry in hopes to shift culture and create lasting social change.

Do you feel like your artistic endeavors influence your work (day job), or vice versa? If so, how? Yes! Both my art and day job inspire me to continue on with the other. As we provide direct service to those in immediate need, I think it’s important we expand people’s understanding of what’s possible and imagine a world beyond the one we’re living in. In this way, I see both as critical to truly serving the people.

Do you feel like your legal background or education makes you a different kind of poet than others working in your genre? If so, in what ways? Through my legal background and education, I’ve had unique opportunities to build relationships with those most impacted by our system and learn about the realities they face. I coordinated and facilitated legal workshops with young people at the King County Juvenile Detention Center, participated in my university’s Youth Advocacy clinic representing several justice-involved young people, and interned at Creative Justice, an arts-based alternative to incarceration for young people in King County. Since then, I’ve begun working with incarcerated and formerly incarcerated individuals in the adult system. Learning from and working alongside justice-involved populations has helped me form the analysis I use while writing poetry and moves me to write for those who are most exploited under our system.

Where do you find the inspiration to create? My two inspirations for writing poetry are the brilliance of language and social movements here and around the world. Poetry that invents new colors and finds beauty in the most unremarkable moments, like while putting on your grandfather’s favorite windbreaker, makes me fall in love with words over and over again. A few poets I’ve been reading recently that have been filling my heart are Ocean Vuong, Reginald Dwayne Betts, and Natalie Diaz. In addition, revolutionary movements fighting for a new world move me to create art as a way to participate in the liberation of all people.

Where can readers find some of your work? I update my Instagram and Twitter whenever I have a new publication or release. Feel free to stay connected @troyosaki!
Tell us about your day job. I am a public defender with the King County Department of Public Defense. Currently, I represent individuals charged with felony offenses. I have been with the Department of Public Defense my entire career; I absolutely love it and cannot imagine doing any other kind of legal work.

Could you talk a bit about your artistic career and what it entails? I am a photographer. I am particularly interested in portrait and landscape work, and have often worked on projects within the queer community. I make all my work personally—I rarely work commercially, as it comes with so many deadlines that often conflict with my legal work. For me, it's a real luxury to focus my photographic work only on personal, creative work.

When and why did you get into photography? I have loved photography my entire life—starting from having a Polaroid camera when I was a little kid. I continued to take photographs for fun during college and, shortly after, became involved in the queer club scene in Seattle as a DJ. I soon moved to taking photography in clubs and also doing some portraiture projects focused on queer folks. Throughout this time, I was also spending a lot of time photographing [how] my personal life related to my own identity and relationships, and that theme has continued to the present.

I hope I bring the same care to my photographic subjects as I do with my clients at work.

Did you ever consider pursuing your art as a full-time career? Why did you decide to go to law school? I decided to go to law school to pursue social justice work through the legal field. My creative work, and involvement in activism and community, has always been related to that interest. Around the time I started law school I became more interested in photography seriously—and gained more attention for my work then, too—but I was already on the path to becoming a lawyer and was still very interested in continuing to pursue legal work.

What is the best part about being a photographer? For me, it is twofold. Portraiture work allows me to make deeply personal connections with people and share vulnerable moments that we don’t always allow ourselves to access. I have met more people taking photographs than I could ever have imagined! My method of portraiture work is slow—unlike a snapshot, it requires time and focused attention between myself and the subject. That creates a connection between us that continues after just the moment. Landscape work shares similar themes, although instead of sharing that with another person I share that time and intention with the world around me. The world can be so fast paced, but this allows me to slow down and explore the moment that I’m in, in order to capture it.

Do you feel like your artistic endeavors influence your work (day job), or vice versa? If so, how? Yes and no. In many ways, of course they do because I am one person; I hope I bring the same care to my photographic subjects as I do with my clients at work. In other ways, I have always created a clear line between my legal work and photography.

How do you make time to do art and your day job? It’s difficult! I used to be very hard on myself about this, but I’ve come to realize that the creative process waxes and wanes. I’ll have times where my legal work is very busy and I must devote myself fully to that. But there's always then a time to find more space for creative work.

Where can readers find some of your work? My Instagram is the most up to date with my personal work: www.instagram.com/adrienleavitt.

Leavitt has worked as a public defender since he graduated from law school in 2011. Leavitt is active in the queer and trans community. He organizes a free monthly legal clinic for transgender individuals, in partnership with Ingersoll Gender Center and the QLaw Foundation.
Tell us about your day job. I am one of eight Kitsap County Superior Court judges, currently criminal presiding and the juvenile treatment court judge.

Could you talk a bit about your artistic career and what it entails? Since being appointed to the bench in February 2016 by Gov. Inslee, I spend most of my [free] time now as a theater director, as opposed to an actor. I probably direct two to three shows a year at different theaters throughout Kitsap.

When and why did you get into theater? My mother took me to see Oliver! at a local community theater in Miami in 1972. After the show, she asked if I’d like to try acting. I auditioned for the very next play, The Music Man, in 1973 and got the child lead at age 12.

Did you ever consider pursuing acting or directing as a full-time career? Why did you decide to go to law school? My father was a lawyer in private practice and I occasionally assisted him in his office. He encouraged me to follow whatever path I wanted. Though I acted through college (and law school), I knew acting wasn’t a “sure bet.” I think I made the right choice, as I’d rather not look at a lifelong passion as a “job.”

What is the best part about being an actor/director? I suppose it’s like the process of conception and birth: You get handed this idea and have to bring it to life. It’s scary trying to bring all of the pieces together, but it’s beautiful once you cross that finish line.

How do you hope your art might develop or change over the next five years? Are there any goals or milestones you hope to hit? I’m actually working on writing a play and I’d love to see that become a finalized project through performance. My acting bucket list is about empty!

Do you feel like your artistic endeavors influence your work (day job), or vice versa? If so, how? Yes, I do. As a director, I have the vision, but I have to be flexible in my approach. As a judge, I can read written argument before holding the hearing and have a pretty good understanding of the arguments, but have to remain open-minded before making any decision.

Do you feel like your legal background or education makes you a different kind of actor/director than others working in your genre? If so, in what ways? Yes. I find that I’m very meticulous and have my hands in every facet of the plays I direct, from set design to costuming. I think it takes a certain type of personality to be able to keep all of that sorted and straight.

How do you make time to do art and your day job? Serving the citizens of Kitsap County and being there for my family are my top priorities. Somehow, I squeeze in theater and nonprofit board work. Frankly, I hate idle time and get bored easily, so I keep myself busy.

Where do you find the inspiration to create? Everyday life. I encourage my actors to feel their roles, to approach the characters as living people, not caricatures.

Bassett has been a Kitsap County Superior Court Judge since 2016, after over 30 years of practice, primarily in personal injury, criminal defense, and dependency law. He is on the board of the ARC of the Peninsulas and has been involved in community theater for over 45 years as a director, set designer, and actor. He is an adoptive father of three tween/teen boys.

Where do you find some of your work? Due to the COVID-19 pandemic, my next acting appearance as Alfred Doolittle in My Fair Lady at GracePoint Church in Bremerton is pushed back to a date not yet announced. I next direct The 40s Radio Music Hour at the Central Stage Theatre in Silverdale in December (www.cstock.org), and then The Cemetery Club at the Bremerton Community Theatre in Bremerton June 2021 (www.bctshows.com).
Tell us about your day job. I have worked for a great firm, Mix Sanders Thompson (MST), PLLC, since passing the bar in 2014. I took on a full-time associate position with them until I moved to part-time in 2017 to focus more on music. MST has been with me every step of the way. I love my day job.

Could you talk a bit about your music career and what it entails? My primary work in music is through Smokey Brights, which I front with my husband, Ryan Devlin. We also record custom music and take on tons of other projects, like DJing and teaching. We even recorded some children’s music this year for an education nonprofit.

When and why did you get into music? I have always had music in my life; it has always been a love of mine. I grew up playing piano and singing in choirs and ensembles. It wasn’t until my early 20s, with newfound confidence from a supportive and musical partner, when I started to think of it as a possible career.

Did you ever consider pursuing music as a full-time career? Why did you decide to go to law school? I was first inspired to go to law school after the 2000 presidential election and the debacle in Florida. I was a freshman in high school at the time and it was the first time the law—in any form really—had intrigued me. Like, how was that legal? Or if not legal, how was it stretched and interpreted to be so?

What is the best part about being a musician? Performing is absolutely the best part of being a musician. I love writing music, I love recording music, but performing it for a packed room full of people—who took a night out of their lives to be there, get sweaty, and rock out with you—is a totally next-level experience.

How do you hope your music might develop or change over the next five years? Are there any goals or milestones you hope to hit? For the industry, I would love to see a restructuring of agreements to benefit artists more. Music has always been a pretty inequitable industry for artists, but the proliferation of streaming and the “exposure” era has made it even more so. For myself, I would love to tour Japan, sync a TV-show opening credit, and win a Grammy. That’s not too much to ask, right?

Do you feel like your artistic endeavors influence your work (day job), or vice versa? If so, how? My work and my artistic life definitely influence each other. They have both taught me the importance of being patient with myself as I learn new skills and try new things. They have also taught me the importance of empathy—a good songwriter needs to understand their listener just as a good attorney needs to understand their client and the opposing party to truly understand a case.

Do you feel like your legal background or education makes you a different kind of musician than others working in your genre? If so, in what ways? My legal background has provided me with critical thinking and reading skills that have proven invaluable in my music career. When navigating a creative field and the uncertainties and vulnerabilities that come along with that, it definitely helps to know how to read a contract.

Where do you find the inspiration to create? I fully subscribe to the idea that no one is a genius, but that we can be visited by genius if we open ourselves to it. Sitting down at your instrument is the hardest part. Once you’re there, it’s all about putting up the antenna and picking up anything that might be floating through the ether.

CHECK IT OUT

Where can readers find some of your work? Smokey Brights’ music is available via Bandcamp, Spotify, Apple Music, and YouTube, as well as on our website, www.smokeybrights.com. The band’s new record, I Love You But Damn, comes out in July on Seattle’s own Freakout Records. We have a few singles up online already for your listening pleasure.
Tell us about your day job. About half my practice involves representing survivors of childhood sexual abuse against institutions like the Catholic Church, schools, and government entities. I also handle car crashes and medical malpractice cases.

Could you talk a bit about your artistic career and what it entails? I’m a musician and aspiring writer, yet never made the leap into the arts professionally. But I have always been fascinated by those who had the courage to become an artist full time, hence the theme of my podcast: discovering the journeys of successful musicians, filmmakers, writers, painters, and other creatives.

When and why did you get into podcasting? The types of cases I take on can weigh on your soul and can become your life/identity if you are not careful. No matter how much you love your day job, you must pursue outside interests in order to feel fulfilled personally. After talking to friends and family about possibly starting a podcast and receiving nothing but encouragement, I attended the 2019 Sundance Film Festival, where through blind luck I was able to see a film directed by a friend of a friend. With the help of my friend, the filmmaker Rayka Zehtabchi agreed to an interview (despite my not even having a name for my podcast yet). By the time I sat down with Rayka, she had just won an Academy Award for her documentary short, Period. End of Sentence, which was later picked up by Netflix. Another friend introduced me to a successful painter in Seattle, an Iraqi American refugee named Hiba Jameel. Rayka and Hiba were my first two interviews. Their stories were so inspiring that I could not help but keep going. One year and 42 episodes later and I’m still excited about this journey.

Did you ever consider pursuing your art as a full-time career? Why did you decide to go to law school? I had a band in high school and college and had some paid gigs but never had the guts to try music full time. The same can be said of writing. The prospect of relying on your creativity to survive is terrifying to me. I went to law school to advocate for the underdog. I have always identified with underdogs and wanted to be an immigration lawyer but ended up representing plaintiffs in personal injury cases.

Do you feel like your artistic endeavors influence your work (day job), or vice versa? If so, how? The skills I developed taking depositions helped me become an active and effective listener during podcast interviews. I have never been a notes or outline guy when it comes to depositions; instead, I go in armed with just my curiosity about the story of the witness. It’s no different with podcast interviews. I think that helps my guest’s story unfold organically.

How do you make time to do art and your day job? Just like legal work, podcasting can take up as much time as you let it. I do many of my interviews on weekends and I have an editor/producer to help with the technical aspects of the show. I update my website and do social media posts after hours and on weekends. It’s a lot more work than I anticipated, but as the old cliché goes, if you love what you do you never work a day in your life. I love my legal career and I love podcasting. If that changes, I’ll stop doing the thing I no longer love.

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Where do you find the inspiration to create? I am inspired by other podcasters I admire, like Marc Maron, Tim Ferris, Terry Gross, etc., as well as musicians, writers, and filmmakers. If I see a movie I like, my first instinct is to research the cast and crew and reach out to those creatives, asking them to talk to me about their process.

Where can readers find some of your work? You can find DreamPath Podcast at www.dreampathpodcast.com, on social media with the handle @dreampathpod, or wherever podcasts are available (including iTunes, Spotify, etc.).
It’s What You Say and How You Say It

What lawyers who represent artists need to know about IP law

BY LERON VANDSBURGER & REBECCA LANCTOT

DISCLAIMER:
The information provided in this article does not, and is not intended to, constitute legal advice; it is intended for general informational purposes only and should not be construed as the legal opinion of Washington Lawyers for the Arts, the authors, or their respective employers.

If you ask any artist to describe what it takes to live from one's art, the most common answer you will hear is, “You can’t.” If you press for more explanation, you might learn about activities such as online promotion, web development, social media, contract review, gig working, team coordination, and grant writing. Artists wear so many hats that often little time remains for creation. Instead, their time is spent competing for limited opportunities to present and share their work. Too often, that competition leads to conflict, disputes, and potentially costly and time-consuming legal issues.

For lawyers who want to help artists, the question often is, how best to help? What are the biggest challenges? In truth, artists face complex, multifaceted legal issues that stretch beyond any one area of the law. They work as employers and as employees, license work to and from others, receive commissions to create art, and distribute art freely and publicly. Digital publication and the distribution of creative works over the internet are at the root of many legal questions posed by artists, making technology and cross-jurisdictional issues important as well.

Contracts and intellectual property law provide strong legal protection for artists, but their legal needs don’t fit neatly into one category of IP protection. Too often, artists don’t think to ask their attorney before creating a work of art or joining a collaborative artistic effort. Further complicating matters, artists typically don’t have the financial resources to seek legal advice prospectively, and more often than not seek legal help only after an issue arises. To assist artists, attorneys should be prepared to fill many roles. They might be translators explaining the law to artists. They might be advisers offering paths forward to avoid potential conflict. They might be defenders advocating for solutions to challenges and disputes. Finally, attorneys might act as gateways to the legal community, helping artists to get the best possible legal advice.

In the following sections, we provide a broad look at the primary IP issues facing artists in Washington, with examples of legal challenges they confront. We also look at the impact that the COVID-19 crisis is having on the arts community, and we wrap up by discussing how restrictions on public gatherings due to COVID-19 are highlighting many legal issues surrounding digital distribution of artists’ works.

COPYRIGHT

Copyright grants immediate rights in a creative work to its author as soon as the work is “fixed in a tangible medium.” In other words, copyright protects original expression—not facts or ideas—that has been created in “a permanent format,” such as literary, musical, dramatic, choreographic, pictorial or graphic, audiovisual, or architectural works, or sound recordings. Merely giving a speech in the town plaza does not give IP protection to the content of the speech unless it has been written or recorded. As with most IP rights, copyright is exclusive, which is to say that a copyright violation is termed an infringement, and legal action must be brought by the rights holder.

Some examples of copyrightable expression include books, brochures, graphic art (distinctive logos might be protected), white papers, slide presentations, packaging (ornamental, nonfunctional elements), websites, blogs, computer code, jewelry, photographs, videos, songs, recordings, lyrics, and poetry. Copyright does not cover ideas, concepts, facts, discoveries, or data. It does not cover procedures, methods, systems, and processes (these are the domain of patent law, another area of IP protection, not covered here). Short forms of expression, such as titles, names, and slogans, are excluded. Familiar, utilitarian, functional, or intangible works are similarly outside the scope of copyright. Finally, works in the public domain are excluded from copyright protection.

Eligible works are automatically protected at the time they are “fixed” in a tangible medium (i.e., written down or recorded) and registration with a government office is not required. However, a copyright registration...
is required prior to bringing an infringement lawsuit in the United States, and statutory damages are available only for infringement of registered copyrights. Considering the complexity and expense of mounting a federal lawsuit, artists might prefer to rely on contract law to resolve disputes—for example, through negotiated licenses. Royalties, for example, can be based on the negotiated value of the licensed use of the work (sampling is treated differently). Even so, having a registered copyright improves the negotiating position.

For copyright, the rights holder must authorize any reproduction, distribution, modification, public display, or performance of the work. Implicit in the term “rights holder” is the fact that ownership of a copyright is not indelibly vested in the author of the work. Copyright can be licensed, assigned, devised, and transferred in many ways, like other forms of property. Any assignment must be in writing, with a present-tense affirmative assignment (i.e., “I hereby assign the copyright”); “agreements to assign” (i.e., “I agree to assign the copyright”) generally are ineffective.

Creative works that fall within “the scope of employment” vest in an employer, rather than in the author. The scope of employment is determined by a multifactor legal test adapted from agency law. In most cases, if an artist is hired to create a specific work, the copyright for that work will vest in the employer. Also, for certain types of works, work made under for-hire agreements vests the copyright directly in the hiring party, not the artist, providing yet another example of the complexity of copyright ownership.

Many artists, especially musicians, regularly work in groups. The prevalence of collaborative creation makes ownership a frequent legal issue. In general, the owner of a copyright is the author, but collaborative works may have multiple “authors” or “creators.” As an example, consider a musical collaboration where a producer creates a beat for an artist to turn into a finished track by adding vocals. In many cases, a single track features many artists contributing to the lyrics or music in a collaborative way. Film and television also frequently involve a high degree of collaborative authorship. Deciding ownership in such cases is difficult, especially when putting things in writing is uncommon or even disfavored. Artists who coordinate collaborative work should provide an assignment agreement at the outset. Conversely, artists who contribute to collaborative work should be careful not to sign away their rights without fair compensation (e.g., John Fogerty1 or pre-symbol Prince2).

Many artists have heard of “fair use” and would like to apply to their appropriation of others’ works, but not vice versa. In truth, fair use is a complicated and over-relied-on doctrine that protects very few types of copying. It is intended to allow criticism, commentary, news reporting, teaching, and research, but there is no clear rule about it. This makes the role of an attorney especially important, as engaging in even a partial use of another’s work without authorization can be risky. An all-too-common example of legal issues of this kind involves using images found from an online search in promotional materials or on an artist’s website. Without permission, such use is often infringing. This also applies to fan art, sampling, adaptation, and fan fiction, to name a few. Examples include the works of Jeff Koons3 and the fan art of Alice X. Zhang.4

Online streaming of art and audiovisual works has increased dramatically since the imposition of COVID-19 restrictions. With that increase have come added concerns about IP rights for work that is distributed online, sometimes live via streaming platforms, to a largely anonymous audience. While concepts of IP (e.g., copyright and trademark) still apply to such works, the rights that artists may expect to hold may be limited by license agreements that govern the use of such platforms. For example, “click-through” user license agreements and terms of service are enforceable in the United States, and an artist may have agreed to give up some or all rights in works merely by sharing them online. Issues may arise, for example, when an...

**SIDEBAR**

**About WLA**

Washington Lawyers for The Arts (WLA) is a nonprofit organization of attorneys and artists formed to coordinate legal assistance for creative artists and arts organizations in Washington. Founded in 1979, WLA offers numerous services statewide to support people in need of legal assistance and resources, bridging the worlds of law and art. WLA organizes regular clinics for artists to provide free legal consultations, workshops for artists and attorneys to explain the basics of IP law and other legal issues relevant to artists, and referrals to attorneys experienced in representing artists. Attorneys interested in participating are encouraged to contact WLA at www.thewla.org.

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Leron Vandsburger is a patent attorney at Kilpatrick Townsend in Seattle. He has been a WLA board member since January 2020 and coordinates the monthly state-wide virtual legal clinic. He previously worked in material sciences at the University of Washington and in plasma physics in Montreal. He is an amateur musician.

Rebecca Lancot is the chair of WLA’s Board of Directors. She has been providing pro bono counsel to artists and art organizations via WLA’s art law clinic since 2017. She is on Amazon’s legal team, supporting Amazon Web Services (AWS) since 2017. Previously, she worked as in-house counsel focused on content licensing for a boutique book publisher in the San Francisco Bay area, and was an active member of California Lawyers for the Arts. She is an amateur writer and self-proclaimed “maker.”
It’s What You Say and How You Say It

CONTINUED >

Tips of the Trade

For lawyers who want to help artists, which legal issues arise most often?

- Receiving a demand for fees/royalties for an image taken from an online image search engine
- IP assignment clauses in publishing/performance contracts
- Business formation questions and ownership of IP
- Licensing contract interpretation/negotiation
- IP ownership and employment/termination
- Potential infringement from creating art
- Defamation liability
- IP ownership of collaborative works
- Nondisclosure agreements
- Help with registration of copyrights and trademarks
- Assignment/work made for hire

TRADEMARK AND TRADE DRESS

An artist’s reputation in the marketplace is a vital intangible asset. Trademark and trade dress protections exist to prevent others from trading on that reputation. The two are different types of protections that are established by a similar mechanism: A trademark is an explicit indicator of a product or service—such as a brand name or a logo—that allows a consumer to distinguish it from competitors in the relevant market. Trade dress, by contrast, is an aesthetic characteristic that distinguishes the product or service that does not fit the definition of a trademark. Examples of trade dress include Tiffany blue, the hoopskirt Coca Cola bottle, or the “look and feel” of a retail space. Trade dress requires broad exposure in the market and strong consumer recognition and often is not available to artists who are not immediately recognizable for their characteristic style (e.g., Lisa Frank®).

Trademark and trade dress are important ways for artists to protect their artistic identities in the marketplace and to develop a commercial identity that forestalls imitation. As with copyright, trademark and trade dress are exclusive rights held by a rights holder, which can be treated as a property right that can be assigned, transferred, or licensed in writing. Holders of a trademark registered in the U.S. Patent and Trademark Office can sue in federal court and demand royalties, which can be treated as a property right that can be assigned, transferred, or licensed in writing. Holders of a trademark registered in the U.S. Patent and Trademark Office can sue in federal court and demand royalties, lost profits, and other forms of damages. As with copyrights, however, most artists do not have the financial resources to litigate, so licensing is a surer path forward.

In order for artists to use trademark and trade dress to protect their works, the marks must be (1) distinguishing, (2) in use, and (3) policed. As an aside, it’s important to note that a trademark registration is not required to use or enforce a mark in the United States. Without discussing all of the nuances of trademark law, in an infringement dispute, trademark rights go to the party with the earliest date of either (1) first use of the mark beyond state lines or (2) a federal trademark registration.

“Distinguishing” indicates both that the mark cannot already be used in the same market and must be distinctive, which is to say that it does not describe, in literal terms, either the product or the service, or is not merely the generic term for the product or service. As an example, a trademark for a machine that cuts grass cannot be simply “Lawn Mower,” because a consumer could not distinguish the manufacturer of the machine based on that name alone, and it also would be unfair to other sellers of lawn mowers if one trademark owner had exclusive rights to the name. The strongest trademarks are fanciful or arbitrary—“made-up” terms that do not otherwise describe the product in any explicit way (such names commonly are used in the pharmaceutical and automotive sectors). Band names often are fanciful or arbitrary as well, and make for strong trademarks. In some situations, individual names also can become enforceable trademarks.

In addition to being distinctive, a trademark also must be “in use” by the owner, meaning that an artist, or a licensee, must be offering products or services bearing the mark.

“Policing” marks, the third requirement, involves an owner making sure others don’t use the mark in ways that confuse consumers about the source of any products or goods. In order to maintain the ability to enforce a mark, the owner must take steps to stop any confusingly similar use, such as sending demand letters and taking legal action.

NOTES

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Nelson v. Thurston County,
2020 WL 2838656 (2020) (denying qualified immunity to a police officer who shot a citizen in the back)

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462 P.3d 861 (2020) (recognizing that a doctor who has sex with a patient the doctor treats for mental health issues can be sued for malpractice)

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8 Wn. App. 2d 399, 438 P.3d 1203 (2019) (Uniform Health Care Info. Act foreclosed disclosure of all experts’ past CR 35 exam reports)

Adamson v. Port of Bellingham,
192 Wn.2d 178, 438 P.3d 522 (2019); 923 F.3d 728 (2019) (recognizing liability of Port as premises owner)

Kimberly Gerlach v. The Cove Apts.,
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Ingenco Holdings v. ACE American Insurance Company,
921 F.3d 803 (9th Cir. 2019) (reversal of district court summary judgment in insurer’s favor as to all risk policy coverage)

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Lights, Camera ... Legal Action?

What lawyers who represent filmmakers should know about IP law

BY ROBERT C. CUMBOW

Filmmakers are often concerned about intellectual property rights—both maintaining their own and avoiding violating those of others. The major areas of intellectual property law that have implications for filmmakers are copyright, trademark, and the right of publicity. This article briefly covers each of those areas, with some tips for filmmakers and the lawyers who represent them.

COPYRIGHT
In the United States, copyright arises from the Constitution and, unlike in Europe, is based not in a theory of natural property rights but in a recognition that the creations of authors and inventors enrich everyone. The Constitution empowers Congress to give authors exclusive control over their works “for limited times” in a specifically stated intent to create and preserve a rich flow of works to the public domain.

Filmmakers are best advised to protect their own copyright in their work. Copyright doesn’t have to be applied for, but arises automatically when an original work is fixed in a tangible medium. It’s best to form a production company to hold the copyright in the film, and to have cast, crew, and contributor contracts that specifically state that all participants’ creative contributions to the film are works for hire or are expressly assigned to the production company. The finished film should bear a copyright notice in the form of “© 2020 MyFilmCompany.” Finally, the filmmaker should register the copyright. Registration, though not legally required, puts the copyright owner in the best position to protect and enforce her copyright, and is a prerequisite for filing a lawsuit for copyright infringement.

In addition to protecting their own copyrights, filmmakers should guard against infringing the copyrights of others. Even incidental uses of preexisting music will likely involve prohibitively expensive licensing fees. It’s usually better for a filmmaker to engage their own composer to provide scoring for a film. Uses of artworks, photographs, or preexisting film footage are a different matter, because they are often considered “fair use.”

A codification of principles arising from decades of court holdings, the fair use provision of U.S. copyright law says that some uses of the work of others that might infringe copyright are nevertheless permissible if their enrichment of public culture and discourse...
outweighs the harm their use would cause the authors. The Copyright Act allows a fair use defense for uses that embody criticism, comment, news reporting, teaching, scholarship, and research, and names four factors to be included in testing that fairness:

1. The purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes, as well as whether the use merely copies all or part of the original work or transforms it in some meaningful way.

2. The nature of the original copyrighted work, including whether the work is predominantly factual or imaginative, and whether it is published or unpublished.

3. The amount and substantiality of the portion used in relation to the copyrighted work as a whole (but there is no “percentage test”; even use of a small portion of an original work can be unfair if it is an important part of the original).

4. The effect of the use upon the potential market for, or value of, the copyrighted work, including whether the use is likely to discourage, encourage, or have no effect on the market for sales or licensed uses of the original work.

Applying these factors involves a fact-specific balancing test, so the only sure answer to the question “is this a fair use?” is the ruling of a court at the end of a costly lawsuit. Nevertheless, the factors are clear enough that filmmakers—in consultation with a lawyer, or even alone—can do their own “triage,” determining with reasonable reliability which uses are likely to require clearance, which are pretty clearly fair use, and which are tough calls. Filmmakers are wise to engage an attorney to guide this analysis before or during production, but at the very latest in post-production, while changes can still be made.

The process should also involve risk analysis. The lawyer and filmmaker should ask:

1. What is the likelihood that the use will come to the attention of the copyright owner? Limited local uses, festival play, and educational uses often stay under the radar, while wider distribution and television airings run more risk.

2. Is the owner likely to care? This depends on how substantial the use is and whether the context is complimentary, neutral, or critical in tone.

3. If the owner does care, how likely is she to pursue the matter? This depends on how big and litigious the copyright owner is.

4. If she does pursue the matter, what is the worst she can do? Most copyright disputes begin with a demand letter, which can often lead to a quickly negotiated amicable resolution. Such a solution can be as simple as providing credit or paying a reasonable after-the-fact license fee, but can also include demands to remove the use from the film altogether or to pay a high and often arbitrary damage figure.

The rule of thumb used to be “when in doubt, get permission.” But today, the rule of thumb is often “get permission whether in doubt or not.” Most uses of preexisting materials that filmmakers—especially documentarists—are likely to include in their films are low-risk uses that any copyright lawyer would tell them don’t need clearance. However, distributors will think otherwise. Before agreeing to package and promote a film for theatrical or educational showings, or to prepare it for television or online streaming, a distributor typically requires the filmmaker to warrant that everything in the film is the filmmaker’s original work, is in the public domain, or is used with permission. No room for “fair use” here. Film distributors are so wary of copyright lawsuits that they require clearance even for uses so minor that no copyright owner would likely object to them.

A good alternative to laborious and costly hours of unnecessary clearance is to indemnify the distributor against any losses incurred if any uncleared use is later litigated and found not to be a fair use. However, it is important to have sufficient insurance to make good on the indemnification. Filmmakers with limited budgets and limited distribution can obtain coverage for $1 million or more of liability for a four-figure premium, and this should be part of any film production budget.

**The only sure answer to the question ‘is this a fair use?’ is the ruling of a court at the end of a costly lawsuit.**

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**Robert C. Cumbow** is a partner with the Seattle office of Miller Nash Graham & Dunn, where he focuses on trademark, copyright, media, and advertising issues for a wide range of commercial clients. He also counsels filmmakers and other artists in intellectual property and media law issues. He teaches trademark law at Seattle University School of Law, and right of publicity law at the University of Washington School of Law. He also works with Washington Lawyers for the Arts, for which he has counseled clients in clinics, is a volunteer referral lawyer, and has served twice as an officer and board member. He can be reached at Robert.Cumbow@millernash.com.
Lights, Camera ... Legal Action?  
CONTINUED >

TRADEMARKS
Filmmakers often worry about whether they can leave in their film storefront signs and advertising containing someone else’s branding. As a practical matter, such trademark owners are unlikely to be concerned about their brand’s appearance in a film, and may even be glad of having the exposure.

If a particular business or bit of signage becomes an important part of the film, however, it’s a good idea to get permission and, of course, to avoid treating someone’s brand or business in a way that could result in backlash. If use of a particular type of business or product is important to the film, the filmmaker should decide whether to get permission, or even enter into a product placement deal, or instead invent a fictitious name for the product or business. If deciding to go the fiction route, a trademark search should be conducted to be sure the fake brand isn’t someone else’s trademark. The producers of The Dark Knight Rises chose the name “Clean Slate” for a mythical software that erased criminal records and found themselves in litigation with a software company that produced a legitimate, noncriminal product under the same name.

The test of trademark infringement is whether the use of the mark will likely create confusion about whether the mark’s owner sponsored, endorsed, or participated in producing the film. With increasing filmgoer sophistication about product placement, even an incidental use of a trademark might wrongly be assumed to be product placement. The best ways to avoid this are to use fake brands; not show brands at all; or, if a brand is shown, include competing brands in the film as well. The appearance of multiple different brands of gasoline, soft drinks, beer, or food products will defeat the perception that any one brand owner was associated with the film.

THE RIGHT OF PUBLICITY
There’s a widespread mistaken belief that you can’t make a film about a person, or something that happened to that person, without getting a “life rights” agreement. Case law has consistently upheld the right of filmmakers to use real people as the basis or inspiration for characters in fictional films, or to make documentary films involving and depicting real people, without obtaining permission. Filmmakers sometimes will get permission anyway, in order to forestall frivolous lawsuits or to obtain exclusive rights to certain information and materials about a person; but this is done for convenience, not because it is legally required.

It never hurts to get releases from bystanders or passersby who are likely to show up in a film, especially if the filmmaker wants to preserve the possibility of making commercial use of the footage. But films are regarded as noncommercial artistic expression (even though filmmakers hope to—and often do—make money from their films). In film, as in literature, theater, dance, music, painting, sculpture, and other artistic endeavors, the fact that money may be charged for viewers to experience the work or purchase copies of it does not render the work “commercial.” Rather, “commercial speech” is limited to expression whose purpose is to advertise or promote a product or service to the public. Courts frequently rely on the precept that “commercial speech is speech that does no more than propose a commercial transaction.”

The right of publicity is the right of an individual to control the commercial exploitation of her name, image, or likeness. Thus, the use of, or reference to, a real person in a film does not require permission. It’s important nevertheless to recognize that using that person’s name or image in promoting or advertising the film—including on the cover art for the film, which is considered marketing rather than expression—should be avoided, or permission should be obtained.

PRIVACY
Beyond the intellectual property rights discussed above, the use of names, images, or information about real people can violate privacy rights. If something a filmmaker shows or suggests about a real person is false, and is serious enough to harm that person’s reputation, there is a risk of a claim of defamation. Only a statement that is proven to be false can be defamatory. But some truthful depictions can also lead to legal claims if they intrude on a person’s legal right to privacy, portray the person in a damaging way, or disclose true facts that the person made a reasonable effort to keep private. This is true, however, only of living persons. While copyright, trademark, and publicity rights are “property rights,” and can survive their owner by many years, privacy rights and the right against defamation are “personal rights” held by living persons only. Filmmakers and other expressive artists are free to say and suggest whatever they want about persons who are no longer living.

THE TAKEAWAY
Part of the cost of making a film is keeping the filmmaker and the production company involved safe from potential liability. Knowing a little about intellectual property and privacy rights, and engaging a few hours of a lawyer’s time, is a good idea. }
Support these important programs with a tax-deductible gift today!

wsba.org/foundation
The Trial of Lizzie Borden

By Cara Robertson

Lizzie Borden took an axe,
Gave her mother forty whacks,
When she saw what she had done,
She gave her father forty-one.

The school children rhyme about Lizzie Borden is somewhat disturbing and definitely crude, yet once embedded is hard to get out of your head. Ms. Borden began to suffer the sing-song rhyme chanted by the children of her hometown shortly after the not-guilty verdict in her trial for the 1892 murder of her father and stepmother. Cruel enough if she had committed the killings, but what if she endured these taunts for much of the remainder of her life while in fact not having committed these heinous acts? Author Cara Robertson provides us with a peek into the life of the Borden family; the history and sociology of the community of Fall River, Massachusetts; an in-depth look at the police investigation; the forensics work performed; the inquest and trial; the media coverage; and the political climate during this time period. Robertson began researching the Borden case during her years as an undergraduate at Harvard and continued through her time acquiring a Ph.D. in English from Oxford University and a J.D. from Stanford Law School. This is perhaps not a “beach read” but a pleasant summer diversion from your routine work and home life; a read that, even with its meticulous detail, has an easy flow and will keep you turning pages until you draw your own conclusions.

— Charles Bates, Bar No. 19819

Every Day Is for the Thief

By Teju Cole

A young man living an urbane life in New York City returns for a short visit to Lagos, Nigeria, the city of his upbringing. This is a deftly told story of revisiting lovers, friends, family, and a fascinating (and bewildering) city from the perspective of a person with a slightly altered lens. With vivid descriptions and crisp, compelling dialogue, Teju Cole captures a thoughtful man’s journey home and the family, city, and community he left, but still inhabits.

— Tim Richards, Bar No. 50872

Talking to Strangers: What We Should Know About the People We Don’t Know

By Malcolm Gladwell

I am a member of a business book club, and this was one of the outlier books we read. I know that Gladwell has his fans and critics but this was really a perspective-changing book. (The audiobook is one of the best I have listened to because it was done in almost a podcast format.) The book begins and ends with the tragic interaction between Sandra Bland and a Texas state trooper and uses that interaction as a frame to explain human interaction. Gladwell uses historical examples to demonstrate the problem that arises when we think we know how to read other people but are generally not very good at doing so. This book is a must-read for anyone who interacts regularly with others, especially lawyers!

— Ralph Flick, Bar No. 41427

Born a Crime: Stories from a South African Childhood

By Trevor Noah

A memoir by the comedian and host of “The Daily Show” about his South African childhood. His mother is a Black South African and his father is a white Swiss-German. At the time Trevor Noah was born, during the racial oppression of apartheid in South Africa, his existence was a crime. This is a compelling, inspiring, and hilarious raw account of his childhood under apartheid. This book will make you want to laugh and cry as you follow the young and mischievous Noah through his adventures. Highly recommended as a good summer read.

— Iris Leong, Bar No. 50258
One Hundred Years of Solitude
By Gabriel García Márquez

While not exactly a new release, my favorite book is still One Hundred Years of Solitude by Gabriel García Márquez. The novel is a sweeping epic that tells the multi-generational story of the Buendía family in a small fictional town in Colombia. The book is unforgettable, with brilliant imagery and populated with thoroughly developed characters who reflect the experiences of a simple remote community being intruded upon by a rapidly developing outside world. As the family goes through marriages, births, and deaths, subsequent generations gradually stray from the values and ideals that bound together the original core. The storyline is engrossing, but the beauty of the novel is the indelible visual language and the elements of magic which create this extraordinary world. It is one of those rare books that as soon as you finish, you want to start reading again.

— Stan Glisson, Bar No. 28323

Rising Out of Hatred: The Awakening of a Former White Nationalist
By Eli Saslow

This is a fascinating account of how Derek Black, born into white nationalist “royalty” and a movement strategist and media figure from a young age, comes to see the error of his beliefs in college and becomes an antiracist. He is a brilliant and interesting person in both roles—far from our stereotypes. The book shows how difficult and time-consuming it is to leave a belief system and community that has been your life since birth.

— Amy Stephson, Bar No. 13056

Too Good to Leave, Too Bad to Stay
By Mira Kirshenbaum

Summer reads don’t usually lean toward self-help, but I find myself recommending this book a lot, both to friends and clients. The book is an exercise in getting people out of ambivalence to figure out whether to get out of a bad relationship, or commit to staying and taking steps to improve it. Woven throughout the stories in the book is a series of diagnostic questions on issues ranging from how you felt about your relationship in the beginning to how you feel when you imagine your future in the relationship. The book also provides common-sense guidelines on how to read your own answers to the questions. While most of this isn’t news, the examples and questions open discussions and help the reader get unstuck to figure out their next move.

— Michelle E. Danley, Bar No. 53316

The King of Nothing Much
By Jesse E. Johnson

This new novella by a Pacific Northwest author about a stay-at-home dad facing middle age and struggling to find his place in the world is very well written, funny, and moving.

— Dan Kirkpatrick, Bar No. 38674

Plaintiff in Chief: A Portrait of Donald Trump in 3,500 Lawsuits
By James D. Zirin

A former federal prosecutor and self-described moderate Republican, attorney James D. Zirin details Donald Trump’s life as a perennial litigant since the early 1970s. According to Zirin, the current president has weaponized the law to devastate perceived enemies, to consolidate power, to deny responsibility, and to frustrate opposing parties. Zirin comments that Trump learned these tactics from his notorious mentor, lawyer Roy Cohn, and cautions that “the implications of such conduct in a man who is the president of the United States are nothing less than terrifying.” Highly recommended as a carefully documented study of legal history.

— Robin Lindley, Bar No. 5712
**Disbarred**

**Jon Emmett Cushman** (WSBA No. 16547, admitted 1986) of Olympia, was disbarred, effective 5/07/2020, by order of the Washington Supreme Court imposing reciprocal discipline in accordance with an order of the Supreme Court of the State of Montana. For more information, see https://judument.mt.gov/getDocByCTrackId?DocId=284845. Scott G. Busby acted as disciplinary counsel. Bradley S. Keller and Joshua B. Selig represented respondent. The online version of Washington State Bar News contains a link to the following documents: Order on Stipulation to Reprimand; Stipulation to Reprimand; and Notice of Reprimand.

**Reprimanded**

**Allan Byers Bakalian** (WSBA No. 14255, admitted 1984) of Redmond, was reprimanded, effective 1/28/2020, by order of the hearing officer. Bakalian’s conduct violated the following Rules of Professional Conduct: 1.18 (Duties to Prospective Client), 1.4 (Communication), 1.5 (Fees), 1.6 (Confidentiality of Information), 1.8 (Conflict of Interest: Current Clients: Specific Rules).

In relation to his consultation with a prospective client, Bakalian stipulated to a reprimand. Bakalian used information learned from the prospective client to investigate a possible products liability lawsuit and potential defense to criminal charges related to an all-terrain vehicle accident. Bakalian then represented a client with interests materially adverse to those of the prospective client in a substantially related matter.

Kathy Jo Blake acted as disciplinary counsel. Kevin M. Bank represented respondent. Henry E. Stiles, III was the hearing officer. Timothy J. Parker was the settlement hearing officer. The online version of Washington State Bar News contains links to the following documents: Order on Stipulation to Reprimand; Stipulation to Reprimand; and Notice of Reprimand.

**Michael Earl Carroll** (WSBA No. 13092, admitted 1983) of Tacoma, was reprimanded, effective 2/06/2020, by order of the hearing officer. Carroll's conduct violated the following Rules of Professional Conduct: L18 (Duties to Prospective Client).

In relation to his consultation with a prospective client, Carroll stipulated to a reprimand. Carroll used information learned from the prospective client to investigate a possible products liability lawsuit and potential defense to criminal charges related to an all-terrain vehicle accident. Carroll then represented a client with interests materially adverse to those of the prospective client in a substantially related matter.

Scott G. Busby acted as disciplinary counsel. Michael Earl Carroll represented himself. David B. Condon was the hearing officer. The online version of Washington State Bar News contains links to the following documents: Order on Stipulation to Reprimand; Stipulation to Reprimand; and Notice of Reprimand.

**Dean Standish Perkins Jr.** (WSBA No. 15856, admitted 1986) of Seattle, was reprimanded, effective 4/13/2020, by order of the hearing officer. Perkins’ conduct violated the following Rules of Professional Conduct: 1.4 (Communication), 1.5 (Fees), 1.6 (Confidentiality of Information), 1.8 (Conflict of Interest: Current Clients: Specific Rules).

In relation to his representation of a client in a personal injury matter, Perkins stipulated to two reprimands. The client was, at the time of the representation, related to Perkins by marriage. Perkins stipulated to two reprimands for the following: 1) failing to promptly inform and/or obtain informed consent in writing from his client regarding terms of a fee splitting agreement with outside counsel; 2) taking a portion of a contingent fee without a written contingent fee agreement; 3) modifying the original fee agreement without (a) fully disclosing the terms, (b) advising or providing the client with an opportunity to consult independent counsel, (c) and/or obtaining the client’s informed written consent; and 4) revealing information relating to his representation of his client and/or by failing to make reasonable efforts to prevent the inadvertent disclosure and/or unauthorized access to information relating to the representation.

Sachia Stonefeld Powell and Emily Krueger acted as disciplinary counsel. Jeffrey T. Kestle and Roy A. Umlauf represented respondent. Seth A. Fine was the hearing officer. William J. Carlson was the settlement hearing officer. The online version of Washington State Bar News contains links to the following documents: Order on Stipulation to Reprimand; Stipulation to Reprimand; and Notice of Reprimand.

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**MORE ONLINE**

Access further details of the notices by clicking the links in the online version: [www.wsba.org/news-events/wabarnews](http://www.wsba.org/news-events/wabarnews).
Transfer to Disability Inactive Status

Malcolm D. Katz (WSBA No. 1329, admitted 1969) of London, England, was by stipulation voluntarily transferred to disability inactive status, effective 4/16/2020. This is not a disciplinary action.

Notice of Hearing on Petition For Reinstatement of James Lloyd White

A petition for reinstatement after disbarment has been filed by James Lloyd White, WSBA No. 14132, who was admitted in 1984, suspended in 2005, and disbarred in 2006. Prior to his suspension and disbarment, Mr. White practiced in several counties in Washington State, including King and Snohomish Counties.

A hearing on Mr. White’s petition will be conducted before the Character and Fitness Board on Friday, September 25, 2020. The hearing on Mr. White’s petition was originally scheduled to take place on April 24, 2020 but was rescheduled to September 25, 2020 because of the coronavirus situation and the measures being taken to prevent the spread of the virus. No later than 5 p.m. on August 25, 2020, anyone wishing to do so may file with the Character and Fitness Board a written statement for or against reinstatement, setting forth factual matters showing that the petition does or does not meet the requirements of Washington State Supreme Court Admission and Practice Rule (APR) 25.5(a). Except by the Character and Fitness Board’s leave, no person other than the petitioner or petitioner’s counsel shall be heard orally by the Board.

Communications to the Character and Fitness Board should be sent to Renata Garcia, Interim Counsel to the Character and Fitness Board, Washington State Bar Association, 1325 Fourth Ave., Ste. 600, Seattle, WA 98101-2539, or to renatag@wsba.org. This notice is published pursuant to APR 25.4(a).
Message from WSBA President Rajeev Majumdar:

Our June WSBA Board of Governors meeting was filled with hard but necessary conversations, particularly as we looked at how to respond as an association to the national dialogue about racism and unlawful use of force. I am enthused to begin the meaningful work of the newly chartered WSBA Equity and Disparity Work Group. And while I believe your Board is collectively committed to the right principles and made the right decisions, I want to acknowledge that statements were made at the Board table that were both offensive and painful, especially for people of color. While we as a Board took actions to promote diversity and equity in our courts and legal profession, I understand how those individual painful comments continue to illustrate and perpetuate the very problem itself. I strongly reject those comments as they are in direct opposition to the WSBA’s and my own unwavering values of diversity, equity, and inclusion. Resultantly, I am invoking the WSBA’s independent ombudsman process to thoroughly investigate the matter. My message today is a placeholder for more to come because this work has to be done thoughtfully and meaningfully.

Note: Because of public directives to curb the spread of the coronavirus, the June 2020 meeting was held in a virtual-only format.

TOP 8 MEETING TAKEAWAYS

1 George Floyd Memoria Agenda—At its first meeting since the killing of George Floyd and the resulting national unrest and dialogue about racism, the Board unanimously passed a resolution acknowledging statements made by the members, supporting the Supreme Court’s message (in its letter printed on page 17), endorsing the WSBA president’s message to the membership, and committing the WSBA to support its members in speaking out. The Board also created a multi-stakeholder Equity and Disparity Work Group with a two-year charter to actively identify and suggest remedies for rules, regulations, and laws related to the practice of law and administration of justice that facilitate injustice and perpetuate institutionalized racism. Finally, the Board proposed a revised mission statement of the Bar to emphasize the WSBA’s mandate to promote an effective legal system accessible to all people.

2 New proposed mission statement: With a strong commitment to serving its members and the public, WSBA ensures the integrity of the legal profession and promotes an effective legal system, accessible to all. (Current mission statement: To serve the public and the members of the Bar, to ensure the integrity of the legal profession, and to champion justice.) The WSBA will solicit feedback membership-wide in the following weeks. Comments can be sent to barleaders@wsba.org.

3 Expanding the Hardship Exemption: In recognition of challenges facing members throughout their lifetimes, the number of times an active member can receive a hardship exemption from paying annual license fees has been increased from once to twice, per a bylaw amendment that is now subject to review by the Washington Supreme Court. The goal is to offer the additional hardship exemption by the next licensing deadline.

4 WSBA Leadership: The Board of Governors selected current District 6 Governor Brian Tollefson as the WSBA’s president-elect for the coming year and Lisa Mansfield as an at-large governor for 2020-23 (note: 14 candidates initially applied for this seat, currently held by At-Large Governor Alec Stephens). After a favorable performance review, the Board also voted to hire Terra Nevitt as WSBA executive director (removing “interim” from her current title), subject to negotiation of an employment contract.
**In Remembrance**

This In Remembrance section lists WSBA members by Bar number and date of death. The list is not complete and contains only those notices of which the WSBA has learned through correspondence from members.

Jamie Aten, #47704, 5/27/19
Donald Aubrey Cable, #182, 4/10/20
Mark W. Conforti, #28137, 7/30/19
Dwayne E. Copple, #362, 1/28/20
James Pearce Hamley, #9279, 1/6/20
Charles H. Hammer, #9475, 1/31/20
J. Michael Koch, #4249, 3/3/20
Ray Duane Lutes, #9531, 2/17/20
Jane Molnar McCormmach, #8365, 5/13/20
Maureen McKaen, #17481, 2/6/20
Mona Kathleen McPhee, #30305, 5/4/20
Marsha Murray-Lusby, #39382, 6/24/19
Darren John Nienaber, #30764, 3/18/20
Joan Elizabeth Pedrick, #25736, 10/13/19
Robert Mason Quillian, #6836, 2/11/20
Terry L. Sarver, #327LPO, 1/7/20
Lisa Ellen Schuchman, #15405, 5/4/20
Sarah Lynn Stookey, #14818, 10/30/19
Kevin Patrick Sullivan, #11987, 7/7/20
James P. “Casey” Thompson, #837, 4/22/20
Christine Wyatt, #6389, 4/23/20

Please email notices to wabarnews@wsba.org.
WSBA NEWS

2021 License Fee
If you are experiencing financial challenges, please note that a payment plan option is available to all licensed legal professionals for the 2021 license fee. Payments may be made in up to five installments with the balance required to be paid in full by Feb. 1, 2021. To take full advantage of the plan, sign up and pay the first installment in October 2020. Also, a license fee hardship exemption is available for active licensed legal professionals who qualify. Visit www.wsba.org/licensing to learn more.

VOLUNTEER

Northwest Justice Project Board of Directors
The WSBA Board of Governors is accepting letters of interest and résumés for up to three attorneys to serve three-year terms on the Northwest Justice Project (NJP) Board of Directors starting January 2021. Please submit a letter of interest and résumé on or before Sept. 4, 2020, to barleaders@wsba.org. Find more information at www.wsba.org/connect-serve/volunteer-opportunities/volunteer-as-a- wsba-representative.

Custodians Needed
The WSBA is seeking interested lawyers as potential volunteer custodians of files and records to protect clients’ interests. Visit www.wsba.org/connect-serve/volunteer-opportunities/act-as-custodian, or contact Sandra Schilling: sandras@wsba.org, 206-239-2118, 800-945-9722, ext. 2118; or Darlene Neumann: darlenen@wsba.org, 206-733-5923, 800-945-9722, ext. 8284.

RESOURCES

Info for Job Seekers and Employers
Visit the WSBA Career Center to view or post job openings at https://jobs.wsba.org/. A special discounted rate for nonprofit and small-firm employers has been extended through Sept. 30. Contact Michael Reynolds at 612-968-3431 or michael.reynolds@communitybrands.com for more information.

Free Consultations and Practice-Management Assistance
The WSBA offers free resources and education on practice-management issues. For more information, visit www.wsba.org/pma. You can also schedule a free phone consultation with a WSBA practice-management advisor to find answers to your questions about the business of law firm ownership. Common inquiries we can help with include technology adoption, opening or closing a law office, and client relationship management. Visit www.wsba.org/consult to get started.

Trial Advocacy Program
Join us for the WSBA’s annual Trial Advocacy Program, Aug. 21-22, designed to help those with little to no trial experience become effective trial practitioners. Learn more and register at https://bit.ly/trialadvocacyprogram.

Lending Library
Due to the COVID-19-related closure of the WSBA office, the WSBA Lending Library is closed (as of press time), but you can continue placing holds online. Visit www.wsba.org/library for more information.

Free Legal Research Tools
The WSBA offers resources and member benefits to help you with your research. Visit www.wsba.org/legalresearch to learn more and to access Casemaker Fastcase for free.

ETHICS

Ethics Line
Members facing ethical dilemmas can talk with WSBA professional responsibility counsel for informal guidance. Learn more at www.wsba.org/for-legal-professionals/ethics/ethics-line or call the Ethics Line at 206-727-8284 or 800-945-9722, ext. 8284.

WSBA Advisory Opinions Available
WSBA advisory opinions are available online at www.wsba.org/for-legal-professionals/ethics/about-advisory-opinions. For assistance, call the Ethics Line at 206-727-8284 or 800-945-9722, ext. 8284.

WSBA Connects
WSBA Connects provides all WSBA members with free counseling on topics including work stress, career challenges, addiction, and anxiety. Visit www.wsba.org/for-legal-professionals/member-support/wellness/wsba-connects or call 800-765-0770.

The ‘Unbar’ Alcoholics Anonymous Group
The Unbar is an “open” AA group for attorneys that has been meeting weekly for over 25 years. Due to COVID-19, the group is holding virtual meetings via Zoom; contact them at unbarseattle@gmail.com. You can also find more details at http://www.wsba.org/for-legal-professionals/member-support/wellness/addiction-resources.

Career Consultation
Get help with your résumé, networking tips, and more—
HAVE SOMETHING NEWSWORTHY TO SHARE?
Email wabarnews@wsba.org if you have an item you would like to place in Need to Know.

www.wsba.org/for-legal-professionals/member-support/wellness/consultation—or email wellness@wsba.org.

WSBA COMMUNITY NETWORKING
Diversity-Stakeholders List Serve
The WSBA Diversity-Stakeholders list serve is for sharing information about diversity, inclusion, and equity issues affecting the legal community. You do not need to be a member of the WSBA to join the list. Please email Diversity@wsba.org to join. Past newsletters are posted here: www.wsba.org/about-wsba/equity-and-inclusion/achieving-inclusion.

New Lawyers List Serve
This list serve is a discussion platform for new lawyers of the WSBA. To join, email newmembers@wsba.org.

ALPS Attorney Match
Attorney Match is a free online networking tool made available through the WSBA-endorsed professional liability partner, ALPS. Learn more at www.wsba.org/connect-serve/mentorship/find-your-mentor, or email mentorlink@wsba.org.

QUICK REFERENCE
August 2020 Usury
The usury rate for Aug. 2020 is 12.00%. The auction yield on July 6, 2020, of the six-month Treasury Bill was 0.167%. The interest rate required by RCW 4.56.110(3)(a) and 4.56.115 for Aug. 2020 is 2.167%. The interest rate required by RCW 4.56.110(3)(b) and 4.56.111 for Aug. 2020 is 5.25%.

COVID-19 NEWS TO KNOW

Diploma Privilege
On June 12, the Washington Supreme Court issued an order allowing graduates with a J.D. from an ABA-accredited law school, who are currently registered for Washington’s July and September bar exams, to be admitted to the WSBA and practice law in the state without taking the bar exam. The WSBA will still administer the July and September exams for those who do not meet the order’s requirements or who wish to receive a Uniform Bar Exam score to practice in different jurisdictions. For more information, visit www.wsba.org/for-legal-professionals/join-the-legal-profession-in-wa/lawyers/qualifications-to-take-the-bar-exam.

Court Emergency Operations and Closures
The Washington Supreme Court has published a COVID-19 response page, which is a compilation of its emergency orders and court modifications: www.courts.wa.gov/newsinfo/index.cfm?fa=newsinfo.COVID19.

Video Deposition Guidance
The WSBA is providing guidance related to remote depositions following the Washington Supreme Court’s April 2 order, which suspended the administering of “any oath or affirmation in person where such oath or affirmation can be administered remotely by available technologies.” For guidance on video and other electronic depositions during the COVID-19 crisis, visit https://www.wsba.org/docs/default-source/resources-services/covidvideo-dep-guidancefinal_president.pdf?sfvrsn=aa1d09f1_4.

MCLE Reporting Extension
The Washington Supreme Court issued an order extending the deadline by one year for lawyers due to report MCLE hours in the 2018-20 cycle and authorizing lawyers to carry over an additional 15 credits toward the next reporting period.
BECU Trust Services is a trade name used by MEMBERS® Trust Company under license from BECU. Trust services are provided by MEMBERS® Trust Company, a federal thrift regulated by the Office of the Comptroller of the Currency. Trust and investment products are not deposits of or guaranteed by the trust company, a credit union or credit union affiliate, are not insured or guaranteed by the NCUA, FDIC or any other governmental agency, and are subject to investment risks, including possible loss of the principal amount invested. This is for informational purposes only and is not intended to provide legal or tax advice. For legal or tax advice, please consult your attorney and/or accountant.

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When planning their legacy, your clients count on thoughtful, personalized guidance. Offer them the benefits of the credit union difference with BECU Trust Services. We'll help them prepare for the uncertainty of tomorrow regardless of the size of their estate. Give us a call. Let’s talk about how we can partner to protect your client’s wealth and secure their family’s future.

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Wyatt DeBenedetti is a majority women-owned firm that represents companies and individuals involved in business litigation, real estate, employment, environmental and land use, and commercial disputes and transactions.

Todd Wyatt, Merryn DeBenedetti, and Kellie Gronski have formed the firm and will continue to practice in Issaquah while serving clients from across the state and country. They are committed to serving their community and resolving legal issues at a reasonable price.

**LEMONIDIS CONSULTING & LAW GROUP, PLLC**

SaNni Lemonidis has devoted her entire legal career to the labor movement and advancing the interests of labor organizations throughout the Pacific Northwest.

She advises individuals and unions on a range of employment and labor law matters. In addition to her traditional labor law practice, SaNni leads the firm’s training and consulting practice. As a seasoned educator, she has developed a range of training modules that address a variety of workplace issues.

To learn more, please visit our website at [www.lemonidislaw.com](http://www.lemonidislaw.com)

Find us on social media platforms by searching Lemonidis Consulting & Law Group, PLLC

2211 Elliott Avenue, Suite 200
Seattle, WA 98121
Phone: 206-926-6700

**FLOYD, PFLUEGER & RINGER, P.S.**

is pleased to announce that

**Brittany C. Ward**

has joined the firm as an associate.

Floyd, Pflueger & Ringer’s diverse litigation team emphasizes defense of complex civil litigation matters, including employment, medical malpractice and professional liability, retail and premises liability, construction claims (defect and injury), fire and catastrophic events response, employment law and transportation.

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[www.floyd-ringer.com](http://www.floyd-ringer.com)
Mac Archibald

Mac has been a lawyer in Seattle for over 40 years. He has tried a wide range of cases including maritime, personal injury, construction, products liability, consumer protection, insurance coverage, and antitrust law.

Mac has over 25 years of experience mediating cases. He has mediated over 2,000 cases including maritime, personal injury, construction, wrongful death, employment and commercial litigation.

Mac has a reputation for being highly prepared for every mediation and for providing as much follow-up as necessary.

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Email: mac@archibald-law.com

Freedom of Speech

(See, e.g.,):
Yates v. Fithian,
2010 WL 3788272
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Thriving Grants Pass, Oregon, family law practice with cases in Josephine and Jackson Counties. The owner has built a firm with a stellar reputation and desires to sell the business as a turnkey operation in order to retire. The average gross revenue for the past two years is over $530,000, and the 2019 Seller’s Discretionary Earnings (SDE) was over $350,000! The practice/case breakdown is 100% family law. The practice was established in 1975 and is located in a desirable, fully furnished office. The practice employs three staff, including the owner. Email info@privatepracticetransitions.com or call 253-509-9224.

Real estate legal practice with two locations is headquartered in the fastest growing metro area in the fastest growing state (Idaho). This real property law firm has two locations (Spokane and Coeur d’Alene), two attorneys, three support staff, and average gross revenue over $625,000 the last three years (2017-2019). For more information on this turnkey practice, contact info@privatepracticetransitions.com or call 253-509-9224.

Extremely profitable Seattle immigration law practice that has average gross revenue of over $1,600,000 the last three years (2017-2019). Even more, in 2019 the gross revenue was over $1,800,000! This successful firm has substantial advance fees in trust. The practice employs two attorneys in addition to the partners, seven paralegals, three full-time administrative staff, and one part-time support staff. If you are interested in exploring this opportunity, would like the freedom to be your own boss, and/or increase your current book of business substantially, then this is perfect for you. Contact info@privatepracticetransitions.com or call 253-509-9224.

Established Pierce County insurance defense practice that was established in 1998 and has approximately 125 active clients as of June 2020. The average gross revenue the last three years was over $1,017,000. The practice/case breakdown by revenue is 50% bodily injury, 10% property damage, 10% product liability, 10% professional liability, 10% plaintiff work, and 10% other. Contact info@privatepracticetransitions.com or call 253-509-9224.

CONTINUED >
Established Seattle estate planning practice that has a practice/case breakdown by revenue of approximately 45% estate & trust administration, 40% estate planning, and 15% other (collateral matters, estate tax preparation, real property issues, etc.). The practice is located in the heart of downtown Seattle, has average gross revenue of over $259,000 the last three years (2017-2019), and is poised for growth under new ownership. Contact info@privatepracticetransitions.com or call 253-509-9224.

Thriving Stevens County personal injury & family law practice that was established in 2009, has a strong client base, and brought in over $650,000 in gross revenue in 2019. The practice/case breakdown by revenue is approximately 48% personal injury, 43% family law, and 9% other (estate planning, probate, general litigation, etc.). The practice employs six people: one owner/attorney, one associate attorney, three legal assistants, and one office administrator. Contact info@privatepracticetransitions.com or call 253-509-9224.

Profitable Snohomish County personal injury practice that has been in business for more than 27 years. The practice/case breakdown by revenue is approximately 95% personal injury and 5% other. The practice is located in a 1,022 SF fully furnished office that is also available for sale, if desired. Contact info@privatepracticetransitions.com or call 253-509-9224.

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Downtown Seattle, 1111 3rd Ave., Class A space, receptionist, voicemail, conference room, copier, scanner, phone, gym, showers, bike rack, light rail and bus stop across the street, several offices available now, secretarial space available, share space with an existing immigration law firm, $1,275 per office, 503-294-5060, ask for Jeri.

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WILL SEARCH

Searching for the last will and testament of David J. Rausch of Spokane, who passed away on March 27, 2020. If you have any information, please contact his daughter, Monica Blum, at 206-300-0220 or monica@octheater.com.

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Ariella Shuster

BAR NUMBER: 32065

LAW SCHOOL: American University-Washington College of Law

I am a family law attorney, life coach, yoga instructor, and mom. I can be reached at Divorce With Dignity Law & Coaching, 206-349-4592, as@divorcewithdignitylaw.com, or www.divorcewithdignitylaw.com.

I became a lawyer because as the child of Holocaust survivors and the first American born in my family, I was starkly aware of racial and religious discrimination and the danger of “otherness” and government-sanctioned oppression for as long as I can remember. I was driven to help create a just society and reduce prejudice and discrimination in the world.

My greatest accomplishment as a lawyer is, when I was a public defender in NYC, having a jury find that the police exceeded their authority by exonerating my client based on an entrapment defense.

My long-term professional goal is to change the paradigm of acrimony in co-parenting and divorce to one of possibility and cooperation.

During my free time, I parent, cook, create cocktails, hike, bike, roam, travel, road trip, yoga. During COVID-19, walk, walk, walk.

The most memorable trip I ever took was: So many trips—I took two separate years off and backpacked extensively through much of Asia. My inaugural backpack trip that set me up for a lifetime of hauling a pack through continents was to Kenya. That was awesome.

I have recently tried or want to try skateboarding with my son.

My best recipe I make at home is: Oooh, right now my baked eggplant parmesan with ricotta and fresh mozzarella is a contender.

I worry about being away from my mom in New York who has dementia.

I grew up in New York, with a short stint in Denver. I like to say that I “did my adolescence” in Staten Island.

My fondest childhood memory is going to farmers markets with my parents and my dad teaching me how to pick the best fruits and vegetables.

My best parenting advice is live your integrity and recognize the power you have over your little one and wield it wisely.

Aside from my career, I am most proud of this: My child and sustaining a healthy co-parenting relationship in two houses for a decade.

I give back to my community by providing information on the availability of high-integrity divorce and co-parenting, and offering life-coaching scholarships to those in need.

This makes me smile: My big white furry stepdog Lily rolling over on her back with her feet splayed up in the air.

An item I will never throw out is my wood-carved Masai warrior that I bought for 10 cents from some Masai kids in Kenya. It has lived with me in every residence since 1987.

My motto is: You are not what has happened to you. You are what you choose to become.

My dream trip would be a year-long, open-ended return ticket, starting in Morocco; ending, nobody knows!

If I had a time machine, I would visit my dad who died nine years ago.

If I could pick a superpower, it would be absolute insight into the truth of human nature.

My favorite band/musical artist is Michael Franti—he offers accessible family-friendly messages of hope and social commentary.

My favorite visual artist is Sam Trout—a local artist who bridges many styles to create something unique. Or Gaudi—his architecture is stunning.

My first car was a 1978 Monte Carlo—OK, it was the family car, but I usurped it. And it was FAST. (Refer back to adolescence in Staten Island.)

My hero is my oldest brother—the most competent, capable, humble, balanced human I know.

I have been telling others not to miss: the movie 13th.
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