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Beyond the Bar Number: Allison Foreman
BY WSBA MEMBERS & STAFF
I saw an Agnes Martin painting in person for the first time last month at the Columbus Museum of Art in Ohio. My sisters were with me, and from afar we joked that it was “a painting of nothing.” Up close, however, the painting—entitled “Wind”—is full of detail. Large and square—nearly 6 feet by 6 feet—“Wind” consists of faint pencil rectangles on a pale yellowish canvas. It’s calming. It makes you want to take a deep breath and be quiet for a while.

I became fascinated with Martin’s work after listening to an episode of “The Great Women Artists Podcast” in which Katy Hessel interviews the director of Tate Modern, Frances Morris. After that, I found the book Agnes Martin: Her Life and Art by Nancy Princenthal. The book depicts an intriguing life of contradictions—solitude and deep friendship, privacy and ambition. Martin is a giant in the world of abstract minimalist art, and although her work speaks for itself, knowing more about her life can inform her work in beautiful ways. I recommend Agnes Martin to new and longtime art lovers and to anyone who appreciates a good minimalist “painting of nothing.”

For more book recommendations, find a handful of WSBA member suggestions on page 34. There are books on law, business, and social justice, and genres ranging from science fiction to poetry. There’s also a bonus section of books written by WSBA members, recommended by WSBA members.

Also in this issue: a recap of the 2021 legislative session (page 30); an article about LASR, a group of Pierce County lawyers fighting against systemic racism (page 42); tips for counseling a client on whether to file an appeal (page 38); a new and improved Beyond the Bar Number complete with an illustration of the member featured (page 64); and more. (If you’d like to fill out a Beyond the Bar Number questionnaire and see your face illustrated on the page, email wabarnews@wsba.org.)
He helped us find our son’s calling. It was as plain as the nose on his dog’s face.

I was worried my son lacked direction. Doug said he just needed to find his passion and suggested we all three meet for lunch at an outdoor café and chat. My son brought his rescue dog Max. Doug had brought a dog biscuit for Max and when he saw how well trained Max was, he recognized my son’s true passion: working with rescue dogs. Doug connected him with a local rescue organization. A few years and my son is running the whole outfit. Doug saw something bigger in my son because he was paying attention to the little things.

— Ashley, Los Angeles
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LET US HEAR FROM YOU!

We welcome letters to the editor on issues presented in the magazine. The full letters to the editor policy is available at www.wsba.org/news-events/Bar-News. Email letters to wabarnews@wsba.org.

Inspiring Words

Kudos to Hon. Lisa H. Mansfield for her interview of Washington Supreme Court Chief Justice Steven González (“Working Toward a Just Court,” June 2021 Bar News). After 50-plus years of practice, I still find myself inspired by the contributions and work of incredible individuals such as these two attorneys.

Jerry Coe
Seattle

Leave Policy to Politicians

I read the cover article on Chief Justice González. The chief justice stresses promoting “minority” groups in the court system, as opposed to promoting people according to merit. Group-against-group policies hurt all of us, including minorities, and they violate equal protection constitutional provisions and anti-discrimination statutes. A bigger issue is that policy is not a judge’s job. A judge’s job is to decide cases in accordance with the laws and cases quickly and fairly and accurately. Precedent helps by giving us a stable view of the law. Judges enforce the will of the people acting through the Legislature: democracy.

Judges also have the job of complying with the constitution and enforcing them. Federal laws and the Constitution are the supreme law of the land, article VI, § 2; so it is odd that [Chief Justice] González believes the state Supreme Court does not have to enforce federal immigration law. I noticed that the interviewer and Chief Justice González don’t discuss defending the Constitution until the end of the interview, when the chief justice merely encouraged lawyers to be active in the bar association and defend more than just their own “group”? The bar association as a political agency has no corner on constitutional wisdom.

Judges wield a great deal of power and some of them wield it badly and on others it must be a heavy burden. They are human and individual like all of us. The artwork in the article makes [Chief] Justice González look saintly, which I believe is inappropriate for any judge.

Roger Ley
Portland, OR

NOTE: The WSBA is not a political agency. The WSBA operates under the delegated authority of the Washington Supreme Court to license and regulate lawyers and other legal professionals and to serve its members as a professional association. For more on what the WSBA does, visit www.wsba.org/about-wsba/who-we-are.

Washington State Bar News Submission Guidelines

Washington State Bar News relies on submissions from WSBA members and members of the public that are of interest to readers. Articles should not have been submitted to any other publications and become the property of the WSBA. Articles typically run 1,000–2,500 words. Citations should be incorporated into the body of the article and be minimal. Please include a brief author’s biography, with contact info, at the end of the article. High-resolution graphics and photographs (preferably 1 MB in size) are requested. Authors should provide a high-resolution digital photo of themselves with their submission. Send articles to wabarnews@wsba.org. The editor reserves the right to edit articles as deemed appropriate. The editorial team may work with the writer, and the editor may provide additional proofs to the author for review.

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The Golden Rule of Rule-Making: Your Input is Welcome and Important

Should bias-mitigation CLEs be mandatory for legal professionals? What about malpractice insurance? In this new day and age of technology, what are appropriate parameters for lawyer advertising? What should be done to lower the escalating cost of civil litigation? How do we shape a cohesive, effective discipline system for all legal license types?

These questions are not rhetorical. They represent just a small slice of the topics about which the Washington Supreme Court has actively solicited feedback recently as part of its rule-making process. They also illustrate the potential for court rule changes to significantly affect the way you practice law. For this reason, my appeal to you is simple: We invite you to actively engage in the rule-making process. The WSBA has made it a priority to notify members—in the “Need to Know” section of Bar News, through TakeNote e-newsletters that go out to all active members, and on our website—when a significant proposed rule or amendment to existing rule is published for comment. You can also sign up for direct notifications at www.courts.wa.gov/notifications/.

My colleagues and I often receive questions about the somewhat murky world of creating and changing the court rules, as well as the particular role the state Bar plays in the process. So let’s start with Rule-Making 101. General Rule (GR) 9\(^2\) is the primary source of law governing amendments to the Washington State Court Rules—which rules encompass governance and operation of appellate courts, courts of limited jurisdiction, and superior courts, as well as professional conduct and admission/practice for legal practitioners, among other areas. GR 9 itself states the purposes of the rule-making process, which is to ensure that:

\begin{itemize}
  \item There is an orderly and uniform process;
  \item All interested persons and groups receive notice and an opportunity to comment;
  \item There is adequate notice of new and revised rules;
  \item Proposed rules are necessary statewide;
  \item The frequency of change is limited so there is minimal disruption to court practice;
  \item The rules of court are clear and definite.
\end{itemize}

(Note: an amendment is a “suggested rule” when submitted by a person/entity; it becomes a “proposed rule” when published for comment by the Supreme Court.)

WSBA AS AN ADMINISTRATOR

Perhaps the least well-known rule-making principle is that any person may initiate a rule change by submitting a suggested rule to the court. A common source of origin is when an entity with an ongoing interest in a particular rule set—such as a court-created commission or board, a specialty bar association, or a superior court clerk’s office—proactively monitors rules for needed updates. WSBA committees and boards often play this role. As an example, the Committee on Professional Ethics routinely screens the Rules of Professional Conduct (RPCs) and recommends amendments as laws and society change. Many times, the entity and/or the WSBA Board of Governors will include member feedback as part of the review process before sending a suggested rule to the court.

There is one entity, the WSBA Court Rules and Procedures Committee, with a primary responsibility to review designated rule sets on a four-year cycle.\(^3\) In addition to the work of this committee, the WSBA, at least in theory, consults with the

Please take the opportunity to engage with amendments to court rules because your voice matters, the rules affect your daily work, and the Washington Supreme Court is listening.
The Washington State Bar Association (WSBA) has been involved in various aspects of the regulation of the practice of law, including the development of mandatory malpractice insurance for lawyers. In 2017, the WSBA Board of Governors formed a multi-year task force chartered to comprehensively study the idea of mandatory malpractice insurance for lawyers. In 2020, as an alternative, the Board of Governors submitted a suggested rule amendment to the Washington State Court Rules for public comment. WSBA-originated drafting generally occurs when the Board of Governors identifies a troublesome trend (e.g., escalating cost of civil litigation) that might be remedied by amending court rules, and then forms a task force to study the issue.

As an example of the many twists and turns a WSBA-originated rule can take, consider recent activity regarding the idea of mandatory malpractice insurance for lawyers. In 2017, the WSBA Board of Governors formed a multi-year task force chartered to comprehensively study the issue and present a recommendation. Ultimately, the Board of Governors was persuaded, in large part by hundreds of comments from members, that the task force's concept—to require under the Admission and Practice Rules (APR) certification of malpractice insurance coverage for most private-practice lawyers—was not the right solution for the problem at hand. Instead, in September 2020, as an alternative, the Board of Governors submitted a suggested RPC amendment that would require most lawyers in private practice to affirmatively disclose to clients if they do not carry malpractice insurance. Meanwhile, an individual who had provided passionate comments to the task force in favor of mandatory malpractice insurance took the task force's draft APR amendment—the one declined by the WSBA Board of Governors—and submitted it directly to the court, which published it for public comment under GR 9. At one point, both proposed rules were simultaneously open for public comment, with the WSBA serving as the proponent of one and a commenter on the other. (The WSBA submitted a comment in opposition to the APR amendment.) Over the course of a years-long process, WSBA members had the opportunity to weigh in with the task force, the Board of Governors, and directly to the court.

What happened? The Court in June adopted the amendment proposed by the Board of Governors, which amends RPC 1.4 to require disclosure of a lawyer’s malpractice insurance status to clients if the lawyer’s insurance does not meet minimum levels; and there is no doubt that voices of the WSBA members made a difference in the development of the amendment.

THE BOTTOM LINE: THE COURT’S PROCESS PROVIDES AN OPPORTUNITY FOR YOUR FEEDBACK

Last June, Washington Supreme Court Justice Mary Yu spoke with the Board of Governors on the topic of regulatory rule-making, and specifically on the development of disciplinary procedural rules. It is her wisdom that I hope you take away from this column: When someone learns about a proposed rule amendment and expresses their views to the court in the form of public comment, the system is working exactly as it should. In many circumstances, the entity suggesting a rule change—including the WSBA—conducts its own outreach before drafting and submitting a rule change as its proponent, but in all instances the public comment process established by GR 9 and followed by the court is available to all interested individuals and organizations.

WSBA AS A NOTIFIER

Here, at last, is the most consistent and important role for the WSBA and its leaders in the court’s rule-making process: To broadly notify members when significant amendments are published for comment. In the case of the current discipline and incapacity rule amendments, the Board of Governors heard from several concerned members; rather than taking a position on the substance of the rules, Board members asked the court to extend the comment period deadline by 90 days. The court agreed, and it is now a top priority to notify members (you!) that input is due by July 29.

So in this particular instance and in general, I want to reiterate: Please take the opportunity to engage with amendments to court rules because your voice matters, the rules affect your daily work, and the Washington Supreme Court is listening. It is easy to sign up for direct notifications, and it is worth your time and effort to monitor potential changes to the foundational rules that govern court administration and procedure and the regulation of the practice of law.

NOTES

1. On June 4, the Washington Supreme Court adopted the suggested amendment to APR 11 that will require licensed legal professionals to earn one MCLE ethics credit in the category of equity, inclusion, and the mitigation of bias. 2. www.courts.wa.gov/court_rules/pdf/GR/GR_09_00_00.pdf. 3. www.courts.wa.gov/court_rules/?fa=court_rules.gr9summary. 4. The June 2020 Board of Governors meeting is available at www.wsba.org/about-wsba/who-we-are/board-of-governors. Click “Watch Video of Past Meetings” and then click “Channels” and scroll down. 5. www.courts.wa.gov/court_rules/?fa=court_rules.proposed.
President’s Corner

A New House for Our Home?

In the April/May issue of Bar News, I wrote of “A Home of Our Own,” and the response has been fascinating: Members have told me they like the idea of purchasing a building the WSBA would own, or lease from the Washington State Bar Foundation, just as it was envisioned nearly 70 years ago. In my article, I suggested a permanent space might offer flexible and innovative solutions for members, such as conference rooms and office hoteling to support legal professionals who are choosing in growing numbers to work from home on a regular basis. I also mentioned a House of Delegates.

The idea of creating a House of Delegates for the WSBA has intrigued me for years. Other bar associations and professional organizations have them, variously titled Council or Assembly of Delegates, but always with the same purpose: to help the governing body consider and implement important policy decisions with a more informed perspective. The Washington State Medical Association (WSMA) is governed by a Board of Trustees that carries out the mandates and policies of its 200-member House of Delegates. For example, the WSMA House of Delegates comprises elected delegates from each county medical society and qualified state specialty societies, as well as members of the WSMA board of trustees. There is one resident delegate, one student delegate, and one young physician delegate. Each county society has one delegate for every 50 active WSMA members, and each medical specialty society is entitled to elect or appoint one delegate and one alternate under certain circumstances.

When I began my year as WSBA president, my plan had been to gather our Board of Governors with the Oregon Board of Governors and the Idaho Board of Commissioners to discuss legal issues that confront the legal profession throughout the Pacific Northwest. I had in mind mandatory malpractice insurance, the issue of compelled bifurcation of the bar, the limited license legal technician initiative, and the APR Rule 6 law clerk program. While the pandemic has made that more difficult, I am still hopeful we can meet soon and discuss policymaking among the three states and learn from each other’s successes and failures. One of those successes is Oregon’s House of Delegates.

Oregon’s model began nearly 30 years ago when the Board of Governors submitted the idea to a vote of the membership in 1992. A favorable vote of the members was followed by passage of legislation in 1995 to create the House of Delegates, which now consists of approximately 240 elected delegates and ex-officio delegates who come from around the state, including:

- Nineteen members of the Board of Governors;
- The chair or designated alternate of each state bar section (41 members);
- The president of each county bar association (24 members);
- Delegates elected from each of the seven in-state regions and from the region consisting of all areas outside the state of Oregon (146 members); and
- One public member from each in-state region appointed by the Board of Governors (eight members).

By a majority vote, the Oregon House of Delegates is authorized to direct the Board of Governors to take action or modify or rescind a decision of the Board of Governors. The Board is bound by decisions of the House of Delegates pursuant to state law. Historically, the House of Delegates has been involved in deciding disciplinary rule changes, bar positions on major legislative and policy issues, member resolutions, and fee increases. The president of the Oregon State Bar presides over the meeting with the help of a parliamentarian. The president may call a special meeting of the House or the delegates may call their own meeting if the requisite number of delegates makes such a request.

Integrated and voluntary bar associations across the country are using similar delegate models to include

Would our own state Bar benefit from the creation of a House of Delegates? It’s an intriguing possibility, with two separate considerations for our members: the concept itself and the logistics.
and empower member voices to make important policy decisions:

• The Louisiana State Bar Association’s House of Delegates, created in 1957, is currently deciding whether to create a committee to investigate group health insurance for its members and to adopt a uniform electronic filing platform for all Louisiana state courts.

• The Nebraska State Bar Association’s House of Delegates recently approved important changes to that state’s fee arbitration rules and section bylaws, and it voted not to adopt a policy related to volunteer lawyers appearing as amicus curiae in landlord/tenant disputes.

• The Indiana State Bar Association’s House of Delegates helped formulate a discussion between its membership and the courts to elicit and improve on lessons learned from the COVID-19 pandemic, including remote and virtual processes that will continue into the future.

• In January, the Tennessee Bar Association’s House of Delegates considered proposals brought by the Nashville Bar Association and CLE Commission to modify rules to support more diversity topics and a one-hour-per-year diversity training requirement.

• The South Carolina Bar’s House of Delegates in May 2019 encouraged the South Carolina Supreme Court to expand the number of states with which out-of-state bar members can meet the continuing legal education requirements for South Carolina by meeting the requirements for the states where they reside and practice law. The delegates also approved changes to the Rules of Professional Conduct relating to the special responsibilities of a prosecutor that impose a duty on prosecutors to disclose evidence discovered post-conviction that indicates that the person who was convicted is innocent, undertake an investigation, and seek to remedy the conviction.

Would our own state Bar benefit from the creation of a House of Delegates?

It’s an intriguing possibility, with two separate considerations for our members: the concept itself and the logistics. As for the latter, space is our primary challenge at the moment. Our current office space configuration, location, and parking facilities would make it difficult, if not impossible, to regularly host hundreds of members and the staff necessary to facilitate such a meeting. While virtual meetings are an option, they come with their own challenges when it comes to voting and orderly debate; and I think we lose something when we only gather by electronic means. In Oregon, the Bar planned for the use of a large conference room to host such gatherings when it designed the Oregon State Bar Conference Center, south of Portland in Tigard.

Assuming the WSBA can overcome its own logistics challenge with a similar solution, which would be a more hospitable solution for an assembly of legal professionals from across the state, the questions then become clear: Would the WSBA benefit from the creation of a House of Delegates that would assist the Board of Governors in the policymaking and governance of the WSBA? Should the WSBA look for a home that would allow the House of Delegates to gather and deliberate the important issues of the day? Could a House of Delegates provide the WSBA with input, ideas, policies, procedures, and oversight from the four corners of the state and expand our state Bar to be more inclusive of our many points of view and experiences?

It’s an intriguing idea and something I believe the WSBA should consider. 

THOUGHTS TO SHARE?

President Sciuchetti appreciates hearing from you. Please send your comments to kyle.s@board.wsba.org.
A Positive Reforecast and Looking to 2022

We are well and truly into the height of summer, and because financial tomes do not generally rank high on lists of riveting beach reads (unless, of course, you are the WSBA treasurer), I want to provide just a few quick fiscal updates.

Foremost, we are in the midst of planning the fiscal year 2022 budget, which covers October 1, 2021, through September 30, 2022. You can expect more information as the Budget and Audit Committee prepares a draft to go before the Board of Governors for a first reading later this summer and before a final version comes back for action in September. License fees for the coming year will remain steady—in line with one of our top priorities to not increase lawyer license fees—and, therefore, our focus is on continued and additional operating efficiencies and maintaining appropriate reserve levels. We are also looking beyond the coming year, as the Board of Governors develops long-range strategic goals that will have a financial impact.

A few actions to note from the Board of Governors meeting in May: We selected audit firm Clark Nuber to perform the next five cycles of annual audits and we agreed to transfer $500,000 from the general reserve fund to the restricted facilities fund. Clark Nuber is our current auditing partner and has served us well for many years; looking forward, Clark Nuber put together the most competitive and comprehensive proposal to continue to do the work. As for the facilities fund, the Board of Governors agreed it would be wise to build that pot of money to allow us to be flexible (buy space? satellite offices across the state?) as the WSBA’s current lease of office space in downtown Seattle comes to an end in 2026.

FINANCIAL STATEMENT

We have closed the books through April—more than halfway through the fiscal year, which runs October through September—with a net increase to the unrestricted General Fund of $1,643,575. Our original FY 2021 budget called for $202,782 in reserve spending by year’s end, which means we are actually at a $1,846,357 YTD positive variance from that projection. We will have several expenses in the remaining months which we anticipate will lower the overall ending fund balance for FY 2021, but we will continue to monitor this and update you accordingly.

As always, it is my honor to serve as treasurer. On a personal note, I was elected by the Board of Governors in May as incoming president-elect. As I transition to that new officer role in October, I will continue to champion transparency, efficiency, and service to members and the public. I look forward to working with our new treasurer during the FY 2022 year!

SAVE THE DATE

You are invited to participate in the Budget and Audit Committee meetings as we do the work. Our upcoming meetings are 1-5 p.m. on July 7 and Aug. 11, accessible via Zoom. You can find the complete schedule and access information at www.wsba.org.

Treasurer’s Report

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.

The WSBA invites you to lunch and learn while earning 1.5 CLE credits. And the tab is on us! The WSBA hosts a 90-minute, live webcast CLE at noon on the last Tuesday of each month.

For more information and to register, please visit www.wsbcle.org.
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Deed of Trust: Lawyer as Escrow

BY MARK J. FUCILE

Lawyers acting as escrows is nothing new. Reported decisions in Washington involving lawyers as escrows stretch back to the 1800s. While a time-honored role, serving as an escrow can create significant risks for a lawyer and the lawyer’s law firm. Because serving as an escrow has long been an adjunct function of law practice, lawyers may not fully appreciate the contemporary risks that have developed over time. In this column, we’ll look at three: conflicts, claims and related insurance coverage, and trust account issues.

Before we do, three qualifiers are in order.

First, in this column we’ll focus on settings in which a lawyer is acting as an escrow in connection with a business or real estate transaction rather than situations in which a litigator is simply processing a settlement through the lawyer’s trust account. RPC 1.15A addresses safeguarding property generally and RPC 1.15A(g) outlines the duties of a lawyer holding funds in trust in which more than one person has a claim. Both merit close review by litigators holding third-party funds.

Second, we’ll focus on lawyers acting as an escrow incidental to their law practices rather than those who may own an escrow service outright. RPC 5.7 discusses “law-related services” and sets out criteria for determining whether the RPCs apply to businesses owned or controlled by a lawyer that are affiliated with the lawyer’s law practice. Lawyers who are operating an escrow service—whether in their own office or separately—should carefully review RPC 5.7 because, depending on the circumstances, all of the RPCs may apply.

Third, we’ll focus on the duties of lawyers rather than limited practice officers authorized to handle real estate closings...
under Admission and Practice Rule 12.\(^7\)

**CONFLICTS**

Conflicts can arise either when a lawyer is serving solely as an escrow or when the lawyer-escrow is also legal counsel to one of the parties in the transaction involved.

**Escrow Only.** A lawyer may be retained solely as an escrow without representing any of the parties as legal counsel. Prudent risk-management practice suggests confirming this limited role in writing so that the parties will not mistakenly believe the lawyer is also representing them as legal counsel.\(^8\) Absent such written confirmation (and conduct consistent with the writing), courts have sometimes found that the lawyer was representing all parties jointly on the closing as legal counsel.\(^9\) In that event, the line between a permitted common representation relating solely to the closing and a nonwaivable conflict arising from negotiating between commonly represented clients is perilously thin—particularly if the escrow services include preparing rather than simply recording documentation of the transaction involved.\(^10\)

Even when a law firm is only providing escrow services, the Washington Supreme Court, in *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 589–90, 675 P.2d 193 (1983),\(^11\) has noted that because the lawyer must act impartially as an escrow, a lawyer-escrow has a corresponding duty to inform the parties to consider obtaining independent counsel to advise them regarding their individual interests in the transaction involved:

> [A]n attorney acting as an escrow agent has a duty to inform the parties to the real estate closing of the advisability of obtaining independent counsel. This duty to inform, which extends equally to both parties to the closing, in no way conflicts with the attorney escrow agent’s duty of impartiality. *Id.* at 590.\(^12\)

**Escrow and Lawyer.** The potential for conflicts sharpens considerably when the lawyer-escrow is also representing one of the parties to the transaction. The *Bowers* court also discussed this scenario and noted that the lawyer’s duty of impartiality as an escrow may come into conflict with representation of the lawyer’s client. Although *Bowers* was decided under the former Code of Professional Responsibility, conflicts arising from potential material limitations on a lawyer’s professional judgment from competing duties to clients and nonclients are now found in RPC 1.7(a)(2):

> [A] lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

> . . .

> (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

\(^{17}\) Photo © Getty / Image Pixel

Mark J. Fucile of Fucile & Reising LLP handles professional responsibility, regulatory, and attorney-client privilege matters, and law-firm-related litigation for lawyers, law firms, and legal departments throughout the Northwest. He is a former chair of the WSBA Committee on Professional Ethics. He is the editor-in-chief of the WSBA Legal Ethics Deskbook and a co-editor of the WSBA *Law of Lawyering in Washington* and the OSB *Ethical Oregon Lawyer*. He can be reached at 503-224-4895 and mark@frllp.com.
Conflicts under RPC 1.7(a)(2) are generally waivable. For example, the simple fact that a lawyer-escrow in this situation must disburse funds consistent with written instructions negotiated with a counterparty would ordinarily be a conflict waivable by the lawyer’s client. As we’ll discuss in the next section, however, the duties of impartiality and safekeeping of property running toward a counterparty have been held to be fiduciary. Therefore, a very real conflict could emerge if, for example, a client demanded that a lawyer ignore agreed escrow instructions and disburse funds solely to the client’s benefit. In that instance, the conflict would likely be nonwaivable.

### CLAIMS AND COVERAGE

Unsurprisingly, a lawyer-escrow who commits an error in legal services provided in connection with a transaction may be held liable for legal malpractice. Equally unsurprisingly, a lawyer-escrow who commits an error as an escrow may also be held liable for negligence. Because lawyer-escrows also owe fiduciary duties to nonclients to whom they are serving as escrow, lawyer-escrows are also at risk of claims for breach of fiduciary duty if they, for example, improperly disburse funds to the detriment of a nonclient. Other common law and statutory claims may follow for deficient performance as an escrow.

Claims relating to escrow services provided in conjunction with law practice may—or may not—be covered by a lawyer-escrow’s legal malpractice policy. Coverage under such policies typically turns on the definition of “professional services” and any related exclusions. Therefore, lawyers providing escrow services along with their law practices should carefully review their malpractice policies. Depending on the services provided and their policy, lawyer-escrows may find that they need a special rider or separate policy to cover that facet of their practice.

### TRUST ACCOUNTS

RPC 1.15A(a)(2) generally requires that “escrow and other funds held by a lawyer incident to the closing of any real estate or personal property transaction” be deposited into the lawyer’s trust account. Comment 3 to RPC 1.15A reinforces this point by specifically noting lawyer-escrows as falling within the rule. Serving as an escrow in conjunction with a law practice, therefore, means that the lawyer is subject to the exacting standards and meticulous record-keeping requirements of RPCs 1.15A and 1.15B. Failure to follow the trust account rules in this regard puts the lawyer at risk of regulatory discipline.

### NOTES

1. Black’s Law Dictionary (11th ed. 2019) generally defines the escrow function as holding a legal document or property “delivered by a promisor ... for a given amount of time or until the occurrence of a condition, at which time ... [the holder] ... is to hand over the document or property to the promisee.” As Black’s also notes, the person or entity serving as the neutral holder is commonly referred to as “an escrow.”


5. See generally RCW Ch. 18.44 (Escrow Agent Registration Act), RCW 18.44.021(1)(b) exempts lawyers from the Act if escrow transactions are performed by a lawyer while engaged in the practice of law and using a law firm trust account.

6. See generally Mark J. Fucile, “Doing Business:


20. See, e.g., ALPS Property & Cas. Ins. Co. v. Farthing, 2018 WL 4927366 at *4-*9 (E.D. Va. Sept. 26, 2018) (unpublished) (examining definition of “professional services” and exclusion for trust account activities in declaratory judgment proceeding over scope of coverage under legal malpractice policy); St. Paul Fire & Marine Ins. Co. v. Llorente, 156 So. 3d 511 (Fla. App. 2014) (concluding that error in escrow services provided by attorney was not covered under malpractice policy).

21. The Oregon State Bar Professional Liability Fund plan, which is publicly available on its website at www.osbplf.org, for example, includes a specific exclusion for escrow services: “This Plan does not apply to any Claim arising from a Covered Party entering into an express or implied agreement with two or more parties to a transaction that, in order to facilitate the transaction, the Covered Party will hold documents, money, instruments, titles, or property of any kind until certain terms and conditions are satisfied, or a specified event occurs.” (OSB PLF 2021 Basic Plan, Exclusion 21 at 15.)

22. Under RPC 1.15A(j), a lawyer who prepares documents related to a closing of a real estate or personal property transaction where the funds involved are being held by a separate closing firm is required to “ensure” that the funds are held in a manner consistent with either RPC 1.15A or LPO RPC 1.12A (which incorporates similar standards). RPC 1.15A(j) excludes situations where the lawyer has a preexisting attorney-client relationship with a client buyer or seller concerned and does not have an attorney-client relationship with the closing firm or LPO involved. Comment 17 to RPC 1.15A(j) explains these elements further. WSBA Advisory Op. 2158 (2007) addresses separate issues surrounding funds held solely in a fiduciary—rather than representational—capacity.

23. See, e.g., In re Oh, 176 Wn.2d 245, 290 P.3d 963 (2012) (lawyer with both escrow and law practices disciplined for trust account violations).

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Client Centrism: The Next Wave of Legal Innovation

BY TERESA MATICH

We’ve reached a turning point in legal technology. More and more, the role of technology in the future of the legal industry lies in its potential to improve the client experience. And in many cases, we’re not waiting for an exciting new tool, feature, or innovation to enable us to serve our clients better. We already have the technology; we simply need to adopt it and incrementally improve the way we use it.

Over the past five years, the main themes from Clio’s “top technology trends to watch for” survey have moved from blockchain and AI to empathy, easier experiences, and better client service. And that was before a global pandemic forced those hesitant to adopt technology to transition to online services in order to keep serving clients and stay in business.

The pandemic-pushed technologies we saw law firms start using en masse are nothing new: video conferencing software, voice-over IP phone services, and cloud-based document management software are all well-worn tools in industries outside of legal. What’s innovative isn’t the technology itself, but how lawyers are using it. A new process, a new focus, and a new goal can amplify the benefits of technology for both lawyers and their clients.

Take the results of Clio’s most recent Legal Trends Report, for example, which looked at aggregated and anonymized data from tens of thousands of legal professionals to compare how the use of three technology solutions within the Clio platform—online payments, client portals, and client intake and CRM (customer relationship management) software—affected business performance. Law firms studied who were using the technologies saw a comparatively better year-over-year performance throughout the pandemic. Through the summer of 2020, law firms that used electronic payments collected 2 to 3 percent more. Meanwhile, firms using client intake software in 2020 saw over 20 percent more cases every
month from February onward. Overall, firms using online credit card payments, client portals, and client intake solutions together were expected to collect $37,622 more revenue per lawyer in 2020 at the time of the report’s publication.

What’s the purpose of these technologies? To provide a better, smoother client experience.

According to the recent Clio report, 65 percent of consumers prefer to pay using electronic forms of payment. Providing this option means law firms are more likely to get paid faster and collect more, but crucially, it also means convenience for the client. Relatedly, 52 percent of consumers believe that most legal matters could easily be handled remotely without having to meet in person, while 26 percent say that lawyers who aren’t able to represent their clients remotely are not good lawyers. Even if we look well beyond the pandemic, remote representation would make a world of difference for clients who were previously forced to take time out of their workweeks to commute to a downtown office just to gain access to the legal system. The innovation here is a client-centered approach, enabled by technology, that leads to a better experience for the client and more efficiency at the back end of the firm.

Let’s talk in more depth about what it means to be a client-centered law firm—and what it doesn’t mean. Many firms believe that they’re client-centered, or at least that they have a focus on client service, because they do what they’ve always done. They continue to provide what the client has always expected from the legal experience—for example, without digging deeper to grasp what the client truly wants. What’s more important to legal consumers: the formality of case updates, or their frequency and simplicity? The answer to this question will depend on a given firm’s practice area and clients, but we’re betting that many clients would choose the latter.

As Clio co-founder and CEO Jack Newton explains in *The Client-Centered Law Firm,* being client-centered is about creating a good product-market fit. In other words, you need to get laser-focused on what it is that a client is truly looking for, while 65 percent of consumers prefer to pay using electronic forms of payment. Providing this option means law firms are more likely to get paid faster and collect more, but crucially, it also means convenience for the client. Relatedly, 52 percent of consumers believe that most legal matters could easily be handled remotely without having to meet in person, while 26 percent say that lawyers who aren’t able to represent their clients remotely are not good lawyers. Even if we look well beyond the pandemic, remote representation would make a world of difference for clients who were previously forced to take time out of their workweeks to commute to a downtown office just to gain access to the legal system. The innovation here is a client-centered approach, enabled by technology, that leads to a better experience for the client and more efficiency at the back end of the firm.

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As Clio co-founder and CEO Jack Newton explains in *The Client-Centered Law Firm,* being client-centered is about creating a good product-market fit. In other words, you need to get laser-focused on what it is that a client is truly looking for,
Innovation in Law
CONTINUED >

knowing what it is about your offerings that meet that need, and delivering that service to clients in a way that makes their entire legal experience as effortless as possible. There is not a single client who has ever wanted a lawyer—what clients want is a solution to a problem. They come to a lawyer because they expect the lawyer to solve that problem. Being client-centered doesn’t mean sacrificing firm efficiency or success either. In many cases, a focus on providing a better client experience will uncover plenty of opportunities for decreasing overhead, improving efficiency, and generally improving the day-to-day work of employees at the law firm. Technology is almost always a key factor here, but innovation is driven by improvements in process. Successful law firms strive to understand their clients’ needs well and to meet them with existing technologies.

Consider the billable hour. In some cases it may still make sense for clients to pay hourly, but in many cases the billable hour does not make sense for legal consumers. Using an alternative fee structure, such as flat fees (especially for routine legal needs) and providing price predictability offers more value and peace of mind to clients. This type of billing can be better for law firms, too, providing greater revenue predictability and helping to attract more clients.

So why do so many lawyers still use the billable hour? It might be due to years of industrywide inertia and hesitancy to change, the perceived simplicity of tracking time worked, or simply “we’ve always done it that way” habit. But the billable hour also might live on because it’s the most straightforward way to stay on the right side of keeping fees “reasonable,” as required by most state ethics rules. ABA Model Rule 1.5 prohibits fees that are unreasonable, but what counts as reasonable or unreasonable depends on a number of factors that must be evaluated on a case-by-case basis. Which raises another issue: Client-centrism is the wave of the future, but there are structural barriers making it more difficult for legal professionals to get there.

Our courts provide an example of a structural barrier. Systems are structured around what makes sense for lawyers, instead of what makes sense for clients. Pre-pandemic, it made sense for litigators to go to court every day during a trial; it’s part of the job. But for clients, this schedule means taking time off work and taking on additional stress just to get access to the legal system. We believe our judicial system is good at discerning the truth, and yet we can’t imagine a justice system without the live theatrics of a jury trial—and clients pay the price.

None of this is what most clients are really looking for, which are lower-cost legal solutions that require lower demands on their time.

The good news is we can do better, and many of us are already thinking this way, thanks to technology that’s long been available and has more recently been adopted by more and more legal professionals. This year’s Legal Trends Report found that 89 percent of legal professionals surveyed believe court systems can be improved with better access to technology, 88 percent of legal professionals believe that the public should be allowed to access court files electronically through an online portal, and 45 percent of legal professionals believe technology can help create a more equitable justice system. Many of us want change: We just need to continue adopting technology in private practices and in our courts so that we can leverage it to come up with creative, client-centered solutions.

We need to think beyond what’s good for our firm or for the legal industry and instead think about how to move forward with clients at the center. The gap between the service lawyers provide and client expectations is now narrower than ever thanks to the increased use of technology that became a necessity over the past year. If we can keep up this momentum, there’s a huge opportunity to improve the way clients engage with both their lawyers and the legal system, leading to happier clients and more profitable law firms.

NOTES
1. www.clio.com/blog/legal-technology-trends/
2. www.clio.com/resources/legal-trends/
4. www.abajournal.com/magazine/article/lets_be_reasonable
Serious Personal Injury
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FROM THE SPINDLE

Recent significant cases decided by the Washington Supreme Court

BY BRYAN HARNETIAUX

Validity of Washington Criminal Statute Imposing Strict Liability for Unlawful Possession of Controlled Substance

In *State v. Blake*, ___ Wn.2d ___ (slip op. #96873-0, decided Feb. 25, 2021, as amended April 20, 2021), the Supreme Court addressed whether defendant Blake was properly convicted of felony possession of a controlled substance under RCW 69.50.4013, without any *mens rea* requirement in the statute; that is, without proof the possession was knowing or intentional.

In *Blake*, Shannon Blake was charged with possession of methamphetamine found in a coin pocket of the jeans she was wearing. Blake contended at trial that a friend had given her the jeans shortly before her arrest and she was unaware there were drugs in the pocket. At trial, Blake un-successfully raised the affirmative defense of “unwitting possession” and she was found guilty. See *Blake*, slip op. at 3-4. The Court of Appeals affirmed, and the Supreme Court granted review. See *id.*, at 4-5.

Prior to *Blake*, on two occasions the Supreme Court upheld the validity of RCW 69.50.4013, concluding that the Legislature intended that drug possession be a strict liability crime under the statute. See *State v. Cleppe*, 96 Wn.2d 373 (1981); *State v. Bradshaw*, 152 Wn.2d 528 (2004); *Blake*, slip op. at 2-3. In *Cleppe*, the court avoided the harsh result of strict liability by creating a new affirmative defense of “unwitting possession,” allowing a defendant to avoid liability if he or she establishes unknowing possession by a preponderance of the evidence. See *Blake* slip op. at 19-20. The unwitting possession defense was reaffirmed in *Bradshaw*. See *Blake*, slip op. at 20. In neither *Cleppe* nor *Bradshaw* did the court reach the question of whether the strict liability nature of the crime offended due process under the federal or state constitutions. See *Blake*, slip op. at 6 n.4; see also U.S. Const. amend. XIV & Wash. Const. Art. I §3.

In *Blake*, a five-justice majority opinion authored by Justice Sheryl Gordon McCloud framed the constitutional question before the court as “whether unintentional, unknowing possession of a controlled substance is the sort of innocent, passive nonconduct that falls beyond the State’s police power to criminalize.” Slip op. at 14. It concluded that by imposing strict liability under the statute the Legislature had exceeded its police power under both the federal and state due process clauses. See *id.* at 1-2, 30-31. The majority found this constitutional issue properly reached because the court had previously interpreted the statute as imposing strict liability, and the Legislature had not thereafter amended the statute to impose a *mens rea* element. See *id.* at 24-27. The statute was declared unconstitutional because it improperly criminalizes unknowing and passive nonconduct that has an insufficient relationship with the objective of regulating possession of illegal drugs; the court-created unwitting possession defense does not serve to cure this constitutional deficiency. See *id.* at 19-21.

Justice Debra Stephens concurred with the majority in vacating Blake’s conviction, but disagreed with its reasoning. See Ste-
Application of Washington Law Against Discrimination 'Religious Employer' Exemption, and Related Federal and State Constitutional Analysis

Woods v. Seattle's Union Gospel Mission, ___ Wn.2d ___ (slip op. #96132-8, decided March 4, 2021), involves a sexual orientation discrimination claim by Matthew Woods against Seattle's Union Gospel Mission (SUGM), under the Washington Law Against Discrimination (WLAD), Ch. 49.60 RCW. See Woods, slip op. at 1-4. On motion for summary judgment of dismissal, SUGM successfully argued that, as a not-for-profit religious organization, it is exempt from the definition of employer under the WLAD, pursuant to RCW 49.60.040(11). See Woods, slip op. at 2. On review in the Supreme Court, SUGM argued that dismissal should be affirmed on the grounds that religious freedom safeguards in state and federal constitutions entitle it to dismissal under the “ministerial exception,” contending the staff attorney position in question included a religious component. See id. at 2-4; see also Our Lady of Guadalupe School v. Morrissey-Berru, 207 L. Ed. 2d 870 (2020).

In this new unanimous opinion, the court expressly repudiated its 1916 opinion in State v. Towessnute as ‘an example of racial injustice.’

Bryan Harnetiaux is a 1973 graduate of Gonzaga University School of Law and practices in Spokane. He is also a playwright. He can be reached at bryanpharnetiauxwsba@gmail.com.

In 1915, Alec Towessnute, a Yakama tribal member, was charged in Benton County Superior Court with multiple Washington state fishing crimes occurring outside the boundaries of the Yakama Nation reservation. He was convicted under the federal law interpreting the First Amendment analysis; Washington Const. Art. I §11 (“religious freedom” provision). In turn, Woods argued below and on review that: (1) the WLAD limitation for nonprofit religious organizations is an unconstitutional privilege or immunity under Wash. Const. Art I §12, and (2) SUGM cannot invoke the ministerial exception for the staff attorney position. See Woods, slip op. at 2-3. In three separate opinions, spanning 62 pages, the Supreme Court wrestled with issues of considerable complexity. TheSynopsis below is only a superficial treatment of the court’s work. (If this looks like a disclaimer, it is.)

A six-justice majority opinion authored by Justice Barbara Madsen reversed the superior court dismissal of Woods’ WLAD claim, and remanded for determination of whether the underlying facts support application of the ministerial exception under federal case law interpreting the First Amendment. See Woods, slip op. at 3, 21. In so doing, the majority rejected a facial challenge to RCW 49.60.040(11), under the Wash. Const. Art. I §12 privileges and immunities clause, reading the WLAD exemption as essentially coextensive with the ministerial exception developed under case law, and agreed with the majority’s remand to determine whether application of the exception is defensible under the particular facts. See Yu, J., concurrence, slip op. at 2. Justice Yu engaged in an extensive analysis of the factors relevant to determining whether the ministerial exception should apply in any given case. See id. at 4-9.

A two-justice dissent/concurrence by Justice Stephens would hold that the RCW 49.60.040(11) exemption categorically violates Wash. Const. Art. I §12, because there are no reasonable grounds for excusing religious nonprofits from the WLAD prohibition against discrimination in employment. See Stephens, dissenting in part, concurrence, slip op. at 1-3. Justice Stephens criticized the majority opinion for failure to address this threshold constitutional claim. See id. at 8-20. Nonetheless, Justice Stephens concurred with the majority’s remand of the case for determination of whether SUGM is entitled to protection under the federal or state ministerial exception. See id. at 3, 20-22. The opinion also rejected other SUGM arguments asserted under federal and state religious free exercise provisions. See id. at 22-30.

Washington Supreme Court Repudiates and Vacates 1916 Opinion in State v. Towessnute

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1. Justice Yu also signed the majority opinion. See Woods, majority slip op. at 22. Chief Justice Gonzales joined in Justice Yu’s concurrence, but did not join the majority opinion. See id.; Yu, J., concurrence slip op. at 9.

2. Justice Yu warns religious institutions that “today’s decision bars redefining every aspect of work life as ‘ministerial.’” Yu, J., concurrence slip op. at 3. The majority opinion endorses Justice Yu’s discussion of the ministerial exception factors as “helpful” in resolving application of the exception. Woods, majority opinion slip op. at 20.

3. The Legislature authorized application for this type of extraordinary relief in RCW 9.96.060(4), which allows for vacation of sentences imposed in violation of the exercise of a “treaty Indian fishing right,” even if the person involved is deceased.

Towessnute argued that the state was without jurisdiction to charge him because his right to fish in the area was unquestionably protected by a treaty with the United States government that preserved his right to fish in the usual and accustomed waters of the Yakama tribe, and to do so in the usual and accustomed manner. While the superior court agreed and dismissed the charges, the Washington Supreme Court reversed and remanded for trial. See State v. Towessnute, 89 Wash. 478 (1916).

Almost a century later, beginning in 2015, descendants of Alec Towessnute, supported by the Washington State Office of the Attorney General, sought relief in state court, urging that the 1916 opinion of the Supreme Court constituted an injustice against Towessnute and the Yakama Nation. Recently, in State v. Towessnute, ___ Wn.2d ___ (slip op. #13083-3, April 26, 2021), the Supreme Court redesignated its July 10, 2020, unanimous order in the case, vacating the 1916 opinion, as a formal opinion of the court to be published in the Washington Reports. In this new opinion, the court expressly repudiated its 1916 opinion as “an example of racial injustice.” Towessnute, slip op. at 3. The court also condemned the 1916 opinion’s skewed analysis of the nature of treaties, federalism, and dual sovereignty. See id. at 3-4. The court concluded: “We cannot forget our own history, and we cannot change it. We can, however, forge a new path forward, committing to justice as we do so.” Id. at 4.
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**Section Spotlight**

**Criminal Law Section**

BY JOSEPHINE TOWNSEND

Q. What is the most valuable benefit members get from joining your Section that they can’t get anywhere else?

We are the only joint collaborative Section with prosecutors and defense counsel. You can get both perspectives by joining our Section. We offer free and reduced price CLEs to Section members. Our annual CLE, the Criminal Justice Institute, is a wonderful, collaborative experience.

Q. What is a recent Section accomplishment or current project that you are excited about?

We are putting together a joint CLE on police reform initiatives and the effects on both defense and prosecution after the landmark Blake decision.

Q. What opportunities does your Section provide for members who are looking for a mentor or for somebody to mentor?

We often get requests from new lawyers for referrals to more experienced lawyers in their area that can give advice on trial practice, brief writing, and negotiation.

Q. What advice do you have for building a successful practice in the area of law related to your Section and how does membership in your Section help do that?

Be professional. Put deposits in the relationship banks. Have and develop rapport with colleagues and opposing counsel—play the long game.

Prosecutors and defense attorneys are warriors; they will see each other in trial, in courtrooms, and in public, and they must respect each other and the role that they each play. It is about justice for the individual and not just “winning.”

Whether you are a prosecutor or a defense attorney, the way to be successful is to work hard, be prepared, be respectful, and do the best you can for the client or the public that you serve, without being dismissive, disdainful, or unprepared.

Our Section exemplifies that both sides can collaborate on important issues that provide relief for victims and fairness for the accused. We do not always agree—but we always listen respectfully and we ensure that each side is heard.

Q. In addition to membership in your Section, what are the best ways to stay up on the developing law in this practice area?

Read, read, and read—court decisions, treatises, the Criminal Case Law Notebook by King County Superior Court Judge Ronald Kessler that he faithfully updates semi-annually and distributes free of charge.

Join professional organizations like the Washington Association of Prosecuting Attorneys; Washington Defender Association; Washington Association of Criminal Defense Lawyers; your local bar association; and, of course, our Section. Attend the Criminal Justice Institute, or better yet, volunteer to teach a class. Talk to colleagues and watch their trials.

Order the trials from the local courts and watch experienced lawyers and how they perform. Become a mentor if you are an experienced lawyer and ask for help if you are a new lawyer. So many times we see new lawyers just thrown into the thick of it, without guidance or experience. If you see it, help them! It does not matter that they do not work with you, or for you—they want to succeed, just like you do.

We can make them love the profession the way we do if we just lend them our experience and our friendship!

Josephine Townsend is the owner of Townsend Law, PLLC. Her experience includes being an administrative law judge, guardian ad litem, and active trial litigator in criminal and civil cases. She is a former prosecutor for the city of Vancouver with over 20 years of supervisory experience including the oversight of criminal attorneys assigned to a heavy trial caseload. She retired from the New York State Police with 20 years of service and has exercised command and control of police officers during critical incidents including service at ground zero on 9/11. She is an adjunct professor for Warner Pacific College and a veteran of foreign war, having served her country in the war in Bosnia. Townsend is also a volunteer lawyer in veterans’ cases. She can be reached at Josie@jctownsend.com.

**LEARN MORE**

The Section membership year is Jan. 1 - Dec. 31. For more information and to join the Criminal Law Section, or any other Section, visit [https://wsba.org/legal-community/sections/sections](https://wsba.org/legal-community/sections/sections).

**NOTE**

1. See “From the Spindle” on page 24 for a summary of Blake.
3. Contact the county superior court administrator’s office for information on ordering recorded hearings or trials.
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The Washington State Legislature adjourned its 2021 session on April 25. In all, the Legislature passed 335 bills—including a new state budget, a tax on capital gains, a cap-and-trade carbon emissions regulatory system, and a low carbon fuel standard—some of which were of particular interest to the WSBA, its sections, and its members. All of the bills summarized below have been signed into law by Gov. Jay Inslee.

**WSBA-REQUEST LEGISLATION**

- **SENATE BILL (SB) 5005 – Concerning Business Corporations.** Originating from the Corporate Act Revisions Committee of the Business Law Section, this bill contains new provisions for notice by electronic transmission to shareholders and directors of business corporations.

- **SB 5034 – Concerning Nonprofit Corporations.** Originating from the Nonprofit Corporations Committee of the Business Law Section, this bill provides a comprehensive modernization of the Washington Nonprofit Corporations Act (WNCA), which has not been significantly updated since 1967. Some of the many changes to the WNCA are: a more efficient process for electronic transmissions; comprehensive rules governing members and directors; updates to record keeping and filing requirements; protection of charitable assets; and addressing the authority of the attorney general to investigate and intervene to protect charitable assets.

To find the full text of any of the bills mentioned in this article, visit [https://app.leg.wa.gov/billinfo/](https://app.leg.wa.gov/billinfo/).
LEGISLATION OF INTEREST TO WSBA SECTIONS

In addition to legislation that is requested by the WSBA, the WSBA Legislative Affairs team monitors and takes appropriate action on legislative proposals significant to the practice of law and the administration of justice. WSBA sections regularly track and review bills during the legislative session. The following is a summary of bills of interest to the sections.

POLICE ACCOUNTABILITY & JUSTICE

• Police Tactics and Equipment. Among several policing reform bills in this session, House Bill (HB) 1054 bans police use of chokeholds, neck restraints, no-knock warrants, and some military equipment. The bill as passed does not ban use of tear gas (a ban that was included in original versions of the legislation); however, the final version places restrictions on its use. HB 1310 revised the standard for use of deadly force to account for the context of a situation, allowing such force only during situations that include an imminent threat of serious physical injury or death.1

• Peace and Correction Officer Accountability. SB 5051 overhauls the state’s laws regarding the decertification of police and corrections officers. The law expands the list of reasons for which an officer may lose certification and expands the state’s power to investigate police misconduct or revoke or suspend an officer’s license.2

• Felony Voting Rights. HB 1078 restores voter eligibility for all nonincarcerated parolees as well as those convicted of a felony in courts outside of Washington. The bill also requires notification to felons of their voter rights upon release from confinement. Washington is the 20th state to restore voting rights to released felons; this legislation is expected to restore rights to approximately 20,000 people across the state.3

• Private Detention Facilities. HB 1090 bans privately operated detention centers in Washington; however, existing
Update from Olympia CONTINUED >

facilities will remain in place until their contracts expire. This bill is expected to result in the closure of the Northwest Detention Center, a privately operated detention center for Immigration and Customs Enforcement; however, the private contract for that facility does not expire until 2025 and some immigrant rights groups are calling for an earlier closure.4

• Behavioral Health and the Justice System. SB 5476 responds to the Washington Supreme Court decision in State v. Blake (see page 24 for more on this decision), which invalidated the existing criminal drug possession law. SB 5476 reestabishes criminal penalties for drug possession while also requiring diversion programs, and funding, for behavioral health prevention, treatment, and related services.

CLIMATE

• Greenhouse Gas Emissions. HB 1091 requires the Department of Ecology to implement a clean fuel standard by 2023, joining Oregon, California, and British Columbia in limiting the aggregate greenhouse gas emission in the state to below-2017 levels by 2035.5

• Climate Commitment. SB 5126 sets a goal of zero carbon emissions by 2050 by implementing a “cap and invest” system that caps carbon emissions and invests in new infrastructure to reduce carbon emissions in certain industries such as transit, agriculture, forestry, and shipbuilding.6

HOUSING

• Home Foreclosure. Resources available from the state for the mediation, reporting, and payment provisions of the Foreclosure Fairness Act are tied to the number of trustees’ sales in the preceding year. As a result of the federal COVID-19 foreclosure moratorium, the number of trustees’ sales in 2020 was reduced; HB 1108 puts into place a temporary stopgap remedy to ensure that funding and assistance programs for homeowners facing foreclosure are not lost as a result of the temporary reduction in trustees’ sales stemming from the federal moratorium.

TAXES

• Working Families Tax Exemption and Capital Gains Tax. HB 1297 funds the Working Families Tax Exemption program that was created in 2008 but never funded, while SB 5096 will impose a 7 percent excise tax on capital gain earnings of more than $250,000 on the sale of certain long-term assets, such as stocks and bonds, but excluding retirement accounts, real estate, farms, forestry, and certain owner-operated small businesses.7

ESTATE PLANNING

• Trusts and Estates. SB 5132 creates the Uniform Electronic Wills Act, which allows the creation of valid digital wills; the Uniform Fiduciary Income and Principal Act, which adjusts the allocation of receipts of a trust among the beneficiaries and applies also to trusts that are converted to unitrusts; and the Uniform Powers of Appointment Act, which provides for the exercise of powers of appointment and distribution of property.

EMPLOYMENT

• Long-Term Care Insurance. HB 1323 created the Long-Term Care Act, the first of its kind in the United States, which establishes a mandatory payroll tax of 0.58 percent to fund long-term care needs; however, those with private long-term care insurance plans will be provided a one-time opt-out opportunity.8

CHILD DEVELOPMENT & CUSTODY

• Early Childhood Development. SB 5237, the Fair Start for Kids Act, caps copayments and provides financial aid for child care and provides more access to grants and other funding for day care providers. The new capital gains excise tax (SB 5096, discussed under Taxes) will fund most of these programs.9

• Foreign Child Custody Disputes. HB 1042 requires Washington courts involved in foreign child custody disputes to consider the foreign country’s human-rights record before making a decision on whether to enforce a child custody decree pursuant to the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA). Specifically, the bill requires the courts to consider whether the foreign jurisdiction at issue imposes the death penalty for the practice of religion, expression of political beliefs, or sexual orientation.10

CIVIL PROTECTION ORDERS

• HB 1320 consolidates and amends laws regarding civil protection orders in Washington state to increase safety for victims of domestic violence, sexual assault, stalking, abuse of vulnerable adults, unlawful harassment, and threats of gun violence.11

NOTES


Ralph W. Flick is a 1994 graduate of Loyola Law School in Los Angeles and—after a more than 20-year corporate transactional career as an in-house lawyer, at a large law firm, and as a solo practitioner—he is now a professor at Pacific Lutheran University, where he teaches business law and human resources. He can be reached at flickrw@plu.edu.


How to Be an Antiracist
By Ibram X. Kendi

Dr. Kendi’s book is engaging, deeply researched, historically based, but not “academic.” It is jargon-free, first-person, autobiographical, candid, even confessional: He says he was “a believer more than a thinker” in college. And though his last book, Stamped from the Beginning, won the National Book Award, and he is the Director of the Antiracist Research Center at Boston University, he claims he’s not “an intellectual.” Yet his ideas are formidable. Policy is the core of this book. The socially constructed—and biologically nonexistent—category of “race,” and its progeny, “Black” and “white,” were built and perpetuated through racist policies. Chief among the policymakers, though he doesn’t say this explicitly, were judges, legislators, and administrators. These policymakers—historically, white men—propagated racist policies in the economic interests of their class. To be an antiracist, Dr. Kendi advises, one must work to disempower those policymakers and work to empower antiracist policies, those designed to reduce racial inequity.

— Reviewed by Marc Lampson
Whale Day: And Other Poems

By Billy Collins

You should read any book by Billy Collins. This one is his 12th. Collins recently turned 80, so some of these poems nod at mortality, but not morbidly. His poems often invite you in with a commonplace event, one you’ve both had, like walking your dogs, or neither has had, like seeing a church mouse. But then the poem takes an unexpected turn, and you happily go along to land in a place you’ve never been before. And the traveling metaphor is apt because the poems mention Dublin, or Florida, or Paris, or Southern California—yet the places he really takes you to are not on the map, but some place funny, or insightful, or delightful. He’s reputed to be “America’s most popular poet,” or worse, “accessible,” which is a shame because that means many lit majors (let’s raise our hands) are therefore likely to pooh-pooh him. Don’t make that mistake. — Reviewed by Marc Lampson

Make the Rules or Your Rivals Will

By G. Richard Shell

Although it was published in 2004, this is a must-read for any corporate counsel and even more so for corporate managers. This is not a typical book for lawyers; rather, Shell uses concepts found in the management discipline (for example, Porter’s Five Forces) to analyze legal strategy. The thesis of the book, as its title suggests, is that if business interests are not engaged in the making of the statutes and regulations that define markets, competitors in those markets will be more than happy to define and manipulate markets themselves, outside of the law. The book is well written and filled with interesting stories and case studies of companies that have benefited, or suffered from, particular legal strategies. The business law class in business schools is often like an introductory version of a traditional law school class; however, this book looks at the law through the lens of management and it is therefore essential reading for business students as well as corporate managers who must make risk decisions—and the lawyers who advise them. Written before the Great Recession, the lessons in the book are as relevant as ever more than 10 years later.

— Reviewed by Ralph Flick

Devolution: A Firsthand Account of the Rainier Sasquatch Massacre

By Max Brooks

Max Brooks, author of World War Z, has created another great summer read in Devolution: A Firsthand Account of the Rainier Sasquatch Massacre. This time Brooks narrows his focus to the recently constructed (fictional) village of Greenloop, near Mt. Rainier. With six homes, common house, only one road in, and helipad, Greenloop was built to be both eco-friendly and remote—the founder having decided that the best connectivity to the outside world would be ground-wired rather than satellite. Big mistake! The novel features a Mt. Rainier eruption with all its destructive force, 11 well-developed, nature-loving characters trying to do good before simply trying to survive, and Sasquatches galore. What is not to love? All the village residents are either dead or missing, so Brooks is tasked with organizing what evidence is available, including the journal of resident Kate Holland, to try to answer, “What happened?” He masterfully reconstructs the scientific account, the horrific tale, and the brave saga of survival that may cause you to rethink your previous benign view of the Sasquatch. — Reviewed by Charles W. Bates

SIDEBAR
QUICK TAKES

Ship of Gold in the Deep Blue Sea
By Gary Kinder
— Alex Tuttle

The Book of Longings
By Sue Monk Kidd
— Mary Carter

The Power Broker
By Robert Caro
— Hon. Sean P. O’Donnell

The Song of Achilles
By Madeline Miller

The Vanishing Half
By Brit Bennett
— Shreya Ley

MORE REVIEWS >
Art Law in a Nutshell (6th ed.)

By Leonard DuBoff, Christy King, and Michael Murray

There are some books that people who work in the many fields of the arts and humanities—artists, writers, museum directors and trustees, collectors, auctioneers—and the attorneys and consultants who advise them must have at their elbows. *Art Law in a Nutshell* is such a book. The sixth edition of this invaluable work from West Academic Publishing is filled with advice, instructions, examples, and, yes, wisdom. The topics covered in the book include international art, war, investments, auctions, contracts, authentication, insurance, collecting, taxation, support, the work of artists, copyright and trademark, moral and economic rights, freedom of expression, museums, and publicity. These are many of the areas with which people creating and managing art—and those advising them—must be familiar—at the risk of losing their work, money, rights, and reputations. Therein rests the great value of this small-but-essential book. — Reviewed by Chet Orloff

The Art of Logic in an Illogical World

By Eugenia Cheng

At a time when many arguments take place over social media and all of them are terrible, I can’t say that reading this book will help you win more arguments. However, it will provide a fascinating breakdown of logic and reasoning through the cold, calculated perspective of a mathematician. Even so, Cheng stresses the importance emotion plays in how we deliver and receive arguments. While the book may not make you a skilled public debater, you will almost certainly walk away from it with a new perspective on human thinking, the intersection of abstract reasoning with emotional argument, and maybe even how to deconstruct and evaluate your most deeply held beliefs. — Reviewed by Colin Rigley

Helena Star: An Epic Adventure Through the Murky Underworld of International Drug Smuggling

By Stewart Riley

In 1978, a ship called the Helena Star was captured off the Washington coast carrying 37 tons of marijuana with a street value of about $74 million. Another vessel was also seized, a 61-foot sailboat named the Joli, owned by freestyle skier Mike Lund. The story didn’t end there, however. It continued for decades after the seizure—to Lund’s arrest in 2001 to the sinking of the Helena Star in Tacoma in 2013. Stewart Riley, who represented the Helena Star ship captain, writes from his insider’s perspective about this years-long saga involving the Colombian-American drug cartel, smuggling, money laundering, suspicious deaths, and courtroom battles.

Taxation of Damage Awards and Settlement Payments

By Robert W. Wood

Wood’s treatise has long been the go-to guide for tax issues surrounding settlement and recovery. This 2021 fifth edition expands on subjects and strategies critical to plaintiffs and defendants. Readers will find guidance on compliance, and more importantly, paths to increase plaintiffs’ after-tax recoveries and decrease defendants’ after-tax costs. It also brings us up to date on analysis and approaches necessitated by recent decisions by the IRS, federal courts, and Congress. If you regularly work in the litigation context, this book belongs in your library. — Reviewed by Jeremy Babener

Green Crimes and International Criminal Law

Edited by Regina M. Paulose

This book is all about crimes against the environment—crimes that not only impact wildlife and ecosystems, but humans as well. The authors discuss whether or not green crimes can fit into existing international criminal law frameworks and explore green crimes in the contexts of different parts of the world. Chapter topics include hydropower and crimes against humanity, environmental harm in conflicts in Africa, the Dakota Access Pipeline, the International Court for the Environment, and protecting against environmental damages in outer space. The book is recommended to academics and practicing lawyers interested in expanding their ways of thinking about practice within the environmental or criminal law arenas.


By Tahmina Watson

This book tells the stories of 14 “legal heroes” who, during Donald Trump’s presidency, took action in innovative and inspiring ways, from advocating for asylum seekers to defending environmental protections. The chapters feature attorneys including Bob Ferguson (Washington Attorney General), Traci Feit Love (president and executive director of Lawyers for Good Government), Michele Storms (executive director of the Washington chapter of the ACLU), Aneelah Afzali (executive director of the American Muslim Empowerment Network at the Muslim Association of Puget Sound), Matt Adams (legal director at Northwest Immigrant Rights Project), Takao Yamada (co-founder of the Washington Immigrant Defense Network), and others.
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Counseling clients on whether to file an appeal in Washington

BY PHILIP TALMADGE

A client’s decision whether to appeal an adverse trial court civil decision is fraught with ethical, legal, and practical considerations, and the attorney counseling the client about a prospective appeal must be aware of all of them. This article is designed to provide a short checklist to assist counsel in thinking about the appropriate questions attendant upon a Washington state court civil appeal. It also provides some informal statistical analysis of success rates on appeal in the Court of Appeals and Supreme Court.

ETHICAL CONSIDERATIONS

Appeals are different from trial work, and both are different from offering transactional assistance to a client. There are special procedural rules that apply in the appellate setting.

Foremost among the ethical rules that pertain to appellate representation is RPC 1.1, requiring lawyer competence:

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Comment [1] to that rule is particularly apt:

In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer’s general experience, the lawyer’s training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question. In many instances, the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances.

Competent transactional attorneys or trial lawyers should not assume that they are competent appellate advocates. I have seen far too many briefs and arguments by otherwise competent lawyers fail because they lack expertise in appellate procedure or in the proper presentation of issues to an appellate court. Examples like jury arguments to appellate courts, briefs that read like law review articles, or briefs that present far too many issues come readily to mind.

A consultation with counsel who focus their practices on appellate work can give both the client and trial counsel a fresh perspective on the issues in the case—a very worthwhile service before a client embarks on an appeal.

And after that consultation with appellate counsel (to whom the client is often referred by trial counsel), if the client decides to retain that appellate counsel to handle the appeal, a second ethical issue can arise. Appellate counsel’s duty on appeal is, of course, to the client, as opposed to any duty to the referring trial lawyer. What happens if, in preparing the appeal, it becomes clear that trial counsel committed malpractice? Does appellate counsel have a responsibility to advise the client? RPC 2.1 relating to counsel’s duty to render candid advice to the client would suggest they do. Counsel has a duty under RPC 1.4 to communicate with the client regarding the representation. Arguably, as a component of that duty, appellate counsel, not responsible for the malpractice, must inform the client if the lawyer responsible for the malpractice has not done so because it is plainly a material development in the client’s case affecting any appeal and any potentially related settlement discussions.

Appellate counsel may choose to confine their representation to appellate issues only, and to thereby avoid participation in such ongoing matters as settlement discussions or related cases, but the imperatives of RPC 1.2 then come into play, including the client’s informed consent. RPC 1.2(c). RPC 1.2 requires any limitation on representation to be reasonable under the cir-
cumstances. While compliance with RPC 1.2 ensures that any limitation of the representation cannot later be second guessed, it is unlikely that appellate counsel can avoid obligations under RPC 1.1, 1.4, and 2.1 by invoking RPC 1.2.

A third consideration is an attorney’s ethical obligation to present only meritorious arguments to a court. RPC 3.1. Appellate counsel must carefully assess the issues the client hopes to present in light of RAP 18.7 and 18.9(a). The client can be sanctioned for filing a frivolous appeal.

LEGAL CONSIDERATIONS

An array of factors enters into the analysis of whether a case is an appropriate one for appellate review. These factors are described in considerable detail in the WSBA’s Appellate Practice Deskbook (4th ed. 2016), chapter 3, Counseling Clients on Appeal. What follows here is a quick checklist of some critical questions to be answered by counsel in assessing the viability of an appeal:

- Does the case involve a final judgment or an interlocutory order? Washington law has long disfavored interlocutory review.
- What is the standard of review pertaining to the issue? Appellate
- What was the burden of proof on the issue? Where, for example, the burden of proof in the trial setting is high, an appellate court’s analysis of whether substantial evidence supports trial court findings is altered accordingly.
- Was the case decided on motion or after a trial? In general, reversals are more likely in cases resolved by motion.

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- Was the case decided on motion or after a trial? In general, reversals are more likely in cases resolved by motion.
Courts afford differing degrees of deference to trial court decisions, from the most deferential (abuse of discretion) to the least deferential (de novo review).

Counsel contemplating an appeal on behalf of a client must analyze these factors carefully to make sure the appeal is worthwhile. Moreover, while an appeal may be worthwhile on an issue or two, it may not be worthwhile on every error the lawyer thinks the judge committed. Nothing sinks an appeal faster than presentation of too many issues. Not only does that prevent the careful, detailed treatment of the most worthy issues (given the word limits on briefs in the appellate rules), it is a clear signal to the appellate court that counsel has not bothered to focus on the most significant issues, forcing the court to waste its time on chaff. Good appellate counsel earn their reputations by being able to separate the most meritorious issues from the others and focusing their appeals accordingly.

**PRACTICAL CONSIDERATIONS**

Early on in the relationship between appellate counsel and the client, appellate counsel must educate the client by answering certain very practical questions:

- **How does the appellate process work?**
- **How long will it take for the appeal?**
- **How much will the appeal cost?**
- **What happens if the appeal is won?**
- **Will the case impact other cases in which the client is interested?**
- **Is the client able to withstand the emotional toll of an appeal?**

Clients who have gone through the trial process do not always understand the appeal process. They are often unaware that an appellate court will have three or nine judges, there will be no jury, new evidence is usually not allowed on appeal, the only appearance before the judges for argument may be as short as 10 to 20 minutes per side, and, if they win, further proceedings may take place before the judge that ruled against them in the first place. Counsel should explain the appellate process to clients and also explore alternatives to appeal like post-judgment motions in the trial court and mediation on appeal, where appropriate.

With regard to the duration of any appeal, and given the long-term impacts of delays caused by the COVID-19 pandemic, it is safe to say that it will require roughly 15 to 18 months from the time the notice of appeal is filed to the time of a written decision in any of the divisions of the Court of Appeals. The time varies based on the complexity of the record, extensions granted on briefing deadlines, and the time taken by the panel to prepare an opinion. The time for appellate review may be further extended if a petition for review to the Washington Supreme Court is filed; that court usually takes four to five months to decide whether to grant review. It may then take an additional 12 to 18 months for the Supreme Court to receive supplemental briefing, schedule and hear argument, and file its decision.

The expense of an appeal can be significant, and clients need to know upfront what costs and fees they face. Clients will have to pay for the record on appeal—the trial court pleadings (Clerk’s Papers) and the court reporter’s transcript (Report of Proceedings)—to be submitted to the appellate court. These can be expensive. The client will need to pay your fees, and it’s advisable to be clear how much those are likely to be. If the client wants to stay enforcement of a judgment, the client must post supersedeas, a bond, or other form of financial security. That cost, too, is considerable. RAP 8.1(c). Not to be over-looked is the fact that the client will necessarily bear the other side’s appellate attorney fees if their opponent was awarded attorney fees at trial, RAP 18.1(a), and perhaps additional attorney fees and expenses upon remand to the trial court. It is far better for the client to be aware of these expenses before an appeal is taken than to be surprised by them as the appeal unfolds.

**STATISTICAL CONSIDERATIONS**

Perhaps the most frequent question posed by a client to appellate counsel is: “What are my chances of appeal?” Any lawyer who asserts that the client will assuredly win, or who quotes a percentage chance of winning, is a fool. Such precision is belied by the reality of the appellate process and the surprises appellate judges often throw our way.

However, it is possible to state certain global, statistical chances of success. With regard to motions for discretionary review, an older Supreme Court case—In re Grove, 127 Wn.2d 221, 235-36, 897 P.2d 1252 (1995)—noted that less than 10 percent of such motions were granted in the Court of Appeals. I have no reason to believe that those odds have changed dramatically one way or the other in recent years.

With regard to appeals generally, there is no recent published data on an appellant’s odds. Historically, the chances of an appellant securing reversal of all or a part of a trial court judgment were about 1 in 3. I wanted to test that understanding. My staff obtained data from the Administrative Office of the Courts and conducted an informal study of 2017 case results. We learned that with regard to the Court of Appeals, Division I affirmed in 74.4 percent of its civil cases that year, Division II affirmed in 60.9 percent, and Division III affirmed in 73.5 percent. These numbers are necessarily rough and do not take into consideration the cases dismissed on appeal. Nor do they reflect that in some of the cases where a full affirmation did not occur, some aspects of the trial court decision may have been affirmed. But the information is pretty clear on one point—appeals are not slam dunks for civil appellants.

As to the Supreme Court in 2017, of the 611 cases (304 civil, 307 criminal), 54 involved direct review and 557 involved petitions for review (PFRs). As to the PFRs, 482 were denied, 68 granted (14 percent),

Any lawyer who asserts that the client will assuredly win, or who quotes a percentage chance of winning, is a fool.
and seven dismissed. Of the 68 PFRs granted, reversals occurred in 34 (50 percent), 32 were dismissed, and two were remanded. Out of the 557 overall PFRs, 251 were civil; 38 were granted, 209 were denied (15 percent), and four were dismissed. Of the 38 PFRs where review was granted, 13 affirmed the Court of Appeals, 23 reversed the Court of Appeals (60 percent), and two were remanded.\(^5\) It’s tough to get to the Supreme Court, but petitioners fare pretty well there if review is granted.

A client needs to appreciate that even if the appeal is successful, it is rare that an appellate court awards judgment to a party. Instead, it is far more common for the appellate court to reverse an order of dismissal or summary judgment, allowing the case to go forward, or to order a new trial. Critically, the client needs to know that this will often mean that the same judge who committed reversible error will be handling the case on remand.

There are instances where an appeal may have implications for the client in other cases. A decision in Washington may be cited for or against the client in similar litigation elsewhere. This is particularly important for institutional clients engaged in extensive litigation. Counsel should explore this impact carefully with the client.

Finally, an important consideration for many clients is the emotional toll of continuing with a lengthy appeal and potential additional trial court proceedings on remand. Some clients simply cannot tolerate the protracted litigation process, and appellate counsel must assess that tolerance.\(^6\)

NOTES
4. United States v. Dunkel, 927 F.2d 955, 956 (7th Cir. 1991) (“Judges are not like pigs hunting for truffles buried in briefs.”).
5. My firm has filed 105 PFRs since 2001; review has been granted in 22 (20.9 percent).
How Pierce County lawyers reimagined their role as community allies in the movement for systemic change

BY ANDREA S. JARMON
It would be the video that touched the world. And for Pierce County Public Defender Dee Sonntag, it would be an emotional call to arms.

On May 25, 2020, Sonntag was among many in the nation who watched, in pain and disbelief, the viral recording of what would infamously become captioned as 8:49—the public death of George Floyd. Police accountability, disproportionality, and racial bias in the criminal justice system were already salient areas in which Sonntag engaged every day as a part of her work. Yet, while watching the last moments of George Floyd’s life, she was outraged.

“It was just the absolute disregard for human life,” she explained. “Seeing how those officers handled not only him but the bystanders who were trying to render aid … was just sickening.”

The images of George Floyd inundated media outlets. Countless businesses, organizations, and agencies issued public statements condemning the actions of the officers. Even police departments and law enforcement officials were speaking out against what they saw and understood to be an excessive use of force. But Sonntag wanted to do more. She had been grappling with how she, as a white woman, could use her privileged status to push and encourage others to do more than engaging in performative allyship such as posting on social media or taking selfies at a protest. And then Pierce County released the autopsy report of the 33-year-old African American male, Manuel (“Manny”) Ellis, who had died in police custody on March 3, 2020, while in handcuffs and being restrained by Tacoma police officers. For Sonntag, what happened to George Floyd was not just a national issue. It was local. It was home. It was right here in Tacoma.

She and other colleagues immediately came together. They did not have any concrete ideas at the time, but they had an unwavering consensus that they were committed to doing more to help bring about change. Initially, it was Sonntag and a few other female lawyers in her office, mostly white, meeting informally. Then in June, they learned of a national day for protest by public defenders in solidarity with Black Lives Matter. While the group (eventually to become known as LASR—Lawyers Against Systemic Racism) was not yet formally constructed, Sonntag and others from her office—including public defenders Sara Alavi, Jessica Campbell, Jennifer Freeman, Naomi Smith, Kelsey Page, and Kelley Vananagh—went to work sending out notices of the protest; organizing the location of where they would march; coordinating speakers; and, of course, gathering supplies like masks and hand sanitizer to be responsive to COVID-19 concerns. When asked about whether the ongoing health crisis weighed on their decision to hold or participate in a public protest, Sonntag said the urgency of social justice compelled them to take action. The tragedies of George Floyd and Manny Ellis were part of a pattern of another pandemic people of color face every day—systematic racism.

On June 4, 2020, when the Washington Supreme Court issued a letter outlining its call to action for the legal community to “work together to eradicate racism,” Sonntag said she was ready—the letter was a “green light.”

A few days later, on June 8, carrying “Black Lives Matter” signs and wearing masks, they led a group of attorneys and other legal professionals in a march that began at the local public defense office and ended at the back of the County-City Building next to the Pierce County Jail. There, in a powerful symbolic gesture of solidarity, the participants lay with their stomachs and faces to the ground and their hands behind their backs for 8 minutes and 49 seconds. Afterward, they led the group back to the front of the County-City Building, with various chants of “Say his name: Manny Ellis,” “Hands up; don’t shoot,” and “Black Lives Matter.”

Shortly after the protest on June 8, LASR became official. It is striking that the group, at the time of its formation and even now, remains primarily comprised of white females. There are nine directors, all of whom the organization’s bylaws say must be elected by members. The group is exclusive to lawyers and an application is required for membership. The group wanted to vet members to ensure that they understood the values and mission of the organization. The vetting process is not intended to exclude but to ensure commitment to anti-racist work. Sonntag says she is hopeful.

**Andrea S. Jarmon** is co-chair of the WSBA Diversity Committee and is a former member of the WSBA Board of Governors. Prior to her current position, she represented indigent clients in criminal matters and dependency proceedings. This self-captioned “Lawyer Mommy” is the mother of seven! She can be reached at andrea@jarmonlawgroup.com.
that membership will continue to grow and the composition will diversify.

Speaking to the visible absence of minority members, Joseph Evans, an African American defense attorney in the same office, said, “They were actively making efforts to recruit minority members to be in the group and in the leadership.” He was one of the individuals approached and has served as an advisor. But even in the absence of minority membership, he encouraged his peers to move forward, recognizing the value of allyship. “They are allies. They were asking how can they help ... how can they serve the cause?” Evans expressed that this allyship is critical to any powerful social movement; allies beyond the community are necessary, as that “helps to diversify the message.”

And messaging is something that was clearly on the minds of the founding members, right down to the details of the name LASR and the logo of the organization. Sonntag said, “We were very conscious about what the acronym would mean and how it would look. We wanted it to be symbolic of our message.” The attraction to the name was also in that it reflected their intent—to be sharply focused on the issue of racism and the particular role of legal professionals in combating it. But being a lawyer wasn’t enough. Sonntag said she and the founding members “wanted to do more than just [their] day job. ... We wanted to take an active role in changing the system.”

On June 18, 2020, after LASR had formally established itself, the group for the first time started protesting at the Tacoma Police Department, where members would continue to be present every other Thursday for the next four months.

For Evans, participating was not just about what else he could do as a lawyer. “As a Black man, I have been harassed by police more often than I can count,” he said. In an all-too-familiar script, Evans, speaking to the safety protocol he uses when encountering police, recited some of what he calls his personal plan—“hands on the wheel; no sudden movements; ask before I do anything.” Evan recognizes that as a tall Black man with stature, he is perceived as a threat and that perception of him does not subside because of his professional role as a lawyer.

LASR demonstrates the powerful role of allyship, the power of a few to build a collective, and the responsibility that lawyers have to help build trust in their communities and collaborate in the movement for systemic change.

So it was personal for him to be a part of LASR and what they are trying to accomplish. “I am a human first, but I am a Black man in America,” he said.

LASR’s anti-racism work includes educating community members about their rights and how to navigate encounters with law enforcement. In connection with other community organizations, the group hosted a virtual panel entitled “Know Your Rights.” Recently, when the city of Tacoma was searching for a new chief of police, LASR was invited to participate in the candidate forum. LASR members have been a steady presence at Tacoma City Council meetings, asking for action in the Manny Ellis case and demanding other police-accountability measures. When allegations arose regarding the current Pierce County sheriff, LASR began facilitating community meetings. Other events have included sponsoring a monthly book club and food drives. Sonntag describes it as a “holistic approach.”

LASR demonstrates the powerful role of allyship, the power of a few to build a collective, and the responsibility that lawyers have to help build trust in their communities and collaborate in the movement for systemic change. 

NOTE
Election Rejection

How the history of voting rights informs modern elections

BY MOLLY P. MATTER
We are in the midst of a tumultuous and rapidly changing time for voting rights law. In an article published in the February 2021 issue of Bar News, Tracy Flood and Christine Kuglin explored voter suppression in the 2020 election and the deep history of voter suppression in the U.S.1 This article extends that work by exploring the recent expansion of individual state influence over voting access and, in particular, issues that face Washington state.

**WHY DO STATES NOW HAVE GREATER INFLUENCE OVER VOTING RIGHTS?**

To fully appreciate where we are now, it is important to know something of recent U.S. Supreme Court voting rights decisions. In 1966, the Supreme Court upheld the federal Voting Rights Act and its central feature, federal preclearance, the mechanism that placed the burden of proof on the jurisdiction, rather than the victims of alleged voter suppression, to prove that voting laws were not discriminatory. The court opined, “Congress found that case-by-case litigation was inadequate to combat widespread and persistent discrimination in voting, because of the inordinate amount of time and energy required to overcome the obstructionist tactics invariably encountered in these lawsuits.”2 Congress recognized then that enforcement by the Department of Justice would never be enough. In *Carolina v Katzenbach*, the Supreme Court prophetically stated, “After enduring nearly a century of systematic resistance to the Fifteenth Amendment, Congress might well decide to shift the advantage of time and inertia from the perpetrators of the evil to its victims.”3

With this decision, “perpetrators of the evil” could no longer delay justice and the burden was no longer on the victims. No one foresaw that half a century later, 90 percent of all voting rights lawsuits would be brought by national civil legal aid organizations and private attorneys (leveraging academia), not the Department of Justice.4 A single legal institution would never have enough resources to combat voter suppression.

After the Voting Rights Act was amended in 1982 to incorporate the impact and intent standard,5 congressional districts drastically changed. After the 1990 census, for the first time in our nation’s (post-Reconstruction) history, states with a history of voting discrimination created majority-minority legislative districts to comply with the Voting Rights Act.6 This resulted in a sea change of representation from historically excluded communities. The 1992 election was the most profound demographic shift in our democratic republic, resulting in a 50 percent increase in Black members of Congress and a 35 percent increase in Latino members.7

But democratic progress was undermined with a Supreme Court case that allowed white voters standing to allege they were harmed by majority-minority districts.8 In *Shaw v. Reno*, the argument by white voters in North Carolina that focusing on race (making race a predominant factor in district lines) was in and of itself a violation of the 14th Amendment, caught the Court’s attention. This injury was perceived by many in the legal community as a “phantom injury” and law review articles runneth over on the subject.9

Then in 2013, the Supreme Court dealt another blow to the federal Voting Rights Act and placed the burden back on the victims by gutting its enforcement mechanism:

**CONTINUED >**

**Molly P. Matter** is proprietor of Amend Law LLC, a community lawyering human rights and voting rights practice. Matter is counsel for Latinx voters in *Reyes v Chilton*, a voting rights claim filed in the U.S. District Court for the Eastern District of Washington regarding the racial disparity in ballot rejections in Washington state due to a perceived signature mismatch.
In Yakima County, voters with Spanish surnames were 7.5 times more likely to have their ballots rejected for a mismatched signature compared to non-Spanish surnames. In Douglas County, voters with Spanish surnames were over 10 times more likely to have their ballots rejected.

CONTINUED >

federal preclearance. Preclearance required that all local and state jurisdictions that had a documented history of racially discriminatory voting practices prove to the Department of Justice that any proposed electoral change (e.g., closing of a polling site, implementation of a voter ID law, redrawing of a district map) was not rooted in discriminatory intent and would not disparately impact voters of color. Even as it dismantled a key mechanism protecting access to voting, the Court noted that “voting discrimination still exists; no one doubts that.”

STATE ACTIONS IN A POST-SHELBY COUNTY WORLD

Immediately after the gutting of the federal Voting Rights Act, North Carolina’s General Assembly enacted a state law limiting early voting, requiring voter identification, reducing polling sites, and eliminating sites on college campuses, in minority neighborhoods, and near churches. The Fourth Circuit ruled the law was enacted with racially discriminatory intent to suppress Black voters because state legislators had requested racial data on every voting provision that produced higher turnouts for Black voters and then drafted legislation to eliminate those very provisions. The Fourth Circuit stated the discrimination was done with “surgical precision.” The opinion stated, “Indeed, neither this legislature—nor, as far as we can tell, any other legislature in the Country—has ever done so much, so fast, to restrict access to the franchise.”

On March 25, 2021, Georgia enacted similar legislation, SB202. The bill makes it a crime to provide food and water to voters waiting in line at polling places. Lawyers Committee for Civil Rights Under Law, a nonpartisan organization initiated by President John F. Kennedy, filed a lawsuit—in collaboration with the NAACP, Asian American Advancing Justice, Common Cause, and other civil legal aid organizations—allleging Georgia’s legislation targets minority voters. This legislation came on the heels of Georgia’s influential role in the 2020 presidential election, which determined which party would control the U.S. Senate.

Voter-suppression laws in North Carolina and Georgia were able to be enacted due to the Shelby County decision that effectively eliminated the requirement for states with a history of voter suppression to prove to the Department of Justice that their state laws would not infringe upon the rights of voters of color. Shelby County flipped the burden. For nearly a decade, the burden has fallen on the victims. The late Justice Ruth Bader Ginsburg, in her dissent in Shelby County v Holder, wrote, “Throwing out preclearance when it has worked and is continuing to work to stop discriminatory changes is like throwing away your umbrella in a rainstorm because you are not getting wet.”

In contrast, some states have enacted legislation to protect voting rights. In the late 1980s, Joaquin Avila, former president and general counsel of the Mexican American Legal Defense and Educational Fund (MALDEF), 1996 MacArthur Fellow, and former Seattle University School of Law professor and director of the National Voting Rights Advocacy Initiative, began developing the legal arguments and environment to carry the nation’s first state voting rights act: the California Voting Rights Act (CVRA). Foreseeing that the federal Voting Rights Act was at the mercy of the Department of Justice, which had only filed 10 percent of all voting rights cases since 1977, and subject to the views of the majority of the Supreme Court at the time of review, Professor Avila realized how our most fundamental constitutional and human rights would be guaranteed: by states themselves.

The CVRA was the blueprint for the Washington Voting Rights Act, which passed in 2018, the same month that Professor Avila died. Due to the statutory remedy of creating majority-minority single-member districts and a provision that allowed for attorney’s fees, the CVRA transformed California’s political representation by stopping vote dilution (i.e., the combination of majority-bloc voting and racially polarized voting) that prevented communities of color an equal opportunity to elect a candidate of their choice. Oregon, New York, and Colorado have followed suit in drafting state voting rights acts.

Despite Washington state’s overall effective system of mail-in voting, our state is not free of vote dilution and other forms of voting practices that disparately impact voters of color. Publicly accessible reports from the Secretary of State show that voters with Spanish surnames and voters with Asian surnames disproportionately have their ballots rejected for having an alleged mismatched signature. Mismatched signatures constituted only 29 percent of total ballot rejections in 2019 but constituted 74 percent of ballot rejections in the general 2020 election.

In Yakima County, voters with Spanish surnames were 7.5 times more likely to
have their ballots rejected for a mismatched signature compared to non-Spanish surnames. In Douglas County, voters with Spanish surnames were over 10 times more likely to have their ballots rejected. The issue of ballot rejection due to a perceived mismatched signature received national attention during the 2020 presidential election.

Although Washington state ranks high in electoral integrity, as demonstrated by its successful administration of mail-in ballots since 2011, some federal circuit courts have ruled that mail-in ballots are at risk for voter fraud. The Fifth Circuit recently ruled that the state’s interest in defending against voter fraud outweighs the requirement of a perfect signature match. However, upon a careful look, the decision cites to the likelihood of fraud with mail-in ballots due to reports of candidate campaign members tampering with individual mailboxes and intimidating elderly voters. Pointedly, these alleged causes of voter fraud are due to bad actors from candidate campaigns, not an inherent flaw in the system of mail-in elections itself. In fact, empirical evidence reveals that signature comparison disenfranchised more citizens in a single Texas general election than the number of voter fraud cases nationwide over the past 38 years.

In Washington, legislation to effectively track the issue has been introduced. Currently, under House Bill (HB) 1545 (passed in 2019), the state is required to provide public reconciliation reports on each county’s elections, including ballot rejection rates. Under proposed HB 1819, introduced in the 2019 and 2020 legislative sessions, the state would be mandated to provide more in-depth information regarding ballot rejection that could then be used to effectively target voter education and outreach.

A civil rights problem can rarely be resolved by a single legal remedy. The first step in addressing voting rights issues is directly informing and educating the communities impacted through voter education and voting rights advocacy. During the COVID-19 pandemic, Washington state served as a national leader in election integrity due to its long history of successful mail-in ballot elections. It now has the opportunity to lead on the signature mismatch issue and, as Justice Louis Brandeis once famously stated in New State Ice Co. v. Liebmann, “serve as a laboratory; (and) try novel social and economic experiments.” In doing so, Washington will become a role model for other states.

NOTES
3. Id.
5. The Supreme Court ruled in Mobile v. Bolden that the VRA could only be used if plaintiff voters could prove racist intent. This impossible burden spurred Congress to amend the VRA in 1982. Morgan Kousser, California Institute of Technology historian and social science professor, concludes that no voting rights cases would have been filed after Mobile v. Bolden if the VRA had not been amended to include the impact standard. The impact standard allows voters to prove vote dilution or abridgment by demonstrating how such policies, practices, and laws impact communities of color. This can be demonstrated by racially polarized voting, majority bloc voting that defeats candidates of color, and a totality of circumstances analysis that examines social factors, including historical and current discrimination.
7. Id.
14. Id.
15. Id.
20. Shelby County, 570 U.S. at 561 (Ginsburg, J., dissenting).
26. Id.
A Summary of the Board of Governors Meeting

The WSBA Board of Governors determines the Bar's general policies and approves its annual budget.

TOP MEETING TAKEAWAYS

1. **New WSBA leadership.** Congratulations to these newly elected WSBA leaders who will begin their terms in October: Daniel D. Clark, current WSBA treasurer and District 4 Governor, will serve as president-elect; and Jordan L. Couch will serve as the at-large young lawyer Board member.

2. **Proposed Rules for Discipline and Incapacity: Comment now!** Upon request from the Board of Governors, the Washington Supreme Court has extended the comment period for proposed amendments to the rules governing the discipline and incapacity systems for all license types. These amendments, known as the Rules for Discipline and Incapacity (RDI), would replace the existing disciplinary procedural rules with a single rule set for all licenses. The stated goals of the amendments are to streamline the disciplinary process by eliminating and/or modifying certain rules to make the process more efficient, and to obtain more consistent decisions on discipline matters that were not purportedly achieved through the use of volunteer hearing officers. Some of the criticisms of the proposed amendments are about the use of paid adjudicators, the selection of paid adjudicators by the WSBA, and the inability of parties to remove an assigned adjudicator without cause. Others are concerned that the proposed amendments do away with the option to issue an advisory letter or an admonition in lieu of authorizing the filing of formal charges, provide a respondent only 15 days to respond to the Office of Disciplinary Counsel's request for authorization to file formal charges, and increase the Office of Disciplinary Counsel's discretion in the way grievances are processed in a number of respects. These are some of the highlights of the proposed changes; there are others as well. Members are encouraged to read the proposed changes and to submit comments to the Supreme Court via supreme@courts.wa.gov. For more information, visit www.courts.wa.gov/court_rules/.

3. **Equity, diversity, and inclusion training.** With acknowledgment of the one-year anniversary of George Floyd’s murder and recent conviction of Derek Chauvin, President Sciuchetti recognized the continued need for systemic equity work. The Board discussed its ongoing training with social equity consultant ChrisTiana ObeySumner.

4. **And the envelope, please ...** The Board approved the full slate of 2021 APEX (Acknowledging Professional Excellence) Award winners! We will reveal the names of the award winners soon, as well as full details of the APEX Awards celebration in September.

5. **Legal Regulatory Sandbox.** The Practice of Law Board (POLB) presented information about its initiative to request that the court create a Legal Regulatory Sandbox in Washington to evaluate and gather data about online legal service providers and other innovative business structures. By the time of its meeting with the Washington Supreme Court in July, the POLB will have a draft plan focused on how to admit to the sandbox—and then closely monitor—innovative legal service providers that close the access-to-justice gap with relatively low risk to consumers. Look for more information in the summer as the court and Practice of Law Board continue the discussion.

6. **Budget and Audit updates.** The Board selected audit firm Clark Nuber to perform the next five cycles of annual audits and approved the Budget and Audit Committee’s recommendation to increase the WSBA restricted facilities fund by $500,000.

MORE ONLINE

The agenda, materials, and video recording from this Board of Governors meeting (held in Spokane and virtually), as well as past meetings, are online here: www.wsba.org/about-wsjba/who-we-are/board-of-governors.
SAVE THE DATE
The next regular meeting is July 16-17. To subscribe to the Board Meeting Notification list, email barleaders@wsba.org

Council on Public Defense Matters. The Council successfully presented for approval its guidance in response to greatly increased public-defense caseloads due to the pandemic; that guidance includes recommendations for cities and counties to consider using newly available federal funds to increase defender resources. The Board noted that its support of public-defense work does not preclude other entities from coming forward with similar requests. The Board also approved for submission to the Supreme Court several changes and amendments including: a new General Rule and amendments to Standards for Indigent Defense Services, CrR 3.1, and JuCR 9.2, concerning the independence of public defense.

OTHER BUSINESS
The Board also:
• Heard a report from the Board of Bar Examiners.
• Heard a first reading of a suggested revision to Admission and Practice Rule (APR) 9, proposed by Washington’s law schools, to expand eligibility to become licensed legal interns to second-year J.D. students enrolled in clinical law courses; the Board will work with the law schools on potential edits before coming back for a vote (to send the proposal to the Supreme Court for approval) in July.
• Supported a request from the Committee on Professional Ethics to withdraw a proposed amendment to RPC 7.2 and 5.4 (to clarify that not-for-profit qualified lawyer referral service organizations may receive a portion of the lawyer’s fee) so the Committee can revise the proposed amendments consistent with recent RPC changes.
• Heard about the future of work at the WSBA, including plans to shift to a more remote workforce and potentially sublet portions of its downtown office space.

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The Lodestar Method for Calculating a Reasonable Attorney Fee in Washington,
52 Gonz. L. Rev. 1 (2017)

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Estate of Hunter ($2.8 million fee award in arbitration)
Arnold v. City of Seattle, 185 Wn.2d 510, 374 P.3d 111 (2016)
Bright v. Frank Russell Investments, 191 Wn. App. 73, 361 P.3d 245 (2015)

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**WSBA NEWS**

**Supreme Court Rules Changes:**

**Malpractice Insurance Disclosure and MCLE**

On June 4, the Washington Supreme Court adopted two rule changes that will affect many lawyers. The first, an amendment to RPC 1.4—Communication—submitted by the WSBA, requires mandatory disclosure to and consent from clients if lawyers do not meet minimum levels of malpractice insurance coverage; the second, an amendment to APR 11—Mandatory Continuing Legal Education (MCLE)—submitted by the MCLE Board, specifies that one of the required ethics credits be in the category of equity, inclusion, and bias mitigation. The WSBA is creating resources to help members navigate these new requirements; look for more information soon. The orders can be found at [www.courts.wa.gov/opinions/index.cfm?fa=opinions.scorders](http://www.courts.wa.gov/opinions/index.cfm?fa=opinions.scorders).

**Comment on Proposed Amendments to Discipline Procedural Rules**

By request of the WSBA Board of Governors, the Washington Supreme Court has extended the comment period through July 29, 2021, for proposed amendments to the rules governing the discipline and incapacity systems for all license types. Visit [http://bit.ly/proposedamendments](http://bit.ly/proposedamendments) to learn more and provide your feedback.

**New WSBA Small Town and Rural Committee**

The WSBA Board of Governors unanimously approved the formation of the Small Town and Rural (STAR) Committee to assess, evaluate, and implement initiatives to support and sustain the practice of law and access to justice in Washington’s rural communities. Visit [www.wsba.org/connect-serve/committees-boards-other-groups/small-town-and-rural-committee](http://www.wsba.org/connect-serve/committees-boards-other-groups/small-town-and-rural-committee) for questions or to indicate your interest in getting involved, contact barleaders@wsba.org.

**Access to Justice Conference**

The COVID-19 crisis revealed and deepened existing inequalities and a growing national conversation about systemic racism. To meet the demands of this moment, the 2021 Access to Justice Conference will highlight the work of non-legal community-based organizations and provide the opportunity for community advocates and legal professionals to build partnerships to advance justice. Find more information and register at [http://allianceforequaljustice.org/accessstojusticeconference](http://allianceforequaljustice.org/accessstojusticeconference).

**MCLE Reporting**

MCLE certification has opened early for lawyers, LLLTs, and LPOs in the extended 2018-2021 and the 2019-2021 MCLE reporting periods. Licensed legal professionals in these reporting periods must earn their MCLE credits, and you can access them for three years from the date of the live seminar. Watch or listen when it’s convenient for you. Go to [www.wsbacle.org](http://www.wsbacle.org) or complete the form at [www.wsba.org/about-wsba/who-we-are/board-of-governors](http://www.wsba.org/about-wsba/who-we-are/board-of-governors).

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**VOLUNTEER**

**Volunteer with the Lawyer Discipline System**

Learn more about volunteering as an adjunct disciplinary counsel (ADC). ADCs assist as needed in carrying out the functions of the lawyer discipline system pursuant to Rule 2.9 of the Rules for Enforcement of Lawyer Conduct. An ADC must have been an active lawyer or judicial member of the WSBA for at least seven years at the time of appointment. Appointment is for a five-year term. Visit [www.wsba.org/adc-panel](http://www.wsba.org/adc-panel) or contact theaj@wsba.org to learn more.

**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](http://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. 5923.

**Volunteers Needed as Attorney Advocates**

Unique opportunity to assist families or individuals in crisis by serving as a volunteer attorney advocate on the first-ever national advocacy hotline. Work from home or office at times you choose with hotline calls routed there. Resolution is typically achieved in under an hour. The nonprofit Help
Now! Advocacy has assisted at no fee over 8,700 clients, mostly in Oregon, over the past 17 years. The organization is expanding its unique services to a national scope through the hotline. Contact LMKahn@HelpNowAdvocacy.org for more information.

RESOURCES

Two Practice Guides Available

Information for Job Seekers and Employers
Visit the WSBA Career Center to view or post job openings at https://jobs.wsba.org. The special discounted rate for nonprofit, government, and small-firm employers, to prevent pricing from becoming a barrier as the legal community continues to navigate the effects of the COVID-19 crisis, has been extended through Dec. 31. Contact Mike Credit at 727-494-6565, ext. 3332, or michael.credit@communitybrands.com for more information.

Career Consultation
Get help with your résumé, networking tips, and more—www.wsba.org/for-legal-professionals/member-support/wellness/consultation—or email wellness@wsba.org.

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. Visit www.wsba.org/consult to get started.

Lending Library
Due to the COVID-19-related closure of the WSBA office, the WSBA Lending Library is closed. 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 and 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.

WSBA Advisory Opinions
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.

WSBA Member Wellness

Judges Need Help Too
The Judicial Assistance and Services Program (JASP) provides confidential support for judges, or those who are concerned about a judge. Contact Susanna Kanther, Psy.D., at 415-572-3803. Visit www.wsba.org/for-legal-professionals/member-support/wellness/judicial-assistance-service-program.

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 unbarwa@gmail.com. You can also find more details at www.wsba.org/for-legal-professionals/member-support/wellness/alcoholism.

WSBA COVID-19 Resource Webpage
All WSBA resources, including member support, law firm management, free CLEs and webinars, information about Washington courts, opportunities to help, and resources for the public, can be found here: www.wsba.org/COVID-19.

Court Emergency Operations & 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.

Law Office Reopening Guide

Quick Reference

July 2021 Usury
The usury rate for July 2021 is 5.25%. The auction yield of the six-month Treasury Bill was 0.041%.

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**Resigned in Lieu of Discipline**

**David A. Jakeman** (WSBA No. 39332, admitted 2007) of Kennewick, resigned in lieu of discipline, effective 4/23/2021. Jakeman agrees that he is aware of the alleged misconduct in disciplinary counsel’s Statement of Alleged Misconduct and rather than defend against the allegations, wishes to permanently resign from membership in the Association. The Statement of Alleged Misconduct reflects the following violations of the Rules of Professional Conduct: 1.3 (Diligence), 1.4 (Communication), 1.5 (Fees), 1.16 (Declining or Terminating Representation).

Jakeman’s alleged misconduct, as stated in disciplinary counsel’s Statement of Alleged Misconduct, related to immigration law practice. Jakeman’s alleged misconduct includes: 1) abruptly closing his law practice, disconnecting the telephones and emails, failing to provide clients or the public with his current contact information, failing to deliver property to clients, failing to promptly inform clients of deadlines and hearings in their matters, failing to protect client interest in their matters, and failing to respond to client communications, thus abandoning the practice of law without providing for his clients’ needs, and 2) collecting and retaining legal fees from multiple clients, for work never performed.

Henry Cruz acted as disciplinary counsel. David A. Jakeman represented himself. The online version of Washington State Bar News contains a link to the following document: Resignation Form of David A. Jakeman (ELC 9.3(b)).

**Reprimanded**

**Grover Matthew Loftin** (WSBA No. 44942, admitted 2012) of Seattle, resigned in lieu of discipline, effective 4/23/2021. Loftin agrees that he is aware of the alleged misconduct in disciplinary counsel’s Statement of Alleged Misconduct and rather than defend against the allegations, wishes to permanently resign from membership in the Association. The Statement of Alleged Misconduct reflects the following violations of the Rules of Professional Conduct: 1.4 (Communication), 1.5 (Fees), 7.1 (Communications Concerning a Lawyer’s Services), 8.4(c) (Dishonesty, Fraud, Deceit or Misrepresentation).

Loftin’s alleged misconduct, as stated in disciplinary counsel’s Statement of Alleged Misconduct, related to immigration law practice including the following Rules of Professional Conduct: 1.3 (Diligence), 1.4 (Communication), 1.5 (Fees), 7.1 (Communications Concerning a Lawyer’s Services), 8.4(c) (Dishonesty, Fraud, Deceit or Misrepresentation).

Loftin’s alleged misconduct includes: 1) abruptly closing his law practice, disconnecting the telephones and emails, by recording a false date on which the work was completed in client invoices, 2) charging a fee for work not performed, and 3) logging hours in his employer’s time management system for time not actually spent, and by making it appear in the time management system, and in his own laptop, that documents had been drafted when they had not.

Henry Cruz acted as disciplinary counsel. Grover Matthew Loftin represented himself. The online version of Washington State Bar News contains a link to the following document: Resignation Form of Grover Matthew Loftin (ELC 9.3(b)).

**Brooks Richard Siegel** (WSBA No. 50766, admitted 2016) of North Miami Beach, FL, was reprimanded, effective 4/06/2021, by order of the Washington Supreme Court imposing reciprocal discipline in accordance with an order of the Supreme Court of the State of Arizona. For more information, see https://azbar.legalserviceslink.com/attorneys-view/BrooksRichardSiegel.

Brooks Richard Siegel represented himself. The online version of Washington State Bar News contains a link to the following document: The Washington Supreme Court Order.

**Al M. Treacy** (WSBA No. 36602, admitted 2005) of Marysville, was reprimanded, effective 5/05/2021, by order of the Chief Hearing Officer. The lawyer’s conduct violated the following Rules of Professional Conduct: 1.7 (Conflicts of Interest: Current Clients), 1.8 (Conflicts of Interest: Current Clients: Specific Rules).

In relation to his work as a prosecutor for the City of Marysville, Treacy stipulated to a reprimand for engaging in an intimate relationship with a public defender who was representing parties adverse to the city of Marysville.

Joanne S. Abelson acted as disciplinary counsel. Al M. Treacy represented himself.
Notice of Hearing on Petition for Reinstatement of Paul Eugene Simmerly

A petition for reinstatement after disbarment has been filed by Paul Eugene Simmerly (WSBA No. 10719), who was admitted in 1980 and disbarred in 2012. A hearing on Simmerly’s petition will be conducted before the Character and Fitness Board on Friday, September 24, 2021. 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 de Carvalho Garcia, 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).
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A Tacoma native, Foreman studied economics at Harvard College and attended Harvard Law School before returning home to clerk for Justice James M. Johnson of the Washington Supreme Court. She lives in Wenatchee with her husband, James, a fellow Harvard grad who grows tree fruit, and their five lively children. Foreman earned an LLM in tax from the University of Washington School of Law while building her diverse practice, which includes trusts and estates, probate, TEDRA litigation, business advising, tax, and civil litigation.

What is the most interesting case you have handled in your career so far and why? One recent case involved a will contest that included expert testimony from a forensic document examiner trained at the FBI Academy in Quantico, Virginia. His testimony was incredible; I know more about handwriting analysis now than I ever thought possible. The court revoked the counterfeit will, but interestingly, the will actually disinherited the forger. Most forgers try to increase their share of the estate by falsifying testamentary documents, not the other way around. (This forger wanted her son to inherit everything.)

If you could change one thing about the legal system, what would you change? I would make things move more quickly in the court system. Many clients are frustrated when it takes months or years to have their day in court due to scheduling backlogs, and often justice delayed is justice denied. Statutes with streamlined procedures like TEDRA certainly help, but not if the judge has no openings in her calendar until next year.

How is being a lawyer different from the way you thought it would be? Being a lawyer is much more collaborative than I thought it would be. Not everything in the law is adversarial. My local bar association in Chelan County is small and collegial, and the rapport and cooperation that I have experienced in our legal community, even in hotly disputed matters, makes it a pleasure to practice law here.

How did you become interested in your practice area? I started with a transactional practice focused on trusts and estates, business advising, and tax. But contested probates kept coming up in my practice, and I now do a lot of civil litigation and TEDRA work. I love the challenge of building the case; moving the chess pieces; seeking compromise; and, if that fails, arguing for my clients at trial. The thrill of the courtroom is hard to beat.

What is your best piece of advice for someone who’s just entered law school? Study hard, of course. Try to get to know one or two professors really well who can recommend you for jobs, clerkships, fellowships, and post-graduate work. Participate in moot court to learn oral advocacy and trial skills. Take time to build friendships with your classmates; they are the beginning of your professional network. Spend as much time as possible working at legal clinics with real clients. There’s no better way to learn the law than by doing it.}

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