BACK TO THE OFFICE?

Law firm administrators weigh in / p. 26
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Editor’s Note

New Court Rule, New Columns, Newer Normals

By the time this “Back to the Office” issue comes out, we may have retreated (temporarily, we hope) to our home offices again. As we continue to waver between new and newer normals, there’s not much we can do but keep ourselves and each other safe, do our jobs, and in the words of WSBA member Jim Senescu, profiled in this month’s Beyond the Bar Number, “Be nice. ... Just be nice.”

In this issue, I want to highlight three new developments.

First, as you probably know by now, the Washington Supreme Court approved a change to RPC 1.4(c) that, starting Sept. 1, requires lawyers to disclose to their clients if they lack malpractice insurance at the minimum level of $100,000 per occurrence and $300,000 in the aggregate. Read about the rule change, and how it came to be, on page 36.

Second, we are debuting a new column this month entitled “Ask a Legal Administrator.” Developed with the help of Amy Strok, president of the Association of Legal Administrators Puget Sound Chapter, this column will be a semi-regular Q&A with law firm administrators from across the state at small to large firms. The first edition of this column is all about returning to the office: Will employees be required to disclose their vaccination status? Will they be required to return to in-person work? Will they be allowed to work outside the state? Read how some law firms are answering these questions and more on page 26.

Finally, we are dedicating space in this issue and in future issues to let you know what’s happening at your local county bar associations. For example, did you know that Ferry County is reviving its bar association this year? Find the first edition of Bar Notes on page 48.

Also in this issue: a look at what Washington’s new Long-Term Care Act means for employees, employers, and those who advise them; an ethics column on documenting fee agreements and modifications; and an overview of a new program proposed by the Washington Supreme Court’s Practice of Law Board called the Legal Regulatory Sandbox (page 34).
The lawyers at Pfau Cochran Vertetis Amala (PCVA) like a challenge, which is why we focus on high-value complex litigation, including catastrophic injury, medical malpractice and sexual abuse. We are assertive negotiators who aren’t afraid to go toe to toe against large, well-funded foes. We’re also experienced trial attorneys who are at home in the courtroom and naturally excel in front of juries.

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Letters to the editor published in Bar News must respond to content presented in the magazine and also comply with Washington General Rule 12.2 and Keller v. State Bar of California, 496 U.S. 1 (1990). Bar News may limit the number of letters published based on available space in a particular issue and, if many letters are received in response to a specific piece in the magazine, may select letters that provide differing viewpoints to publish. Bar News does not publish anonymous letters or more than one letter from the same contributor per issue. All letters are subject to editing for length, clarity, civility, and grammatical accuracy.

Tests Don’t Lie
My family is replete with doctors and nurses. Each one had to pass rigorous examinations to be allowed to provide medical services to their patients. Thank God. To pass those tests each had to have extensive knowledge in their field. It is certain that without that knowledge they would be hazardous to their patients. I have, to date, heard no one say the tests are unfair because of some racial disparity in the number of those passing them. The only issue is competence. If medical providers do not have the objective knowledge, people suffer and die. The tests are not “equitable,” they are effective. “Equitable” has no place.

Terra Nevitt, in her June 2021 Bar News column “The Bar in Brief,” used the words “equity” and “equitable” in reference to admissions standards. From the context I assume she refers to admission to the Bar, rather than law school, which is another issue entirely. I know the concept of equity rather well since I am also licensed in Tennessee where there are still courts of equity, chancery courts. One definition of equity is “freedom from bias or favoritism.” A definition of equitable is “dealing fairly and equally with all concerned.” Nevitt uses those terms improperly in the context of her article. The Washington Bar is not a country club, it is a tremendously important guardian which has as its primary purpose the assurance to those in need that each person who offers services in legal matters is competent and ethical. The job of the Bar is absolutely not to consider the color of the applicant to practice. If the Washington State Bar Association is going to do its job, it cannot look to the ethnicity of the applicant. That, in turn, requires that it exclude any application of the concept of equity. The applicant has no claim for equity, just for equal treatment. Equity cannot measure or add to competence, therefore it cannot be a factor in the process to determine it.

The sole purpose of the bar exam must only be to serve the clients’ needs and fulfill the legal system’s obligation to assure competent counsel, not what some members of the Bar perceive to be a need to appear “woke.”

Laurence A. Deas  
Payallax

In re Headline
I read with interest the interview of Chief Justice [Steven] González [June 2021 Bar News]. However, I was somewhat alarmed with the Bar News cover title for that interview. “Working Toward a Just Court” sends an unambiguous message that the court is not currently “just.” Was that the intended message?

Keith Hamack  
Seattle

Voluntary or Bust
Regarding [WSBA] President [Kyle] Scichetti’s idea about a House of Delegates [President’s Corner, July/August 2021 Bar News], why not just make the WSBA voluntary? That would also give the statement which followed Roger Ley’s letter to the editor “[Leave Policy to Politicians]” a ring of truth: “The WSBA is not a political agency.”

Inez Petersen  
Enumclaw

A Fun ‘Brain’ Jumper
There was a note in Teresa Matich’s article “Client Centrism: The Next Wave of Legal Innovation,” July/August 2021 Bar News that was a thought creator. The note was: “There is not a single client who has ever wanted a lawyer—what clients want is a solution to a problem.”

That made me start thinking a lot about other people in professions, and I think the comment relates to all workers/professionals. Who ever wants a doctor? Or a chef or waiter or accountant or anything? Nope, none. What we want is a person we like and then we can appreciate what they can do for us. What we want are solutions, service, knowledge related to everything we have to do or live with. Very fun thought processes. It was a fun “brain” jumper.

Ed Huneke  
Spokane

The Rulemaking Process Is Flawed
In her column about the rulemaking process [July/August Bar News], Executive
Director Terra Nevitt addressed the development of the proposed new disciplinary procedural rules. She believes that if we submit public comments to the court, “the system is working exactly as it should.” In the context of these proposed rules, I must disagree.

WSBA staff spent five years developing a new set of procedural rules without any opportunity for public input. No explanation has been provided for the exclusion of other viewpoints from the rulemaking process. The so-called stakeholder review was flawed as I addressed in my comments to the court, available on the court’s website. The process used this time contrasted sharply with previous overhauls of the disciplinary rules in which many stakeholders participated in the drafting process. Limiting our input to comments to the court is inefficient and impractical because the court does not have the capacity to consider every proposed change to such a large set of rules. Rather, the process appears designed to give the Office of Disciplinary Counsel even more power in a system that is already weighted in its favor.

According to documents I obtained through a public records request, shortly before the rules were submitted to the court for consideration, the WSBA’s chief disciplinary counsel and general counsel made a presentation to the full court about the proposed rules. This was not an open meeting and, as far as I know, no one else was provided an opportunity to meet with the court about these proposed rules.

The system is working exactly as it should if the goal is to let the prosecutors determine the rules without much consideration for the views of either grievants or respondent lawyers. Sugarcoating this deficient process doesn’t change what happened.

Anne Seidel
Seattle

Loving the Law

In these days of being somewhat confined due to the ongoing pandemic I feel the need to try and uplift my colleagues with a positive message: GAWD I LOVE THE LAW! Notwithstanding the time we are in, I know that most of you share my enthusiasm for our profession. Each day, after I finish my work, I always return home feeling an enthusiasm for our profession that most of you share my hope that one day the time we are in will pass and we can set aside our differences and work together for the betterment of our clients.
coffee and sit myself down into the
captain’s chair in front of the com-
puter, in my mind I am fastening my
safety belt, putting on my helmet and
closing its face shield, and settling
in to adjust the gauges before engag-
ing the engine. Then I am off; first
checking messages in the inbox for the
Order of the Day. Sometimes, I even
rub my hands together in anticipation.

Due to the pandemic I am, of
course, working from home; but in
the pre-pandemic era my faithful
assistant would have appeared at my
side saying, “Who we going to sue
today, boss?” If, after returning to his
workstation in the reception area,
something of grave importance or an
important visitor appeared, he would
summon me with “Boss, report to the
bridge.” Then we would create a plan
of action. If I had to leave the office,
my faithful assistant was jubilant at
me telling everyone present that he
had the con. Admit it, don’t we all miss
those kind of days?

Colleagues, I miss you all. Like those
healers who practice medicine and
members of the clergy, we are descen-
dants of an ancient profession—those
who took an oath to serve justice. Not
withstanding that many of us, including
me, are capable of poor choices in times
of stress to the disadvantage of those
around us, keep the faith. We will get
through this. Band together, even if
electronically, if a sounding board or
other support is needed. As people, we
lawyers have lagged behind the world-
class athletes who have only recently
come to announce that their mindful-
ness is inseparable from their ability to
perform under pressure.

Due to the nature of the adversary
system, in order to fulfill our oaths
many of us are cast in roles easily vil-
ified, which causes added pressure—
even cognitive dissonance. Take heart,
your colleagues know who you are.
Bless all of you for joining me in this
great profession. Take precautions,
remember your mindfulness, and like
the old Doonesbury character join me
in saying, “GAWD I LOVE THE LAW!”

Jack Fiander
Yakima
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What is needed for police reform? Last summer, in the wake of George Floyd’s murder, tens of thousands of protesters rallied in cities throughout America to [...] nwsidebar.wsba.org

Washington Nonprofit Corporation Act: What You Need to Know

Earlier this year, the Washington Legislature adopted, and Gov. Jay Inslee signed into law, an all-new Washington Nonprofit Corporation Act (the “New Act”). [...] nwsidebar.wsba.org

The Rise and Necessity of Mutual Aid in Immigrant Communities

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The Bar in Brief

A NOTE FROM THE WSBA EXECUTIVE DIRECTOR

A Deeper Look at Our State’s ‘Legal Deserts’

My dad is an optometrist in Raymond (population 2,963). He’s the only one in Raymond. In fact, he’s the only one for 30 to 50 miles in any direction. We moved to Raymond when I was 3. My dad finished optometry school and joined the practice of Dr. William J. McKinney. The plan was for my dad to practice with him initially as an employee, then become a partner and eventually buy the practice. It worked well. Dr. McKinney was able to transfer the practice he spent his life creating—from the building and the equipment, right down to the staff and the goodwill—and my dad was able to step into that practice and make it his own, investing in new technology, developing new systems, and building a new office that he still walks to and from every day. My dad is my role model for loving what you do.

His retirement plan has always been to repeat what Dr. McKinney did and sell the practice to someone ready to make it their own. And over the years, he’s tried. Several doctors have come and gone for one reason or another. Maybe small-town living didn’t suit them. Maybe their spouse couldn’t find a job. Maybe their student loan debt was too much to take on the debt of buying a practice. Whatever the reason, so far, it hasn’t worked out. My dad will turn 71 this year, and I wonder: Who will serve that community when my dad is no longer able to?

All of this was on my mind when I sat in the offices of MDKJ Lawfirm in Davenport, two years ago on the annual WSBA Listening Tour. Then-President Bill Pickett, Governor P.J. Grabicki, and I were sitting around the firm’s conference room table eating pizza and listening to L.R. “Rusty” McGuire talk about what a hard time they’ve had recruiting lawyers to join their firm. “We pay the same rate as the Spokane firms,” he told us, “and that goes a lot further in Davenport. We can offer attorneys a great practice and a great lifestyle here.”

We spent the next hour talking about the many benefits of a small-town practice—the variety of legal issues you get to take on, the deep relationships you form, and the ability to leave the office early to coach your kid’s baseball team. We also brainstormed the reasons that it’s so difficult to convince new attorneys to move there. We had lots of theories, all very similar to the reasons I suspect my dad hasn’t been able to find anyone to take on his optometry practice.

When I visited Davenport that day, the WSBA had already been talking about this problem—the problem of insufficient numbers of practitioners in rural communities and the resulting access-to-justice gap—for many years: The Washington Young Lawyers Commit-

tee had been working on a summit to address the issue. Concerned with the lack of referrals for the Moderate Means Program, our public service team was exploring what states like South Dakota are doing to promote rural practice. We had even budgeted to pilot some kind of rural placement program but hadn’t gotten it off the ground yet. I told Rusty about some of our plans, and he seemed doubtful that it would be of any help. We left Davenport convinced of two things: (1) we need to solve this problem and (2) we need to do so in partnership with the folks already practicing in what have come to be referred to as “legal deserts.”

The American Bar Association’s 2020 publication, ABA Profile of the Legal Profession, provides data that illuminates the legal desert problem nationwide. The first chapter covers legal deserts, stating that while there are more than 1.3 million lawyers in the United States, they are not evenly distributed. On average, there are four lawyers for every 1,000 people in the U.S. (Washington comes in a little below the average with 3.5 lawyers per 1,000 people); most are concentrated in urban areas, leaving some rural areas with less than one lawyer per 1,000. What’s worse, in some areas, the only attorneys work for the government, leaving the community with few if any resources for legal representation, particularly in civil matters.

Shortly after our meeting in Davenport, the WSBA put together an informal team to investigate Washington’s unique challenges. The group included representatives from each Washington law school, former and current members of the Board of Governors, representatives from the Washington Young Lawyers Committee, and WSBA staff from across the organization. Over the past 20 months, the group has conducted considerable research, including outreach to 182 practitioners in rural counties. In addition to the survey feedback, 41 rural practitioners, representatives from legal aid
organizations, the Attorney General’s Office, prosecuting attorneys’ offices, and tribal communities participated in brainstorming sessions designed to gather potential solutions. The group ultimately prioritized three initiatives that the WSBA can facilitate: (1) outreach and education about the unique needs, opportunities, and benefits of rural practice; (2) development of a pipeline of rural practitioners, including through an incentive program to encourage the exploration of rural practice; and (3) highlighting rural job opportunities and assisting with the purchase and sale of rural practices. The WSBA has created the Small Town and Rural (STAR) Committee to drive these initiatives and has been actively recruiting members.

I’m looking forward to supporting the STAR Committee as they take steps to implement these ideas. And as we’ve begun the 2021 Listening Tour, I’m looking out for the work to be prioritized next.

NOTES

SIDEBAR
Distribution of Legal Professionals in Washington

The counties in our state most impacted by a shortage of lawyers are Adams and Franklin Counties (.5/1,000), followed by Ferry and Douglas (.6/1,000), Skamania and Asotin (.7/1,000), Pend Oreille (.8/1,000), and Stevens and Klickitat (.9/1,000).


1 DOT EQUALS 10 LAWYERS

King County 16,552
Spokane County 1,925
Clark County 875
Pierce County 2,264

Source: ABA Profile of the Legal Profession
A Year to Remember
To those who uplift the profession ... and this outgoing WSBA President

Last month I attended the funeral of former long-time Spokane City Attorney James “Jim” Sloane. A year out of law school, I worked for Jim in the Spokane City Attorney’s Office as an assistant city prosecutor. Friends who knew Jim—my parents included—described him as calm, thoughtful, and unassuming, and I was fortunate to experience these traits firsthand; he was everything you could hope for in a boss. At the funeral, I realized my feelings were not unique—many, many (certainly more than his family expected) colleagues came to say goodbye and relive old stories about Jim and the life he led. His is a legacy of leadership, relationships, and service, and he made a deep and permanent impact on the legal community.

As I traveled home from Jim’s service, I began thinking about this past year and my experience as the Washington State Bar Association president. There have been challenges, for sure, but my predominant feeling is one of thanks: for the relationships I have established and the way we came together to serve our profession at a time of unprecedented challenges. This is my last President’s Corner before handing the torch over to new leadership, and I can’t help but feel that I have come full circle, with Jim’s influence of putting people and service first guiding me to where I am today.

With these final words, I am going to honor Jim’s memory by focusing on what counts: recognizing the people committed to improving our Bar Association and helping its members deliver the best legal services—even, or perhaps especially, during the most unprecedented of times. These are people who not only helped me succeed as president, they helped us all succeed through their devotion to the advancement and improvement of the profession.

Immediate Past President Rajeev Majumdar (Blaine). President Majumdar spent his own term navigating extraordinarily challenging conditions, including new WSBA leadership and the onset of the COVID-19 crisis. He did so with steadfast determination, diplomacy, and good humor. The first time I met President Majumdar, he greeted me with a hug, which was a true show of his leadership style and depth of caring for people. He set the bar high, and I am eternally grateful for his friendship and sage advice whenever I was called upon to make difficult decisions during my term.

President-Elect Brian Tollefson (Tacoma). In 2018, Judge Tollefson and I were sworn in to the Board of Governors. As we started our service to the organization together, I think it’s safe to say neither of us could have predicted what was to come! A retired superior court judge, President-Elect Tollefson has earned a reputation as a soft-spoken yet direct contributor whose careful words always command attention. I look forward to his presidential year.

Sunita Anjilvel (District 1, Redmond). Governor Anjilvel was appointed to the Board of Governors in 2019 to fill a vacancy, and I am so pleased she will continue her service after winning re-election this year. She is a persuasive advocate for the tyrannized and oppressed, speaking her mind with authority and conviction. She has been a sounding board to keep me focused and centered throughout my term. She is a force for good for our organization, endlessly willing to step up to do important work.

Carla J. Higginson (District 2, Friday Harbor). We may not always see eye-to-eye, but I appreciate Governor Higginson’s tenacious focus on what she believes is in the best interest of the membership. While on the Legislative Committee, we worked together on policies and procedures to allow WSBA sections to better help legislators draft laws with the guidance of subject-area experts. She is not afraid to challenge other opinions, which makes us all better leaders.

Lauren Boyd (District 3, Vancouver). Governor Boyd joined the Board when I became president, and I have been grateful to get to know her this past year. Her leadership contributions have been swift and measurable; she is a strong advocate, tireless contributor, and relentless problem solver. She continues a tradition of governors from southwest Washington who participate fully and robustly despite geographic distance from WSBA headquarters and most other members. She represents our district, and the entire state, expertly.

Dan Clark (District 4, Yakima). Not only has Governor Clark been on the Board of Governors since 2017, he has served two terms as WSBA treasurer and was recently elected as the 2021-22 president-elect. His commitment to fiscal responsibility, transparency, and member engagement is unparalleled. He speaks up for his colleagues in Yakima as well as for members throughout the state. I’m glad to call him a friend and confidant.
Governor Grabicki’s catchphrase is, “Here’s what we oughta do!” Over the past three years, I have heard it dozens of times. As the Board wrestles with challenges, great and small, Governor Grabicki is quick to find simple and effective solutions. Typically, these ideas are accompanied by a colorful story or figure of speech. I’ve enjoyed working with Governor Grabicki immensely, and I always appreciate his wit and candor.

Governor Purtzer has long been considered a leader in his community, and our entire association has benefited from that skill and perspective during this, his first year as a governor. The breadth of his experience and knowledge has been invaluable, especially as the Board of Governors has tackled many policy decisions.

I met Governor Kang shortly after I was elected to the Board of Governors in 2017. Immediately, I could see that she had a solid sense of right and wrong and the confidence and authority (she’s a great litigator!) to back up those convictions. Governor Kang listens, gives astute advice, and is a fierce advocate for diversity, equity, and inclusion in the legal profession. She would make a great president of the WSBA. She would make an even better judge, justice, or chief justice on our Supreme Court.

Governor Dresden has brought a restrained, yet commanding, presence to the Board. He has the meritorious habit of listening more and talking less (which I try to emulate). He is trusted and respected, and his skills, experience, and knowledge will improve the organization, now and well into the future.

Governor Williams-Ruth this past year, it’s clear he has a passion for doing what’s right. He champions justice and is not afraid to speak out when he believes it necessary. There’s no doubt Governor Williams-Ruth will have significant influence over the direction of the state Bar during his tenure on the Board and career as an attorney.

Governor Peterson was elected by the Board in August to be WSBA’s next treasurer; it was an election with robust conversation about fiscal policy and transparency. With his skill, knowledge, and humility I know Governor Peterson will oversee the finances of the organization in the most dependable and responsible way.

Governor McBride and I share a passion for the legislative process. His unparalleled knowledge of the Legislature and keen insight into the workings of the House and Senate have made him an exceptional member of the Board of Governors and the Legislative Committee. Governor McBride’s logical approach and folksy demeanor make him a powerful leader, and I have enjoyed every conversation we have shared. I will not hold it against him that he is the product of North Central High School (Spokane).

Governor Stephens began his service as Governor At-Large to the WSBA in 2018 and was re-elected in 2020. He has set himself apart as a fierce advocate and independent thinker for the WSBA. I relied on him heavily during my tenure, both as official parliamentarian and for his wealth of experience in leadership positions. He has my eternal thanks for all of the shrewd counsel during these past years. Like Governor McBride, I promise to no longer hold it against him that he’s a Miami Hurricane.

Governor Knight’s commonsensical eloquence and ability to persuade made the difference in a close vote. As the At-Large Governor representing new and young lawyers, Governor Knight demonstrates wisdom beyond his years. I know he will continue to give back to the WSBA and to the legal community well into the future.

Governor Abell has mastered the art of disagreeing without being disagreeable. He is polite and friendly, yet direct (perhaps a product of his Navy background). Governor Abell has thrown his energy into supporting the Small Town and Rural Committee, dedicated to strengthening and supporting the practice of law in rural communities. I am confident Governor Abell will volunteer his time and energy to worthy causes, as he has done his entire life, and our profession will be better for it.

Joining the Board of Governors this year are Francis Adewale (District 5), Serena Sayani (District 7-South), and Jordan Couch (At-Large). All three have already participated in several Board meetings and trainings to be able to hit the ground running in the new fiscal year. Their fresh ideas and energy are inspiring; I look forward to seeing their contributions as leaders of this organization.

Finally, my year would not have been as enjoyable or smooth without the leadership and staff of the WSBA. I’ve treasured my time working with every one of them. To Executive Director Terra Nevitt and her executive leadership team (Doug Ende, Renata de Carvalho García, Sara Niegowski, Julie Shankland, Glynnis Klinefelter Sio, Jon Dawson, Kevin Plachy, Jorge Perez, Diana Singleton, and Ana LaNasa Selvidge) and staff members (Kirsten Abel, Paris Eriksen, Jennifer Olegario, Rex Nolte, and Shelly Bynum): I owe a debt of gratitude to you all.

All that we have accomplished this year is the result of hard work and wise leadership by these people, and many more. People committed to making a difference and improving the legal system and Bar Association. People from across the state who share ideas, collaborate, and compromise and who, in the end, develop lifelong relationships. People not unlike those that attended Jim’s funeral in Spokane in celebration of a colleague, community leader, boss, mentor, and friend. For me, that may be the greatest reward of serving as your president this past year. It has been an honor to serve.

### NOTES
1. Cross-town rival to my alma mater John R. Rogers High School (Spokane).
2. In 1991, the University of Washington football team (my Huskies) went 12-0 and won the Rose Bowl, but had to split the national championship with the also 12-0 Miami Hurricanes.
Treasurer’s Report

A New Fiscal Year, a New Budget, and New Leadership

My fellow WSBA members, it has been my honor to serve as our Association’s treasurer for the past two years. As we begin the new fiscal year in October, I want to provide some details about the 2021-2022 budget, and, on a more personal note, to thank you for being interested in the financial integrity of the WSBA during my tenure. This is my last Treasurer’s Report, and as I pass the torch to newly elected Treasurer Bryn Peterson (District 9 Governor), I have no doubt that transparency through robust member communication will continue to be a top priority for Treasurer Peterson and the entire Board of Governors. It certainly will be for me as I continue as District 4 Governor (I marked the start of my fifth year in this role in July) and assume the president-elect position for FY 2022. I am excited to transition to this new leadership opportunity and to continue to serve you and the WSBA.

FINANCIAL STATEMENT

Through June 2021 (the latest final financial figures at the time of this column’s publication), the WSBA’s general fund has a net positive growth of $1,765,240 for the fiscal year. In spring, when we conducted a reforecast of the budget based on actual expenses and revenue halfway through the fiscal year, we anticipated a loss to the general fund of $114,092, which would have come out of the reserves. So it is great news that we are currently on pace for revenue to far exceed that reforecast. The latest forecast by Chief Financial Officer Jorge Perez indicates that the WSBA should end FY 2021 in September with a net increase of approximately $1,391,731. If so, the WSBA will start the new fiscal year with $6,805,873 in the general fund ($2,550,000 in a restricted facilities/capital fund and $4,255,873 in unrestricted funds). Overall, we have performed better than projected this fiscal year because of cost savings from remote meetings with volunteers and staff not incurring travel costs due to COVID-19 conditions, as well as several unfilled staff positions.

FY 2022 BUDGET

It might be helpful for you to understand some of the priorities and context we are using to make financial decisions for the coming year and beyond. Foremost, the Board of Governors has made a commitment to hold license fees steady (in recent years the total fee has actually been lowered due to a decrease in the Client Protection Fund assessment). I am proud to say we will be able to keep that commitment in FY 2022, and the Board of Governors just made a recommendation to the Supreme Court to hold fees steady again in 2023. Of course, with license fees being the primary revenue source for the WSBA, our budget conversations are focused on how to be as efficient and strategic as possible—especially as we conduct long-term planning and make decisions to enhance support for, as an example, member wellness and rural practitioners.

When the Board of Governors made a decision to prioritize holding license fees steady for a period of five years beginning in 2020, a corresponding financial analysis anticipated careful use of the WSBA’s reserve funds to maintain programs and services, which would keep our reserve fund balance within a responsible range mandated by policy. As such, an initial draft of the FY 2022 budget called for use of close to $700,000 in the reserves to support ongoing services and support to members and the public.

As WSBA treasurer, this is concerning to me, and I will push for a balanced (or even profitable) FY 2022 budget. Future WSBA leaders will continue to have very difficult choices to make in order to hold license fees steady through 2026—choices that will be best supported through a robust reserve fund and lowered annual costs of operating. For example, we have had discussions in the Long-Range Strategic Planning Council about potentially moving the WSBA office location when the current lease is up in 2026 and/or buying a building, both of which I believe would require additional funds from a special assessment on members, and/or from increased license fees or reduced services and/or staff.

Looking ahead next year and beyond, the WSBA should continue to use technology to engage with members and hold meetings virtually, which will result in tens of thousands of dollars in savings as volunteer committees, work groups, task forces, councils, and even the Board of Governors reduce travel costs and meeting expenses. I also believe there are cost savings to be captured in the sublease of WSBA office space as many employees transition to work remotely (we are looking for prospects) and other efficiencies. All that is to say: I am going to continue to advocate for a positive balance for FY 2022 as we pass the budget and as we make financial decisions in the coming year. FY 2021 is a prime example of how we can beat our anticipated budgets through careful diligence and prioritization.

In any event, it has been an absolute honor to serve as your treasurer. I am confident that our next treasurer will have the same commitment to financial transparency and fiscal prudence as I’ve tried to have on behalf of each of you and our Association. Respectfully,

Daniel D. Clark, WSBA Treasurer

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.
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Even in those situations where no written fee agreement is required, in order to avoid confusion or later dispute, it is always wise to have one and, if a written fee agreement is used, it should be written in clear language that the client can understand.

—In re Van Camp, 171 Wn.2d 781, 805 (2011)

When the ABA Model Rules of Professional Conduct were comprehensively updated two decades ago, the ABA Ethics 2000 Commission that developed the amendments recommended that virtually all fee agreements be in writing. When all was said and done, however, the ABA adopted an amended version of Model Rule 1.5(b) that, aside from contingent fee agreements, states only that fee agreements “preferably” should be in writing.

Washington’s version of RPC 1.5 followed a roughly similar trajectory. The WSBA Ethics 2003 Committee, which was patterned on its ABA counterpart, debated but ultimately chose not to recommend that all fee agreements be in writing. Again, aside from contingent fee agreements, the Washington amendments eventually adopted in 2006 only noted in an accompanying comment that written fee agreements were “desirable.” RPC 1.5 was amended in 2008 to also require written agreements for flat fees paid in advance that are denominated as “property on receipt.” Those, however, remain the only two circumstances in which a written fee agreement must be in writing under RPC 1.5.

As a matter of legal ethics, then, fee agreements must be in writing in only relatively limited circumstances; however, law firm risk management counsels that most, if not all, fee agreements should be in writing. Similar considerations apply when a lawyer modifies an existing fee arrangement. The ABA Ethics 2000 Commission put its finger squarely on the reason for written fee agreements nearly 20 years ago, and its observation has only become more apt with time: “Few issues between lawyer and client produce more misunderstandings and disputes than the fee due the lawyer.”

In this column, we’ll survey some practical approaches to documenting both initial fee agreements and any later modifications.

Before we do, however, two qualifiers are in order. First, in this column, we’ll focus on drafting fee agreements that are clear enough to avoid disputes (one hopes) and that will be enforceable later if necessary. When it comes to the contractual aspects of fee agreements, RPC 1.5 and associated case law set a benchmark that courts often look to when addressing their enforcement. In *LK Operating, LLC v. The Collection Group, LLC*, 181 Wn.2d 48, 85, 331 P.3d 1147 (2014), for example, the Washington Supreme Court noted: “We have previously and repeatedly held that violations of the RPCs or the former Code of Professional Re-
sponsibility in the formation of a contract may render the contract unenforceable as violative of public policy.” In short, RPC 1.5 looms large in enforcing agreements in the civil context because it is the functional equivalent of statutory law applicable to fee agreements.

Second, billing and collection are equally sensitive associated topics. RPC 1.5 on its face also applies to charging and collecting fees, and case law both within and outside the disciplinary realm illustrates the risks lawyers run if they do not bill accurately and collect fairly.9

**ORIGINAL AGREEMENTS**

Some fee agreements are quite elaborate while others are more basic—with the degree of detail often varying by practice area and clientele. Two key drafting considerations, however, cut across that spectrum: be complete and be clear.

“Complete” means including the central financial and non-financial aspects of the representation. On the former, Comment 2 to RPC 1.5 suggests the core elements: “the basis, rate or total amount of the fee and whether and to what extent the client will be responsible for any costs, expenses or disbursements[,]”10 In *In re Marshall*, 160 Wn.2d 317, 335, 157 P.3d 859 (2007), for example, a lawyer was disciplined for charging for contract attorney services that had not been included in the lawyer’s fee agreement. As for the non-financial aspects, Comment 2 to RPC 1.5 suggests inclusion of “the general nature of the legal services to be provided”11—to which I would add the inclusion of a specific statement as to the identity of the client.12 In *Davis Wright Tremaine LLP v. Peterson*, 2017 WL 1593009, at *4 (Wn. App. May 1, 2017) (unpublished), for example, a law firm was able to overcome the client’s defense in a collection case over the scope of the matter involved by pointing to its fee agreement.13

“Clear” means providing the client with a fee agreement that is understandable. Courts can—and do—apply the general rule of contract construction that “ambiguity is construed against the drafter” when reviewing fee agreements. The Court of Appeals in *Forbes v. American Bldg. Maintenance Co. West*, 148 Wn. App. 273, 288, 198 P.3d 1042 (2009), aff’d in part and rev’d in part, 170 Wn.2d

**Few issues between lawyer and client produce more misunderstandings and disputes than the fee due the lawyer.**
157, 240 P.3d 790 (2010), for example, cited this standard in reviewing a fee agreement and underscored the rule’s practical import in an environment where the lawyer or law firm involved is almost always the drafter:

[Lawyer] not only drafted this contract, but she amended it on more than one occasion in the course of the parties’ relationship. If she had intended to provide herself a specific contingency for settlement after a tria on the merits and judgment, she could have drafted appropriate language clearly indicating that the parties agreed to that contingency.14

MODIFICATIONS
Modifying existing fee arrangements in ways that benefit the lawyer triggers a complex blend of regulatory, fiduciary, and contractual considerations. The Court of Appeals in Ward v. Richards & Rossano, Inc., 51 Wn. App. 423, 428-29, 432, 754 P.2d 120 (1988), summarized this interlocking web:

Review of an attorney’s fee agreement renegotiated after the attorney-client relationship was established requires particular attention and scrutiny. ... Such a modification is considered to be void or voidable until the attorney establishes “that the contract with his client was fair and reasonable, free from undue influence, and made after a fair and full disclosure of the facts upon which it is predicated.” ...

A fee agreement modified to increase an attorney’s compensation after the attorney is employed is unenforceable if it is not supported by new consideration. (Citations omitted.)15

Ward involved an increase in the compensation for an engagement. The standards summarized, however, apply with equal measure to other financial elements such as adding security for fees.16 WSBA Advisory Opinion 2209 (2012) noted the reason for this high bar: “Once the attorney-client relationship has been established, the attorney’s obligations change drastically because the attorney now owes a fiduciary duty to her client.”17

This suggests two approaches when circumstances change during an ongoing representation.

First, to the extent possible, anticipate reasonably foreseeable events in advance and then build those contingencies into the original fee agreement. Two ready examples are a mechanism for periodically changing hourly rates and increasing the percentage for a contingent fee if a case moves on to trial or appeal. If those events occur, then they will simply reflect contingencies anticipated by the original fee agreement rather than a modification.18

Second, if an event arises that was not anticipated by the original fee agreement, the lawyer or law firm should carefully document the changed circumstances that triggered the corresponding change in compensation or security. For example, a matter may have grown more complex than anyone anticipated, or the client may have fallen behind in paying the law firm. The same degree of completeness and clarity discussed earlier for original agreements should be applied to modifications. Further, where the change involves taking security for an existing receivable, RPC 1.8(a)—the “business transaction” rule—applies under Valley/50th Ave., L.L.C. v. Stewart, 159 Wn.2d 736, 744, 153 P.3d 186 (2007),19 and WSBA Advisory Opinion 2209,20 Lawyers and their law firms in that situation should closely review and carefully apply the conflict waiver standards required under RPC 1.8(a) to ensure that the resulting amended agreement will be enforceable. In situations not invoking RPC 1.8(a), the extent of the amendments or the nature of the negotiations over those changes may still require a conflict waiver under RPC 1.7(a)(2)—which governs conflicts between, among other things, the financial interests of a lawyer and the lawyer’s client. Even if a conflict waiver is not required, both RPC 1.5(b)21 and contract law22 require discussing proposed material changes with clients rather than simply imposing them unilaterally without notice. Therefore, documenting both the discussions with the client and the client’s agreement to a modification can be critical to any later enforcement. 23

NOTES
1. See ABA, A Legislative History: The Development of the ABA Model Rules of Professional Conduct, 1982-2012, at 97 (2013) (ABA Legislative History). The principal exceptions recommended at the time were for recurring matters for the same client or where fees were de minimis. id.
2. ABA Model Rule 1.5(c).
4. RPC 1.5(c)(1), RPC 1.5(c)(2), in turn, includes mandatory elements for contingent fee agreements.
5. RPC 1.5, cmt. 2.
6. RPC 1.5(f) (including suggested text). For a history of this amendment, see Washington courts’ website at: www.courts.wa.gov/court_rules/?fa=法院_rules.proposedRuleDisplay&ruleId=136.
7. Under both ABA Model Rule 1.8(a) and Washington RPC 1.8(a), business transactions with clients must also be documented in writing.
8. ABA Legislative History, supra n. 1, at 97. Comment 2 to Washington RPC 1.5 makes this same point.
10. See also RPC 1.5(a)(9) (including as a factor in determining the reasonableness of a fee “whether the fee agreement or confirming writing demonstrates that the client had received a reasonable and fair disclosure of material elements of the fee agreement and of the lawyer’s billing practices”).
11. See also RPC 1.2(c) (limiting the scope of representation).

Modifying existing fee arrangements in ways that benefit the lawyer triggers a complex blend of regulatory, fiduciary, and contractual considerations.

13. These are not intended to be a comprehensive catalog. Depending on the circumstances, other items such as alternative dispute mechanisms should be detailed in writing. See, e.g., Mann Law Group v. Digi-Net Technologies, Inc., 2014 WL 535181 (W.D. Wash. Feb. 11, 2014) (unpublished) (discussing arbitration provision in fee agreement); see generally ABA Formal Op. 02-425 (2002) (same from national perspective). Although technically separate from fee agreements, any conflict waivers necessary to proceed with a representation must be confirmed in writing under RPC 1.7, 1.8, or 1.9 as applicable.

14. The Supreme Court did not accept the attorney’s petition for review on this point. 170 Wn.2d at 166.


20. “If the only modification is the acceptance of a security interest for the payment of already negotiated fees, the attorney will be required to comply with the terms of RPC 1.8(a) as this constitutes a business transaction.” WSBA Advisory Opinion 2209 (2012).

21. “Any changes in the basis or rate of the fee or expenses shall also be communicated to the client.”

Write Introductions That Will Bedazzle Rather Than Bore

BY BENJAMIN S. HALASZ

No part of a brief is more likely to be read than its opening line. And yet, many briefs start like this:

**Opposition to Motion to Dismiss Complaint**

XYZ Corporation respectfully submits this Opposition to the Motion to Dismiss the Complaint of ABC Corporation.

Or like this:

**OPPOSITION TO DISMISSAL OF COMPLAINT AND SUBSTITUTION OF PARTIES**

TO THE HONOURABLE COURT:

COMETH NOW Plaintiffs, through the undersigned attorney, and very respectfully state and pray for:

These kinds of openings have no verve, no action. And your readers are more likely to yawn and reach for coffee than to approach the next sentence with interest.

By contrast, consider these two opening lines, from two of the parties involved in the Bernie Madoff litigation:

1. Operating a massive Ponzi scheme, Bernard L. Madoff stole billions of dollars from thousands of investors, including charities, pension funds, universities, and individuals.¹

2. The Securities and Exchange Commission (“SEC”) decided to investigate Bernard Madoff’s multi-billion dollar Ponzi scheme at least six times over two decades.²

These make me look forward to reading the brief; and beyond that, they hint at the story to come.

Your introduction presents two strategic opportunities. First, you can present your brief’s theme in a favorable light. You convey that theme through tone—this brief is going to be aggressive, boring, narrative, educational, or something else—and by telling the story in a way that is memorable and interesting.

Second, you can place your brief in the context of the larger case, one in which you’ve been working to convince the judge of your version of events. Your simple procedural motion can remind the judge what the case is really about; for instance, that this was the case about the Ponzi scheme where the government had plenty of chances to catch the crook and yet failed.

But accomplishing these goals is easier said than done, and it can be a struggle to write a compelling, interesting intro. To make it easier, aim to include five elements in your introduction: a hook, a theme, a reminder of the underlying facts of the case, the key legal arguments for this motion, and the exact relief requested. While this isn’t the only way to write an introduction, these elements will help ensure you meet those strategic goals; and they provide an outline for when you’re facing a time crunch or just struggling to make the text flow.

**THE HOOK**

A hook is an opening line that catches your reader’s attention, making them want to...
read more of the brief. Hooks are common features in newspaper and magazine articles. Both of the Madoff examples above contain a hook: they each read like the start of a story. Consider the story in this first line as well, from a tort case:

On the evening of July 1, 2005, plaintiff Laura Reichhart was walking with her young daughter and a friend along the Charlotte Pier (the “Pier”) at the Rochester Harbor, when she fell after tripping in a hole in concrete pavement approximately 17 inches across, 36 inches wide and 3 inches deep, and indistinguishable from the surrounding rough and chipped pavement surface.5

This hook is factual, as were the Madoff ones. But a hook can also be about the law or its policies, as illustrated by this opening line:

In the 28 years since the United States Supreme Court decided Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), minority jurors continue to be removed from panels at a disproportionate rate due to the continued discriminatory use of peremptory challenges.4

The hook should be short, interesting, and directly relevant to the motion. Creating a directly relevant hook can be difficult, but it’s worth the effort. Some brief writers reach for a book of quotations, or a tome of poetry, as many speechwriters do; I find those hooks unpersuasive because they don’t seem sufficiently tied to the case. They are distracting rather than informative.

Nor are hooks limited to practitioner briefs; judges too will sometimes use hooks in their opinions to capture their readers’ attention. U.S. Supreme Court Justice Neil Gorsuch included some memorable ones during his time on the Tenth Circuit, ones that give a sense of what the case is about beyond the purely legal issues. “Little but grief has come of the loan Michael Van De Weghe gave his girlfriend,” starts one opinion.5 At the same time, as others have pointed out, some judicial hooks serve as a warning not to reach too far, as they too can come across as distracting, irrelevant, or inappropriate.6

If you have a question about legal writing that you’d like to see addressed in a future “Write to Counsel” column by UW Law writing faculty, please submit it to wabarnews@wsba.org, with the subject line “Write to Counsel.”

**THE THEME**

Your introduction should also present the theme of your brief. Your audience should be able to read it and understand quickly why your client is in the right and the opposing side is in the wrong. Each of the hooks discussed earlier present the theme of the brief: (1) this scam was huge and far-reaching; (2) the government had plenty of chances to catch Madoff and failed; (3) the dangerous hole in the pavement was invisible to someone walking.

These themes not only serve to capture the attention of the reader, they also tell the reader from the get-go what the brief will be about. And by doing so, they help create a sense of unity in the brief, especially when the writer then develops that theme further in the facts section and hearkens back to it throughout the argument.

**A reminder of the underlying facts**

While the subject matter of a motion may be narrow, it exists within the context of a larger case, one in which the parties have already been trying to make the judge sympathetic to their client. Judges have hundreds of cases they are working on at any one time, and they may not immediately remember which one you’re presenting from just the party names. So it’s worth taking a sentence or two to remind the judge of that larger context, if it’s not already apparent.

**The key legal arguments**

Your introduction should also tell your readers the main legal grounds on which the judge should grant (or deny) the motion. This part is often very simple: the author provides the key legal rule or standard from the most important issue and the main argument or fact that shows why your client should win. For instance, in the brief about the hidden pothole, the author wrote:

Approximately one year after we commenced this personal injury action, defendant moved to dismiss based on the discretionary function exception to the Federal Tort Claims Act, arguing that (1) the challenged acts or omissions are discretionary, and (2) the judgment or choice exercised is grounded in social, economic or political policy. Needing to establish both of these elements, defendant has failed to prove either: defendant’s own policies prescribe specific acts to be taken with respect to pedestrian safety at the Pier and in any event, defendant’s negligent disregard of dangerous conditions are not “policy” decisions protected by the discretionary function exception.7

Some writers may hesitate to include a summary in the introduction, either out of fear of repetition or out of a sense that they don’t want to give away the exciting argument to come. But that summary functions just like a detailed agenda before a meeting: it tells you what topics will be discussed. Now that you know what to expect, you’re better prepared and your mind is ready to focus. That’s very helpful when you’re sitting through a two-hour meeting—or reading through a 25-page brief.
Exact relief requested

When judges visit my writing classes, they often emphasize the importance of including the exact relief requested in the introduction. One judge said it was a “pet peeve” when parties fail to do so, for often what seems obvious to the author is not apparent to the judge.

SO DOES IT WORK?
Consider judicial opinions.

I suggest two metrics to decide whether to include these elements: whether it makes writing easier and whether it makes the brief more persuasive.

First, many authors find it easier and faster to write when they have a checklist of items to include. Second, while persuasion is subjective and difficult to measure, I appreciate these elements in others’ writing. When they appear in a judicial opinion, I know the holding right away, I know what to look for in the order to come, and I know when I’m in for a surprisingly good read. And those are worthy goals for briefs as well.

NOTES
2. Pls.’ Mem. of Law in Opp’n to Def.’s Mot. to Dismiss 1, Molchatsky, 778 F. Supp. 2d 241 (No. 09 CIV 8697).
7. Pl.’s Memo. of Law Opposing Def.’s Mot. to Dismiss, supra note 3, at 1.
Section Spotlight

Elder Law Section

BY MIRIAM AYOUB, LISA KREMER, AND MEREDITH GRIGG

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

Our members get legislative and case law updates; an active list serve of helpful, experienced practitioners; twice-yearly CLEs on timely topics; and Section legislative advocacy related to important elder law topics and issues.

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

Our Section recently made a formal comment in opposition to ESHB 1197, a bill proposed but not passed in the last legislative session that would have amended Washington’s health care informed consent law by adding to the list of individuals who could provide health care consent for a patient. It was the consensus of the Section’s Executive Committee that the bill, if approved, would not benefit our vulnerable population, but instead would increase the potential for exploitation, undue influence, confusion, ambiguity, and liability. Our Section also worked together early in the pandemic to share COVID-19-era court and legal practice procedures to reduce health risks and comply with state law.

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

In the past, our Section held in-person networking events with mentoring opportunities such as “speed mentoring,” where mentees were assigned to a mentor. We are looking forward to getting our mentorship programs up and running again as state orders allow in-person gatherings. In the meantime, our active list serve is a valuable tool for new attorneys looking to connect with a mentor.

In addition, the Elder Law Section supports and implements the annual Elder Law Summer Internship, which provides a law student from one of the three Washington law schools the opportunity to serve very low-income seniors on a pro bono basis. This internship was created to honor Peter Greenfield, who devoted his professional life to the service of seniors and critical legal and policy issues in the elder law field. The selected student works at Northwest Justice Project’s Seattle branch with a supervising attorney, handling a multitude of legal and administrative issues impacting low-income seniors.

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?

Elder Law offers attorneys the chance to engage high-level legal theory with practical legal assistance and planning that protects elders, honors relationships, and preserves human dignity. It is truly an amazing and fulfilling practice area. In addition, the need for attorneys in this area is great, as the number of elderly individuals continues to grow. Our Section supports its members and members support one another. Not only are there incredibly talented and knowledgeable elder law attorneys in our Section, but our Section’s members are known for collaborating with and assisting one another.

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

We recommend attending one of the Section’s biannual Elder Law CLEs or connecting with national organizations like Justice in Aging or the National Academy of Elder Law Attorneys.
NOTE: The information in this column was collected in August and may have changed since then due to evolving guidance regarding COVID-19.
While a return to the workplace may be up in the air for some, this new column asks a group of law firm administrators for a point-in-time snapshot of how their firms are approaching key logistical issues.

1. What COVID-19 policies and procedures are you considering maintaining as part of your “new normal”? How will vaccines play a role?

Susan Williams (Williams Kastner):
Williams Kastner will continue to follow any state or local mandates, and we will consider hybrid work arrangements for our staff and attorneys. While we have previously allowed remote work in certain circumstances, we will take what has worked successfully and incorporate it into our decision-making for hybrid work approvals moving forward.

At this time we are requiring everyone to wear a mask regardless of vaccination status. We will continue to follow mask mandates of state and local areas, and require anyone who is not fully vaccinated to wear a mask in our offices. This includes guests.

Kristin Stoddard (Summit Law Group):
We have followed the CDC and state recommendations as of June 30, including continuance of daily health screenings. Summit is not requiring our employees to receive a vaccination,
but we do highly recommend it. Those who have provided proof of vaccination can now choose to not wear a mask on-site and do not need to quarantine with any potential exposure. Any person who has not provided proof will need to continue to wear masks in common areas and will be required to do a 14-day quarantine if exposed.

Ann Callahan (Helsell Fetterman): I see us following the changes in regulations pretty closely, preferring a lagging pace to some extent. I think the preference here is to revert step by step to prior norms. We are offering incentives for those getting vaccinated, and I can see that continuing for some time to come. We have rolled out remote work policies and these are expected to become a part of the norm. Those who are unvaccinated will be required to wear masks. I can see us making changes to mask policy in phases—a month or so of continuing to wear masks (for all) in public spaces, but not at desks.

Mikael Kvart (Friedman | Rubin PLLP): With every one of our attorneys and staff fully vaccinated, we are not maintaining any COVID-19-related policies or procedures for our own people beyond what might be required. However, some of our employees will continue to mask and social distance because of unvaccinated children or vulnerable people in their lives. COVID-19 restrictions will still apply to unvaccinated visitors. Of course, this could all change depending on what direction the global pandemic takes.

2 Are you requiring employees to reveal their vaccination status? Why or why not?

Williams: We require masks regardless of vaccination status as state or local authorities require/recommend, and when it is appropriate, we will permit fully vaccinated employees to work in the office mask-free. Our firm has recently rolled out a vaccine mandate policy in an effort to safeguard the health of our employees and their families, our customers, and the community at large. This policy requires proof of vaccination and the signing of a verification form. We will address requests for medical or religious accommodation on a case-by-case basis.

Stoddard: We are not requiring employees to reveal their vaccination status for several reasons. We want our employees to understand we take their privacy seriously. This also allows many to know that they will not be discriminated against or treated differently if they choose not to receive the vaccine.

Callahan: Our only requirement around revealing vaccination status is related to wearing a mask. We are now allowing fully vaccinated employees to discontinue wearing masks in the office—if they wish to...
do so. Vaccination status must be revealed to me only (HR), and we have named four forms of documentation that are acceptable: CDC card, photo of CDC card, signed document from health care provider, or credible documentation from the state immunization information system.

**Kvart:** Everyone was invited to voluntarily share their vaccination status, to help us understand what we were dealing with. The initial plan was to allow only vaccinated attorneys and staff in the office, meaning those who were unvaccinated or preferred not to say would be asked to not come into the office. As it turned out, every single person was vaccinated!

**3 When are you planning to bring employees back on-site? Will it be voluntary or required?**

**Williams:** Employees were scheduled to return at least one day per week in July, and at least three days per week in August. Absent any state or local changes to the contrary, we expect to have our offices “fully” open the second week of September, allowing for a hybrid office/home schedule that has been working successfully.

**Stoddard:** Summit has been running a full-time voluntary crew that comprises about 15 percent of the firm since Phase 1. We planned for a full reopening Aug. 1, at which point people were required to begin working on-site based on their previously approved schedules. These schedules are predominantly hybrid, but some employees will be fully on-site or off-site.

**Callahan:** Beyond a small core group who have always been on-site, we’ve had workers rotating into the office since July 2020. There has been a very small group who, for specific reasons, have not come in at all. But the rest have been coming in one or two days per week, as the limitations allow.

**Kvart:** During the last 15 months we have found that our work as trial lawyers for the most part lends itself quite well to remote work. We are therefore letting everyone decide what works best for them—return...
to the office, continue to work remotely, or do some combination of the two—as long as that works for the team. This means that when they are needed in the office, we expect people to be there. We will monitor whether this arrangement continues to be effective and efficient longer term.

4 Will you allow remote or hybrid employees to temporarily work outside the state? Outside the country?

Williams: This is more of a risk analysis determined by wage and hour, business licensing/taxes, unemployment, and workers’ compensation. If someone wants to log in and do some work while out of town on a short trip, it is not an issue. However, arrangements to work out of state for an extended period of time (i.e., other than vacation or need to temporarily care for a family member recovering from injury or illness) would not typically be allowed, as we are licensed to do business only in Washington and Oregon.

Stoddard: No, we do not allow any employees to reside/work outside of Washington.

Callahan: We are currently grappling with this question. We are small enough to have only one business location, and the work it would take to administer additional state/country locations is hard to justify.

Kvart: This is not new territory to us; we have had employees working remotely full time out of state for many years and have found the extra administrative work well worth it. For shorter periods of time we definitely don’t see a problem with this, but we will need to evaluate requests for longer-term remote work out of state or abroad on a case-by-case basis since there are so many factors to consider.

5 What of the following factors (or others) are being considered in deciding who will work on-site, remotely, or in a hybrid role, and why?

a. Position
b. Department
c. Attorney preference
d. Billable vs. non-billable
e. Exempt vs. non-exempt
f. Health risks for vulnerable employees
g. Employees with children
h. Another determining factor

Williams: All of the factors listed are considerations, plus performance while working remotely and the employee’s ability to perform all (or a majority, without a burden to others) of their essential responsibilities. We are using the same methodology for allowing hybrid work as we would have prior to 2020, except we now have more data to
determine what works and what does not. It is easier to convince attorneys of a productive staff member’s ability to work remotely part of the time, as we have a year’s worth of evidence to support it.

Stoddard: We encouraged employees to review several aspects of their work, including physical needs for equipment, needs of attorneys/practice groups, and ability to support the firm. We then asked them to consider their preference of working schedules and location, in combination with the working aspects already mentioned, to develop a proposed working arrangement. This arrangement was then run by their attorneys/practice group leaders for approval, then approval at the firm administrative level. Outside of a couple of positions that must remain in-house (reception and office services), we were able to accommodate all requests, with only a couple of very slight modifications. This allowed everyone to take ownership of their choices and will hopefully result in a more efficient and effective environment for all.

Callahan: Position function is the major factor. Beyond that, there will be expectations regarding productivity which, if not met, will result in withdrawing the remote work option. New hires, whatever the position, will be required to work in the office for at least six months before considering any remote work options. Per existing accommodation procedures, we may use remote work as a means of accommodation for those with specific health issues.

Kvart: At least for now we will let everybody choose their principal work arrangement—on-site, remote, or a combination of the two—as long as it works for the team. With the exception of our receptionists (who work in the office), individuals and teams have proven themselves to be highly productive while working remotely over the last 15 months.

6 How will you try to create balance and equity for employees in different working situations—for example, for those who will be allowed to continue working remotely and for those whose jobs do not allow for remote work?

Williams: We will be working to encourage on-site work by resuming social activities such as birthday and anniversary celebrations, happy hours, and other opportunities to gather and reestablish our community and collegial culture. In addition, we will have virtual gatherings to make sure those who are remote still feel connected. It is important to our culture to make everyone feel appreciated, regardless of where they are working.
**Stoddard:** This is a tough thing to consider and judge, as everyone views it differently. Getting buy-in on schedules by letting each person determine what would work best for them is our attempt to provide each employee with the ability to decide what is equitable for them and what will create balance in their lives. It is up to them to maintain the level of quality and high expectations of the firm and our clients; so as long as they can, we feel we are giving them the best experience we can.

**Callahan:** As a baseline, I think it needs to be understood that not all jobs are equal. For instance, the person who processes mail can only do their work in person at the firm. None of the other typical roles require this. But no one thinks twice about this. The pandemic has prompted us to embrace remote work on a level never anticipated. In general, it’s worked well. But, as has always been true, not all job functions and not all personalities are suited to remote work. Given that our culture sees remote work as a benefit to the employee and not a burden, our approach will be two-pronged. We have been carefully analyzing the workflow of each position and gauging whether that function adapts well to remote work. We’ll make those analyses known to everyone. Any worker who wants to work remotely will have the opportunity to apply for that and to also define how many days per week they prefer. So I think much of the balance and equity is in standardizing the process. We are not including any financial elements on either side of the equation.

**Kvart:** At Friedman Rubin we have had people both on-site and working remotely for many years and are confident that we have created balance and equity for everyone regardless of where they work—although we understand that perhaps not every employee feels like that is the case. As we now see more people work remotely, we are watching for any issues in this space as they might come up so that they can be addressed.

**Susan Williams** has been the HR director at Williams Kastner since 2018. Prior to that, she spent 14 years working in human resources at Davis Wright Tremaine. In her 30-plus years in the legal industry, Williams has been a receptionist, complex litigation legal assistant, and marketing coordinator, and provided executive support to the assistant general counsel at Washington Mutual. She earned her PHR in 2013 and her SHRM-CP in 2015. 

**Kristin Stoddard** has worked within the Seattle legal market for over 20 years. She currently serves as the executive director of Summit Law Group and is committed to driving innovation, fostering the values of the firm, and ensuring the success of the firm and all its employees.

**Ann Callahan,** SHRM-SCP, CLM, has been a human resources professional for over 25 years, joining Helsell Fetterman LLP in 2007. Working in different industries—both large and small, publicly owned and privately owned—Callahan has a broad range of experience and knowledge.

**Mikael Kvart** is the business manager and general administrator of Friedman | Rubin PLLP, a plaintiff-side trial lawyer firm in Seattle. With degrees in both engineering and business, he enjoys the variety of his work and the people he gets to work with. Originally from Sweden, Kvart has lived in four countries on three continents.

**Methods or tools do employers intend to use for that?**

**Williams:** Non-exempt staff continue to record their time on electronic timesheets as before and are trusted to work their hours. The proof is in their timely work product, reliability, and availability when needed during their work hours. In addition, we will require staff to be logged into Microsoft Teams and on their softphone when remote, so that they are available in “real time” to communicate with, as though they were in the office and we could walk up to their desks.

**Stoddard:** Summit has been requiring all off-site, non-exempt staff to clock in and out daily and for their lunches since the beginning of the mandated work from home. We will continue to do this in our new remote work policy. Additionally, the off-site staff need to send an email to their direct group and an admin distribution list at the start of each day. This allows us to start the day by opening communication within the group and ensuring everyone is online and accounted for. At this time, we are not tracking productivity through any software tools.

**Callahan:** A basic tenet here is that performance cannot be effectively managed by getting snared in the minutiae of attendance patterns. Further, if there are attendance issues, they are almost always reflected in productivity metrics. The better focus is on whether documents are being timely created/crafted/filed and whether billable-hours expectations are being met (for those who do report billable time).

**Kvart:** Ensuring productivity is a tricky area. At Friedman Rubin, we trust our employees to be truthful in reporting and putting in the required amount of work—just like we did pre-COVID-19 when people mostly worked in the office!
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Legal Regulatory Sandbox Could Incubate Innovation in Washington

BY NOEL BRADY

Courts in Washington and other states are wrangling over how the practice of law can catch up with rapidly evolving demand for legal services and new technology. The answer might come in a Legal Regulatory Sandbox proposed by the Washington Supreme Court’s Practice of Law Board.

Imagine a website that could guide people through contesting traffic infractions. More often than not drivers just pay the fine and forfeit their day in court to avoid the hassle. The online service might explain legal procedures and provide documents, or it might refer their case to a licensed attorney. Under current rules, gaining full authorization by the Washington Supreme Court for such a practice can take years, if authorized at all.

According to its designers, the Legal Regulatory Sandbox could serve as a springboard for innovative online legal services and alternative business models, such as a solo practitioner who wants to afford a paralegal by offering them a 10 percent stake in the practice. The sandbox aims to provide new alternative legal services to those who otherwise could not afford or access traditional legal representation. It would create a process to regulate and test new ideas with a streamlined Supreme Court authorization process.

The Practice of Law Board met with the justices of the Washington Supreme Court on July 1 to present a blueprint—a plan for the Legal Regulatory Sandbox. Under the blueprint, the court would grant participation in the sandbox based on balancing the risk of consumer harm with the potential to improve access to justice. Supreme Court orders would authorize participating online legal services and alternative business structures to practice law in Washington for a two-year trial period as part of the sandbox, with the possibility of ongoing authorization to practice after showing there is minimal potential for harm to consumers.

“The goal is to regulate the practice of law even for people working in the Legal Regulatory Sandbox,” Practice of Law Board Chair Michael Cherry told Bar News. For example, legal ventures such as a new legal-document software system for property management or a new business model led by nonlawyers could be authorized to work in the Legal Regulatory Sandbox, said Cherry, who worked in technology for years before becoming a lawyer. “We’re very serious about thinking through how the court determines who gets to participate in the sandbox.”

Many online legal services operate on the assumption that they can practice in Washington if they comply with a set of conditions laid out in an Assurance of Discontinuance in Thurston County Superior Court. The court there approved the motion filed by former Attorney General Robert McKenna following his investigation of LegalZoom in 2010. McKenna alleged LegalZoom had engaged in the unauthorized practice of law and used deceptive business practices involving costs and benefits of its services. The Assurance of Discontinuance is a legally binding agreement with conditions and limitations under which LegalZoom can practice. It includes LegalZoom’s promise “to review and offer to adjust any customer charge where the customer articulates concerns that are the subject of any prohibited

“The goal is to regulate the practice of law even for people working in the Legal Regulatory Sandbox.”

Michael Cherry, Practice of Law Board Chair
practice identified in this Assurance of Discontinuance or are otherwise alleged to be unfair and deceptive, whether directly from a customer or from another person on the customer’s behalf.”

By participating in the Legal Regulatory Sandbox, Cherry said, new online legal services could obtain Supreme Court authorization faster with fewer restrictions, a “carrot” that might attract innovation as well as investors in nontraditional legal services.

“It’s a carrot-and-stick approach,” Cherry said. “I believe the stick is that if we have this mechanism for people to go through and if they choose not to, the Practice of Law Board can refer people offering new services outside the Legal Regulatory Sandbox for unauthorized practice of law to the appropriate enforcement agencies. We [the Practice of Law Board] also have to educate the public about the unlawful practice of law.”

For some law firms looking to expand services through partnerships with people who are not lawyers, such as paralegals, financial advisors, or software developers, the sandbox could provide a regulated and accountable environment for ventures to get off the ground, Cherry said. And it ensures that those innovations are serving more than just those who can afford traditional services.

“Innovation is not a bad thing in and of itself,” said Justice Barbara Madsen during the July 1 meeting with Cherry and WSBA President Kyle Sciuchetti. “But we need the access-to-justice component.”

The Practice of Law Board worked with the Access to Justice Board’s Technology Committee to model its proposed sandbox on a similar one launched by Utah’s Office of Legal Innovation in August 2020. A major difference is that Washington’s approach includes the potential for enhanced access to justice as a requirement for participation. In the Practice of Law Board’s blueprint, participants will also be asked to provide the board with data showing the effectiveness of the services they provide.

The proposed sandbox would be funded by a participation fee of $3,000 to $5,000 if the program is found eligible. Nonprofit applicants could participate at reduced cost or no cost, and grants may also become available. Utah’s sandbox is funded mainly by grants.

So far, Utah’s initiative shows promise, Cherry said. Of the 26 participants in Utah’s sandbox, most were found to pose low or moderate risk of harm to consumers; 4 percent were determined to be high risk. More interesting, he said, was who applied to participate.

“Surprisingly, or at least surprising to the Practice of Law Board,” Cherry said, “most participants are law firms exploring alternative business structures. Several are software providers that do document completion or provide other legal services without a lawyer’s involvement.”

In calculating an applicant’s risk of causing consumer harm, Utah developed a formula focused on three categories of risk: inaccurate or inappropriate legal result, failure to exercise legal rights through ignorance or bad advice, and purchase of unnecessary or inappropriate legal service. Cherry said the Practice of Law Board’s sandbox blueprint follows Utah’s approach for assessing harm with the addition of considering the consequences of harm.

“We’re spending a lot of time thinking about harm,” Cherry said. “Essentially the service [must be] no more likely to cause harm than the individual acting on their own.”

Cherry said the Practice of Law Board factored in the potential conflict of a Legal Regulatory Sandbox Board composed of lawyers charged with granting or denying nonlawyer participation in the sandbox. The blueprint includes a panel of lawyers and nonlawyers charged with reviewing applications.

The Practice of Law Board plans to continue to meet with the Supreme Court to determine next steps for the program.

NOTES
PUT IT IN WRITING

Washington Supreme Court enhances malpractice insurance disclosure to clients

BY HUGH SPITZER
he long saga of mandatory malpractice insurance has come to an end—at least for now—with the Washington Supreme Court’s June adoption of amendments to RPC 1.4 that starting Sept. 1, 2021, require disclosure of a lawyer’s malpractice insurance status to clients and prospective clients if that lawyer’s insurance fails to meet minimum levels.

In short, the new RPC 1.4(c) requires a lawyer, before or at the time of commencing representation of a client, to provide written notice to that client if the lawyer is not covered by professional liability insurance at specified minimum levels. The lawyer must promptly obtain written informed consent from the client. Similarly, if a lawyer knows (or reasonably should know) that the lawyer’s malpractice insurance policy lapses or is terminated, the lawyer must within 30 days either obtain a new policy or get written consent from each client in order to continue the representation.

For disclosure purposes, the minimum level of insurance is $100,000 per occurrence and $300,000 in the aggregate ($100K/$300K). This matches Idaho’s mandatory malpractice insurance levels and are the lowest levels of insurance offered by ALPS, the WSBA-endorsed professional liability insurance provider. All Washington-licensed lawyers in private practice are covered by the new insurance disclosure mandate. Certain lawyers are excluded, including judges, arbitrators, and mediators; in-house lawyers for governments and private entities; and employee lawyers, where the nonprofit entity provides malpractice insurance coverage at the minimum levels.

From a practical standpoint, it is likely that the enhanced disclosure will reduce the percentage of uninsured Washington lawyers. Currently, 14 percent of the state’s private-sector attorneys are practicing without insurance. When South Dakota implemented a similar disclosure requirement, the number of uninsured lawyers was halved, to about six percent. But the main thrust of the new requirement is to alert clients when their attorneys are uninsured so that those clients can decide whether to continue with the representation.

### Highlights of New RPC 1.4(c)

- New RPC 1.4(c) is effective as of Sept. 1, 2021.
- For the disclosure requirements, the minimum level of insurance is $100,000 per occurrence and $300,000 in the aggregate ($100K/$300K).
- Any lawyer who does not have insurance that meets the minimum level must, before or at the time of commencing representation of a client, provide written notice of this to the client and obtain written informed consent from the client in order to continue to representation.
- Similarly if a lawyer learns (or reasonably should know) of a malpractice insurance policy lapse or termination, the lawyer must within 30 days either obtain a new policy or get written consent from each client in order to continue the representation.
- Lawyers covered by the rule:
  - lawyers with an active status with the WSBA,
  - pro bono status lawyers,
  - lawyers permitted to engage in limited practice under APR 3(g), i.e., visiting lawyers, and
  - any other lawyers authorized by Washington’s Supreme Court to practice law, unless they come within one of these exemptions:
    - judges, arbitrators, and mediators not otherwise engaged in the practice of law;
    - in-house counsel for a single entity;
    - government lawyers practicing in that capacity; or
    - employee lawyers of nonprofit legal services organizations, or volunteer lawyers, where the nonprofit entity provides malpractice insurance coverage at the minimum levels.

### A LONG HISTORY

In contrast with Oregon, Idaho, and the vast majority of common law and civil law countries outside the U.S., Washington lawyers have never been required to have professional liability insurance coverage. However, they are required to report yearly to the WSBA whether they are covered. Our state Supreme Court in 2007 adopted Admission and Practice Rule (APR) 26, requiring annual insurance reporting as part of the WSBA’s licensing process. All Washington lawyers must certify whether they are engaged in the private practice of law and, if so, whether or not they are covered by and intend to maintain professional liability insurance. That information has been available on the WSBA’s Legal Directory, and clients aware of that directory could check on the malpractice insurance status of their lawyers. However, most clients have probably been unaware of the directory.

In the late 1980s, the WSBA investigated the possibility of creating a mandatory malpractice insurance program. The key initiative was proposed in 1986 in a report of the WSBA Lawyers’ Malpractice Insurance Task Force chaired by former WSBA President William H. Gates Sr. In 1977, Oregon had established a Professional Liability Fund in response to demand from attorneys having trouble obtaining malpractice insurance in a tight market. The Washington task force recommended the creation of a similar professional liability fund and system with required malpractice insurance, and this would have been incorporated into an APR. In December 1986, by a 7-4 vote, the WSBA Board of Governors approved the proposal for submission to the Supreme Court, subject to submission of the issue to a referendum of the membership. The membership defeated the referendum by a vote of 6,971 to 1,693.

In September 2017, after considering input from a new work group it had formed to consider approaches to the issue, the WSBA Board of Governors formed the WSBA Mandatory Malpractice Insurance Task Force to evaluate the characteristics of uninsured
SIDEBAR
Notice Language That Satisfies the Rule

Under Rule 1.4(c) of the Washington Rules of Professional Conduct, I must obtain your informed consent to provide legal representation, and ensure that you understand and acknowledge that [I][this Firm] [do not][does not][no longer] maintain[s] [any lawyer professional liability insurance (sometimes called malpractice insurance)] [lawyer professional liability insurance (sometimes called malpractice insurance)] of at least one hundred thousand dollars ($100,000) per occurrence, and three hundred thousand dollars ($300,000) for all claims submitted during the policy period (typically 12 months). Because [I][we] do not carry this insurance coverage, it could be more difficult for you to recover an amount sufficient to compensate you for your loss or damages if [I am][we are] negligent.

RPC 1.4(c)(2)(i).

Put It In Writing CONTINUED >

The cost to lawyers of complying with the new notice requirement is insubstantial, as compared to requiring acquisition of insurance.

But a number of lawyers—many uninsured—vociferously objected to mandating malpractice insurance. Critics expressed concerns regarding cost, especially for solo and small firm practices; the likely adverse impact on pro bono services provided by semi-retired members; high costs or uninsurability for some hard-to-insure specialties; and what they characterized as an effective delegation of licensing to the insurance industry. Some opponents to mandatory insurance argued that lawyers should decide for themselves if they desired insurance, and clients should inquire for themselves whether their counsel carried insurance.

At its May 2019, meeting, after brief discussion of the task force report and listening to some public testimony, the WSBA Board of Governors voted not to forward the “free market” mandatory malpractice model to the Supreme Court. However, in the wake of the vote, several Board members urged the Board to consider other models evaluated by the task force that might serve to increase protections to the public against errors committed by uninsured lawyers.

In January 2020, then WSBA President Rajeev Majumdar convened an Ad Hoc Committee to Investigate Alternatives to Mandatory Malpractice Insurance to gather more information and advise the Board on potential viable alternatives to mandatory malpractice insurance. This ad hoc committee was chaired by then WSBA President-Elect Kyle Sciuochetti and composed primarily of select members of the WSBA Committee on Professional Ethics and the earlier WSBA Mandatory Malpractice Insurance Task Force, together with several members of the Board and a public member.

From March to September 2020, the committee explored approaches to public protection other than mandating malpractice insurance, including enhanced malpractice insurance disclosure requirements and “proactive management-based regulation” that emphasizes lawyer self-assessment and improved practice management. Ultimately, the committee focused on a rule requiring disclosure of a lawyer’s insurance status to clients when the lawyer is uninsured or underinsured. The committee, and then the full Board, proposed this as a less burdensome and more practicable regulatory requirement aimed at protecting the public without having an undue impact on private practitioners.

Members of the public, including clients harmed by uninsured lawyers, independently proposed to the Supreme Court that it adopt the mandatory malpractice insurance proposal suggested earlier by the WSBA task force but rejected by the Board. The court considered both approaches, rejecting a malpractice insurance mandate by a 7-2 vote and adopting the enhanced disclosure requirement by a 7-2 vote.

The new RPC 1.4(c) is effective as of Sept. 1, 2021.

ENHANCED INSURANCE DISCLOSURE RULE: THE DETAILS

The enhanced malpractice insurance disclosure rule includes both a new RPC 1.4(c) and new Comments [8]-[13] to RPC 1.4. The drafters drew the language from enhanced disclosure rules in several other states, including California, Pennsylvania, New Hampshire, New Mexico, and South Dakota, with New Mexico’s RPC 16-104(c) having the most influence.

Substance of the Rule Change. Specifically, the new RPC 1.4(c) requires a lawyer, before or at the time of commencing representation of a client, to provide notice to
the client in writing if the lawyer is not covered by professional liability insurance at specified minimum levels. The lawyer must “promptly” obtain written informed consent from that client. In addition, a lawyer whose malpractice insurance policy lapses or is terminated must within 30 days either obtain a new policy or obtain, from each client, written consent to continue the uninsured or underinsured representation.

It appears that the provisions requiring notice apply prospectively only. In other words, an uninsured/underinsured lawyer would be required to provide notice and obtain consent from new and prospective clients, but would not be required to do so with all existing clients as of the Sept. 1 effective date.

The new rule is structured to address the major lawyer concerns expressed to the Board about mandating insurance, concerns that resulted in the Board’s decision not to recommend that approach to the Supreme Court. Importantly, the cost to lawyers of complying with the new notice requirement is insubstantial, as compared to requiring acquisition of insurance.

As reflected in new Comment [8], a lawyer without a basic level of professional liability insurance might not pay for damages or losses a client incurs due to the lawyer’s mistakes or negligence. Consequently, according to Comment [8], clients should have sufficient information about whether the lawyer maintains a minimum level of lawyer professional liability insurance so they can intelligently determine whether they wish to engage, or continue to engage, that lawyer.

The new RPC 1.4(c) requires a lawyer to provide disclosure if the lawyer is without the specified level of lawyer professional liability insurance. The lawyer must promptly obtain every client’s acknowledgment and informed consent to uninsured or underinsured representation. The amendment includes disclosure and consent language which, if used, is meant to serve as a “safe harbor” for compliance with the rule. Each lawyer must maintain a record of these non-insurance disclosures and consents for at least six years.

Comment [13] specifies that notice to a client may be delayed in emergencies “where the health, safety, or a financial
interest of a person is threatened with imminent and irreparable harm.” The lawyer is then required to provide the notice “as soon as reasonably practicable.”

Comment [12] makes it clear that a lawyer’s failure to provide the mandated disclosures to a client requires that the lawyer withdraw from the representation under RPC 1.16(a)(1) because continued representation would violate the Rules of Professional Conduct. Withdrawal must be carried out consistent with RPC 1.16(c) and (d). Failure to comply with the new RPC 1.4(c) and with RPC 1.16(a)(1) would also constitute a violation of RPC 8.4(a) and could lead to discipline.

**Minimum Levels of Professional Liability Insurance.** The new RPC 1.4(c) sets the minimum levels at $100,000 per occurrence and $300,000 in the aggregate. These are the mandatory malpractice insurance levels in Idaho and the lowest levels of insurance offered by ALPS, the WSBA-endorsed professional liability insurance provider. The Mandatory Malpractice Insurance Task Force found that, nationally, 89.1 percent of malpractice claims are resolved for less than $100,000 (including claims payments and expenses). According to ALPS, for all Washington claims where payments were made by ALPS, its average loss payment was $119,856 and average loss expenses were about $40,454.82. Given these statistics, the proposed minimum level of insurance of $100K/$300K was deemed both reasonable and sufficient.

The new Comment [9] to RPC 1.4(c) explains that the $100K/$300K minimum limits include deductible or self-insured retention amounts that must be paid by a lawyer or law firm for claim expenses and damages. But the comment adds that qualifying lawyer professional liability insurance does not include a policy with deductibles or self-insured retentions that a lawyer knows or has reason to know cannot be paid by the lawyer or the firm if a loss occurs.

**Lawyers Covered by the Rule.** The new rule applies to each “lawyer,” defined as:

- lawyers with an active status with the WSBA,
- pro bono status lawyers,
- lawyers permitted to engage in limited practice under APR 3(g), i.e., visiting lawyers, and
- any other person authorized by the Washington State Supreme Court to engage in the practice of law.

The disclosure requirement does not apply to:

- judges, arbitrators, and mediators not otherwise engaged in the practice of law;
- in-house counsel for a single entity;
- government lawyers practicing in that capacity; and
- employee lawyers of nonprofit legal services organizations, or volunteer lawyers, where the nonprofit entity provides malpractice insurance coverage at the minimum levels.

**THE FUTURE**

Over the coming years, it will be quite interesting to observe the effectiveness of the new RPC 1.4(c) at providing useful “consumer disclosure” about lack of lawyer professional liability insurance at the required levels. In concept, clients will receive informed consent and will be able to make intelligent decisions about engaging, or continuing to engage, lawyers without adequate malpractice insurance. Further, a significant number of previously uninsured lawyers may opt for minimum insurance coverage in lieu of possibly losing clients who prefer an attorney who is covered. Washington’s percentage of uninsured lawyers might drop, perhaps to the South Dakota level (6 percent) that is less than half of Washington’s current percentage of uninsured lawyers. This might sufficiently satisfy advocates of an across-the-board malpractice insurance mandate. But if the needle does not move much, and our state’s percentage of uninsured lawyers remains around 14 percent, a renewed push for mandatory insurance could develop in the future. Board members and some past WSBA presidents continue to advocate a closer look at either a free market insurance mandate or a mandatory in-house insurance system like Oregon’s. But that would require a shift in lawyer attitudes generally, and, of course, a change in the view of members of the Washington Supreme Court.

**NOTES**

3. Id. at 26.
4. Id.
5. The WSBA legal directory is located at https://mywsba.org/PersonifyEBusiness/LegalDirectory.aspx.
8. Report to WSBA Board of Governors at 45.
9. The full set of comments received by the Task Force and the Board is available at: www.wsba.org/insurancetaskforce.
13. WA Supreme Ct Court Order 25700-A-1351 (In the Matter of the Suggested Amendment to RPC 1.4 (Communications)) is available at: https://perma.cc/AG26-496L. Justices Charles Johnson and Susan Owen did not sign the order adopting the amendment to RPC 1.4 that implemented the enhanced insurance disclosure approach.

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Hugh Spitzer teaches professional responsibility at the University of Washington School of Law. He chaired the WSBA’s Mandatory Malpractice Insurance Task Force from 2017 to 2019, and in 2020 served on the Board’s Ad Hoc Committee to Investigate Alternatives to Mandatory Malpractice Insurance, which recommended the addition of the new RPC 1.4(c) on enhanced malpractice insurance disclosure.
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WHAT IS THE WASHINGTON LONG-TERM CARE PROGRAM?
The Washington program is the nation’s first public, state-operated long-term care insurance program. The program, which is codified at Chapter 50B.04 RCW, will be funded by a 0.58 percent payroll tax on all employee wages, beginning Jan. 1, 2022. The payroll tax, however, is not sufficient to fund the benefits, and the assets of the program are currently projected to be depleted by 2076.

Employers will be required to collect this premium assessment via after-tax payroll contributions and to remit those premiums to the Washington State Employment Security Department (ESD) as part of their quarterly reporting. Employers are not required to contribute to the program, just remit the employee-paid taxes.

IS THERE A CAP ON THE AMOUNT OF WAGES THAT ARE TAXED?
Of significance, and unlike other state insurance programs, there is no cap on wages. All wages and remuneration—including stock-based compensation, bonuses, paid time off, and severance pay—are subject to the tax. For example, an employee with wages of $65,000 will pay $377 toward the program each year, while an employee with wages of $250,000 will pay $1,450 toward the program each year.

Washington’s Long-Term Care Program, long under the radar, should now be a top concern for all Washington state employers and their employees. The law mandates long-term care benefits for Washington residents, paid for by a tax on employees’ wages. The tax/premium collections are on track to commence Jan. 1, 2022. Employees who plan to retire in the next 10 years will be required to pay premiums but may never qualify for the benefit. There is a one-time opt-out exemption window, which opens on Oct. 1, 2021, and closes on Dec. 31, 2022. However, in order to be eligible to opt out, the employee must purchase long-term care insurance before Nov. 1, 2021.

Employers must act now to be ready to comply with payroll tax deductions and to inform employees and answer their questions. This article provides background on the Washington program, a review of the proposed rules,1 and answers to the key questions employees may already be asking, including what they must do to opt out.
WHICH EMPLOYEES ARE SUBJECT TO TAX/PREMIUM COLLECTIONS?
All employees employed in Washington will be required to pay taxes into the program with the exception of self-employed individuals, federal employees, employees of a federally recognized tribe, certain collectively bargained employees, and employees who qualify for an exemption (discussed below).

For purposes of the program, an employee is treated as employed in Washington if the employee's service is localized in Washington or, if the service is not localized in any state, the employee performs some services in Washington and the services are directed or controlled from Washington. (Note that the program defines “employment” in the same manner as used for the Washington Paid Family and Medical Leave Program.)

Although we anticipate that ESD will provide clarifying guidance, this likely means out-of-state employers must collect and remit premiums for any employees who primarily work in Washington.

WHO IS ELIGIBLE TO RECEIVE BENEFITS?
Benefits are limited to Washington residents who have paid premiums under the program for either (1) a total of 10 years without interruption of five or more consecutive years or (2) three years within the last six years from the date the application for benefits is made. In addition, to qualify, an employee must have worked at least 500 hours during each of the 10 years or each of the three years, as applicable.

From a practical standpoint, this means that employees who plan to retire in the next 10 years will be required to pay premiums but may never qualify for the benefits. It also means that retirees who move out of state will not qualify for the benefits.

WHAT ARE THE BENEFITS UNDER THE PROGRAM?
Benefits under the program will first become available Jan. 1, 2025. If eligible, and if the Department of Social and Health Services determines that an individual...
Employers & Employees Take Note
CONTINUED >

requires assistance with at least three activities of daily living, the program provides benefits of up to $100 per day, up to a maximum lifetime limit of $36,500.

CAN EMPLOYEES OPT OUT OF THE PROGRAM?
As described in the proposed rules, an employee may opt out of the program and all associated taxes and benefits if (1) the employee is 18 years old or older on the date he or she applies for the exemption and (2) the employee attests that he or she has other long-term care insurance as defined in RCW 48.83.020.2

To opt out, a qualifying employee must provide identification to verify his or her age and must apply for exemption with ESD (using a format that will be approved by ESD) between Oct. 1, 2021, and Dec. 31, 2022. If approved, an employee's exemption will be effective for the quarter immediately following approval. Once an employee opts out, the employee cannot opt back into the program—i.e., the opt-out is permanent.

There is nothing in the program that prevents employees from dropping their other coverage following approval, but the employee will never become eligible for benefits under the program.

WHEN MUST THE EMPLOYEE HAVE LONG-TERM CARE INSURANCE IN PLACE TO OPT OUT?
Employees must purchase long-term care insurance before Nov. 1, 2021, to be eligible to opt out of the program. This is a very short window to purchase long-term care insurance.

HOW WILL I KNOW IF MY EMPLOYEES HAVE OPTED OUT OF WASHINGTON’S LONG-TERM CARE PROGRAM?
After an employee’s application for exemption is processed and approved, he or she will receive an approval letter from ESD. The employee must provide this approval letter to his or her employer. Employers must maintain copies of any approval letters received.

If an exempt employee fails to provide the approval letter to his or her employer, the employer must collect and remit premiums beginning Jan. 1, 2022. An employee will not be entitled to a refund of any premiums collected before the employee’s exemption took effect or before the employee provided the approval letter to his or her employer.

This could impact decisions regarding compensation timing—for example, if an employer knows that a large number of employees have filed for exemption, the employer may want to consider that those employees may appreciate delayed bonuses and stock awards so that such wages will not be subject to the payroll tax.

If an employer deducts premiums after an employee provides the employer with his or her approval notice, the employer must refund the deducted premiums and will be responsible for restoring the premiums to the employee. The employer is not eligible to receive a refund of the premiums from ESD.

WHAT HAPPENS IF AN EMPLOYEE MOVES OUT OF STATE?
Because benefits are limited to Washington residents, employees who move out of state will not be eligible to receive benefits under the program. Employees who maintain a second home may, therefore, wish to consider which location will be their permanent residence.

ARE SELF-EMPLOYED INDIVIDUALS EXEMPT?
Self-employed individuals are exempt from the program but may choose to opt in. Under the program, self-employed individuals must elect coverage by Jan. 1, 2025, or within three years of becoming self-employed for the first time.

ARE COLLECTIVELY BARGAINED EMPLOYEES EXEMPT?
Parties to a collective bargaining agreement in existence on Oct. 19, 2017, are not subject to the program unless and until the existing agreement is reopened and renegotiated or the existing agreement expires. Parties must notify ESD when the collective bargaining agreement becomes open.

IS THE STATUTE PREEMPTED BY THE EMPLOYEE RETIREMENT INCOME SECURITY ACT (ERISA)?
Because Washington’s long-term care program mandates that employers maintain an ongoing administrative scheme that involves a program providing health, sickness, and disability benefits, the program may be preempted by ERISA. Employers may wish to challenge the statute on ERISA preemption grounds.

NOTES

Richard Birmingham is a partner at Davis Wright Tremaine LLP. He has over 30 years of experience in both employee benefit consulting and ERISA litigation. He is one of the few lawyers in the country who is listed in “Best Lawyers in America” in two employee benefit categories—ERISA law and ERISA litigation. Birmingham’s command of both the substantive and litigation areas of ERISA enable him to give practical proactive advice when consulting with clients and to obtain early dismissal or settlement when litigating ERISA matters. He is a frequent speaker at employee benefit seminars and has published numerous articles and client advisories on a wide variety of employee benefit issues. He can be reached at RichBirmingham@dwt.com.

Christine C. Hawkins is an associate at Davis Wright Tremaine LLP. She assists clients who are restructuring their employee benefits and compensations program to address changes in law, minimize risk, and offer greater investment flexibility. She regularly advises companies on a wide range of employee benefits and ERISA matters, including plan operational and non-amender failures, mergers and acquisitions due diligence, COBRA, 409A arrangements, multiemployer withdrawal liability, health care reform compliance, and fringe benefit programs. She can be reached at ChristineHawkins@dwt.com.
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The Lawfulness and Awfulness of Employee Non-Solicitation Agreements

BY KELBY FLETCHER

A key feature of most post-employment restraints, many employment and severance agreements, and some settlement and release of employment claims agreements is a commitment by the departing employee not to solicit and hire the former employer’s employees for a stated period of time.

Such a commitment by a departing employee to the former employer can have these consequences:

• It may impede the employer’s other employees, XYZ, in terminating their employment at-will;
• It may hinder mobility of labor;
• It may restrain trade;
• It may have the effect of reducing wages.

How can all these things be lawful? The usual response is that these potential results are “reasonable” in the overall scheme of things. But are they? The Washington Constitution and state statutes may provide answers.

Non-solicitation of employees by a former employee should be distinguished from an agreement under which the former employee is prohibited from soliciting or accepting business from the former employer’s customers. In that context, one can assert that the customers or clients of the former employer are its “property”—(itself problematic if the former employee brought to the former employer the customers that the former employer then tries to protect as its own). But note that this is not the case in a law firm, because clients are not the “property” of the firm. The client has the ultimate right to choose counsel. A law firm cannot impair that choice. (It seems odd that lawyers can draft and enforce contracts allowing their clients to do what they cannot, but I digress.)

The commitment in an employee non-solicitation agreement is by A, who was employed by B, and affects XYZ employees of B without their knowledge or consent. In other words, XYZ are prevent-
ed from having an economic opportunity through A because of B’s insistence expressed in a contract with A. XYZ are potential third-party losers in the transaction between A and B.

Thus, B, the employer, can terminate XYZ at will. The termination may be due to the economic distress of B. But XYZ’s ability to terminate their own employment at will to obtain a possible benefit through A is compromised, through no agreement they have entered into with B. XYZ may have better opportunities for income, advancement in a trade or profession, or better working conditions if they work for A or A’s new employer.

One could say that the obligation of A simply not to solicit XYZ is a reasonable restraint on A’s future action. In that situation, A can make known only broad contact information and XYZ could approach A and seek employment. Nowogroski v. Rucker, 137 Wn.2d 427 n.4 (1999). Even then, however, XYZ are deprived of possible economic and other benefits that might flow from their ability to obtain other employment. And some employers propose contracts preventing A even from publicizing his contact information at his new employer generally. That, too, is problematic.

But an obligation on the part of A’s new employer not to hire XYZ, even if XYZ are not solicited by A—how is that reasonable? Recent Washington legislation on post-employment restraints finds “that workforce mobility is important to economic growth and development.” RCW 49.62.005. This recognition of labor mobility as protected activity is important in any discussion of post-employment restraints.

The statute deals in part with non-solicitation agreements: A franchisor may not restrict a franchisee from hiring any employee of another franchisee of the same franchisor. RCW 49.62.070.

If non-solicitation of employees in the franchise industry is pernicious, why is the practice not pernicious in other contexts? Certainly this legislation does not champion non-solicitation and non-hire agreements outside of the franchise world. Instead, the statute “does not revoke, modify, or impede the development of the common law.” RCW 49.62.090(b)(2). In that vein, perhaps the statute’s prohibition against non-competes for individuals earning less than the statutory threshold (now $100,000/year) gives guidance to courts and contract drafters about what would be tolerable for a non-solicitation agreement.

If nothing else, RCW 49.62 provides a useful definition of what constitutes “solicitation”: “solicitation by an employee upon termination of employment: (a) of any employee of the employer to leave the employer . . .” RCW 49.62.010(5). A broad contractual provision prohibiting A from “aiding, assisting, or promoting . . . [XYZ] seeking other employment . . .” runs afoul of the simple definition in the statute. Providing information about employment opportunities with A is not asking XYZ “to leave the employer.”

But the larger issue is this: By restricting XYZ from other employment opportunities, through the vehicle of B’s non-solicitation agreement with departing employee A, is B unlawfully restraining trade in violation of Washington Constitution art. 12, § 22, and RCW 19.86.030?

The constitutional provision prohibits “any contract . . . for the purpose of fixing the price or limiting the production . . . of any product or commodity . . .” The statute declares unlawful “[e]very contract . . . in restraint of trade.” The Washington Supreme Court adopted those as the bases for analyzing non-competition agreements. Sheppard v. Blackstock Lumber Co., 85 Wn.2d 929 (1975). Earlier cases established that labor is a “commodity.”

Non-solicitation and non-hire agreements should be subject to even greater scrutiny under the constitution, RCW 49.62.005, and RCW 19.86.030, because they involve third parties (XYZ) not subject to the contract between A and B.

Let the common law develop and let labor freely move.

Kelby Fletcher has counseled and advised individuals in employment matters for over 30 years. He was admitted to practice in 1974 and retired as a notary public. He is a shareholder in the Seattle office of Stokes Lawrence, P.S. He can be reached at kelby.fletcher@stokeslaw.com. The views expressed in this article are those of the author alone.

Kelby Fletcher

Join the Discussion at NWSidebar
Bar Notes

ROUNDUP OF COUNTY BAR NEWS FROM AROUND THE STATE

1 Clark County Bar Association

The Clark County Bar Association (CCBA) recently moved to a new office at 904 Esther St. in Vancouver. On April 16 a “Party at the New Place” was held in the parking lot to celebrate the new space. Over 40 members attended to check out the new office and enjoy a complimentary beverage from a celebratory coffee cart.

The annual Clark County High School Mock Trial Tournament was held via Zoom in February. Clark County Superior Court Judge Robert Lewis wrote the fact pattern, entitled “The Statue,” a criminal case involving charges of malicious mischief and assault that arose when a public monument was destroyed during a protest. Eleven local teams competed over three days; Cascadia Technical Academy was named the county champion. Four other schools—Henry M. Jackson High School, Cedar Tree Classical Christian School, Team 1-Hockinson High School, and Columbia River High School—also received invitations to the state tournament. Over 100 volunteer judges and attorneys from Clark County helped to score, rate, and provide feedback to all competitors.

Lisa Darco, Clark County Bar Association executive director, reports that the past year has brought some unexpected benefits: member engagement is up, emails are being opened at a greater rate, and members have come to rely on the CCBA as a central place for the latest information including court updates and local rule revisions. Engagement with local courts at all levels has increased, and short 60-minute Zoom updates and CLEs have proved to be popular.

2 Ferry County Bar Association

After several years on hiatus, Ferry County is reviving its county bar! Ferry County Deputy Prosecutor Matthew Upchurch was recently named interim county bar president, and an initial meeting was attended by several local bar members.

3 Kitsap County Bar Association

The Kitsap County Bar Association (KCBA) held its annual Law Day celebration on May 7. Over 110 people attended the morning program via Zoom; Kitsap County Superior Court Judge Kevin Hull presided over the day’s festivities. Washington Supreme Court Justice Sheryl Gordon McCloud presented the keynote address entitled “Lifting as We Climb.” Kitsap Legal Services Executive Director Joanne Sprague recognized local pro bono attorneys with several awards including the COVID-19 Award to Steve Olsen, the Mr. Reliable Award to Eric McDonald, and the Law Firm of the Year Award to Compass Legal Services, PS.

A benefit of the virtual Law Day celebration was the ability of Navy personnel from San Diego who are members of the Kitsap legal community to participate. Military awards were presented by Naval Captains Art Record and Stephen Reyes to legal professionals. Honorees included Lt. Ryan Feingold, Legalman 2nd Class LaClaire Cartwright, and paralegal specialist Suzanne Burleigh.

A highlight of Law Day is the student essay contest. Attorney Tom Weaver coordinated the annual contest. Medals and cash awards were presented to first-, second-, and third-place recipients in the high school and middle school categories.

The Liberty Bell Award acknowledges outstanding community service. This year the KCBA presented the award to Pastor A. Richmond Johnson of the Mt. Zion Missionary Baptist Church. Pastor Johnson was recognized for his work in establishing Police and Communities Together (PACT), a partnership bringing young church members and local police together for open dialogue and community building.

Law Day 2021 concluded with a virtual luncheon. Rep. Tarra Simmons, D-Tracyton, who is also a member of the Bar, provided updates and answered questions on Washington’s 2021 legislative session.

NOTE
The Spokane County Bar Association (SCBA) offices have been open and operating under a “new normal” since May 2020.

Scott Mason was recently named the 2021 recipient of the Smithmoore P. Myers Professionalism Award. The award recognizes an individual who practices law in the Spokane area and exemplifies the high ethical and professional standards of the legal profession.

In April, the SCBA held an in-person swearing-in ceremony for four new bar members: Krista Ozimy, Jason Gillmer, Pansy Watson, and Cody Ross. Spokane County Superior Court Judge Harold D. Clarke III administered the Oath of Office.

The annual Champions of Justice Breakfast was held on May 14 and broadcast live to SCBA members from a local television studio. Bar President Jenaé Ball moderated a panel of three Spokane County Superior Court judges—Julie McKay, Tony Hazel, and Charnelle Bjelkengren—and County Clerk Timothy Fitzgerald, who spoke about the future of access within the courts. Additionally, SCBA members were able to hear directly from clients and volunteers about how the Volunteer Lawyers Program improves access to the courts and access to justice.

We’re eager to see what’s ahead and are optimistic about the future.

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On Board

NEWS FROM THE BOARD OF GOVERNORS & THE WSBA

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. **Proposed Amendment to General Rule 40 (Informal Domestic Relations Trials).** The Board discussed a significant proposed amendment, now published for public comment, that seeks a statewide general system for domestic relations cases. The Board decided: to ask the court for an extension of the July 30 comment deadline (the comment expiration date has been extended to Sept. 28, 2021) in order to notify members widely; to discuss at its September meeting whether to submit an official comment from the WSBA; and to allow a comment to the court from the WSBA Family Law Section expressing concerns.

2. **And the envelope, please ...** The full slate of the 2021 WSBA APEX (Acknowledging Professional Excellence) Award winners has been announced! More details about this year’s virtual ceremony in the fall will be posted soon. Find the list of winners at www.wsba.org/news-events/apex-awards.

3. **Licensed Legal Interns.** The Board approved recommended changes to Rule 9 of the Admission and Practice Rules (APR) for submission to the Supreme Court for consideration. Most significantly, the recommended changes allow law school students who have completed one-third of their studies to be eligible for the Rule 9 legal intern license if they are enrolled in a law school clinic. (Currently, only law students in their third year are eligible.) The changes are supported by Washington’s law schools and the WSBA’s Regulatory Services Department.

4. **Can you help serve moderate means Washingtonians?** The Washington State Bar Foundation presented a report about one of the significant access-to-justice programs that it helps fund: The Moderate Means Program (MMP). Launched in 2011, the MMP serves moderate-means clients throughout Washington in the areas of family, housing, and consumer law; the program expanded in 2020 to include unemployment benefits cases, which became increasingly prevalent during the COVID-19 pandemic. Some MMP stats: 26,354 requests for services, 18,152 intake sessions, and 5,657 referrals to attorneys. Learn more at www.wsba.org/connect-serve/volunteer-opportunities/mmp.

OTHER BUSINESS

The Board also:

- **Heard** an annual update from the WSBA Diversity Committee, including information about its outreach activities and goals to address issues such as law school debt.
- **Approved** proposed changes to rules and regulations governing the APR 6 Law Clerk Program to be submitted to the Supreme Court for consideration. The changes clarify and expand the program requirements, provide for increased accessibility to the program, and make the program more efficient to administer.
- **Approved** several action steps associated with recommendations from the Board’s Personnel Committee in response to findings from a recent WSBA employee climate survey. Those recommendations include four Board commitments: to clarify its governance model; to engage in team development with staff; to engage in facilitated dialogue with staff about strategic and policy matters; and to engage in strategic planning.
- **Changed** the WSBA Bylaws to provide for a timeline for an election for at-large positions.
- **Discussed** ongoing activities to advance equity, diversity, and inclusion, including recent training with facilitator ChrisTiana ObeySumner and plans to meet with leaders of minority bar associations.
- **Approved** proposed technical amendments to RPC 1.6 for submission to the Supreme Court for consideration, to fix incorrect numbering.
- **Heard** an overview of open-meeting provisions of the WSBA Bylaws.

MORE ONLINE

The agenda, materials, and video recording from this Board of Governors meeting (held in Stevenson and virtually), as well as past meetings, are online here: www.wsba.org/about-wsba/who-we-are/bog.
WSBA NEWS

2022 License Fee Payment Plan Option

If you are experiencing financial challenges, please note that our payment plan option is available to all licensed legal professionals for the 2022 license fee. Payments may be made in up to five installments with the balance required to be paid in full by Feb. 1, 2022. To take full advantage of the plan, sign up and pay the first installment in October 2021. Also, a license fee hardship exemption is available for active licensed legal professionals who qualify. Visit www.wsba.org/licensing to learn more.

Supreme Court Rule Changes: MCLE and Malpractice Insurance Disclosure

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 (read more on page 36); 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/court_rules/?fa=court_rules.adopted.

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 CLE credits by Dec. 31, 2021, and certify by Feb. 1, 2022. If you have any questions, please reach out to the MCLE team at 206-733-5987 or mcle@wsba.org. Find more information at www.wsba.org/mcle.

WSBA Small Town and Rural (STAR) Committee

The WSBA Board of Governors unanimously approved the formation of a Small Town and Rural (STAR) Committee to study and implement initiatives to support rural practice and access to justice in the “legal deserts” of Washington. For questions or to indicate your interest in getting involved, contact barleaders@wsba.org.

WSBA Board Feedback

Send your feedback to the newly created email address: boardfeedback@wsba.org. Please note that all WSBA emails are subject to public records requests.

Receive Notice of Upcoming Board Meetings

Join the Board meeting notice subscription list to receive WSBA Board of Governors meeting notices straight to your inbox! To join, email barleaders@wsba.org or complete the form at www.wsba.org/about-wsba/who-we-are/board-of-governors.

Volunteer Custodians Needed

The WSBA is seeking interested lawyers as potential volunteer custodians of files and records to protect clients’ interests. Visit www.wsba.org/connect-serve/volunteer-opportunities/act-as-custodian, or contact Sandra Schilling: sandras@wsba.org, 206-239-2118, 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.

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 or contact theaj@wsba.org to learn more.

Virtual Job Group

The Virtual Job Group will be meeting on Zoom beginning Sept. 30 from 9:10:30 a.m. The group will meet for seven weeks and seeks to provide both strategy and support to job seekers. This is a chance to learn new approaches to networking, clarify what kind of career you are seeking, and review your materials with other group members. If you are interested email wellness@wsba.org.
**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](http://www.wsba.org/COVID-19).

**Court Emergency Operations & Closures**


**Law Office Reopening Guide**


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**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](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](http://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/oma](http://www.wsba.org/oma). You can also schedule a free phone consultation with a WSBA practice-management advisor. Visit [www.wsba.org/consult](http://www.wsba.org/consult) to get started.

**Lending Library**

The WSBA Lending Library is scheduled to reopen to members on Sept. 1 for both in-person and online checkouts. We have made a few changes to be aware of. For more information, visit [www.wsba.org/library](http://www.wsba.org/library) or email lendinglibrary@wsba.org.

**Free Legal Research Tool**

The WSBA offers resources and member benefits to help you with your research. Visit [www.wsba.org/legalresearch](http://www.wsba.org/legalresearch) to learn more and to access Fastcase for free.

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**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](http://www.wsba.org/for-legal-professionals/ethics/ethics-line) or call the Ethics Line at 206-727-8284.

**WSBA Advisory Opinions**


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**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](http://www.wsba.org/for-legal-professionals/member-support/wellness/judicial-assistance-service-program).

**WSBA COMMUNITY NETWORKING**

**Sign Up for Low Bono**

The Moderate Means Program connects moderate income clients with family, housing, consumer law, and unemployment cases to legal professionals who offer reduced fees. Find out more here: [www.wsba.org/connect-serve/volunteer-opportunities/mmp](http://www.wsba.org/connect-serve/volunteer-opportunities/mmp).

**New Lawyers List Serve**

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

**ALPS Attorney Match**

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

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**QUICK REFERENCE**

**Sept. 2021 Usury**

The usury rate is 12.00%. The auction yield of the Aug. 2, 2021, auction of the six-month Treasury Bill was 0.056%. The interest rate required by RCW 4.56.110(3)(a) and 4.56.115 for Sept. 2021 is 2.056%. The interest rate required by RCW 4.56.110(3)(b) and 4.56.111 for Sept. 2021 is 5.25%.

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**NEED HELP?**

**WSBA MEMBER WELLNESS Services Program (JASP)**


**WSBA Lending Library**

The WSBA Lending Library is scheduled to reopen to members on Sept. 1 for both in-person and online checkouts. Visit [www.wsba.org/library](http://www.wsba.org/library) or email lendinglibrary@wsba.org to learn more.

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**NEWS TO KNOW**

**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](http://www.wsba.org/COVID-19).

**Court Emergency Operations & Closures**


**Law Office Reopening Guide**


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**Have something newsworthy to share?**

**Email wabarnews@wsba.org** if you have an item you would like to place in Need to Know.
Disbarred

Brian Conroy Read (WSBA No. 34091, admitted 2003) of Everett, was disbarred, effective 6/25/2021, by order of the Washington Supreme Court. Read’s conduct violated the following Rules of Professional Conduct: 1.15A (Safeguarding Property), 1.15B (Required Trust Account Records), 1.15C (Client Records), 1.15F (Keeping Account of Funds), 1.15I (Compliance with Trust Fund Rules), 3.1 (Merritorious Claims and Contentions), 4.4 (Respect for Rights of Third Person) and 8.4(d) (Prejudicial to the Admin of Justice).

In relation to his solo practice focused on landlord-tenant law, specifically evictions, Read stipulated to disbarment for: 1) converting client funds for his own benefit without entitlement to the funds; 2) using one client’s funds on behalf of another and by disbursing funds in excess of the amounts clients had on deposit; 3) failing to promptly pay or deliver funds that clients or third persons were entitled to receive; 4) failing to maintain a complete and current register and client ledgers; 5) failing to perform bank statement and client ledger reconciliations for the trust account; 6) disbursing funds from the trust account before deposit(s) cleared the banking process; and 7) failing to promptly respond to the Office of Disciplinary Counsel’s requests for information and records.

Marsha Matsumoto acted as disciplinary counsel. Henry Cruz and Francesca D’Angelo acted as disciplinary counsel. Brian Conroy Read represented himself. Nadine Darlene Scott was the settlement hearing officer. The online version of Washington State Bar News contains links to the following documents: Disciplinary Board Order Approving Stipulation to Disbarment; Stipulation to Disbarment; and Washington Supreme Court Order.

Suspended

James Egan (WSBA No. 28257, admitted 1998) of Seattle, was suspended for three months, effective 7/22/2021, by order of the Washington Supreme Court. The lawyer’s conduct violated the following Rules of Professional Conduct: 1.15A (Safeguarding Property), 1.15B (Required Trust Account Records), 1.15C (Client Records), 1.15F (Keeping Account of Funds), 1.15G (Confidentiality), 1.15I (Compliance with Trust Fund Rules), 3.1 (Merritorious Claims and Contentions), 4.4 (Respect for Rights of Third Person), 8.2 (Judicial and Legal Officials).

In relation to his actions advising and assisting a litigant in a family law matter, Egan stipulated to suspension for: 1) asserting frivolous issues in the motions, requests, notices, remarks, and other papers that he filed, delivered, or attempted to deliver to a judge; 2) using means that had no substantial purpose other than to embarrass, delay, or burden multiple judges; and 3) making statements that he knew to be false or with reckless disregard as to truth or falsity concerning the qualifications, integrity, or record of a judge.

Scott G. Busby and Henry Cruz acted as disciplinary counsel. Kurt M. Bulmer represented Respondent. Anthony Angelo Russo was the hearing officer. Donald W. Carter was the settlement hearing officer. The online version of Washington State Bar News contains links to the following documents: Disciplinary Board Order Approving Stipulation to Suspension; Stipulation to Suspension; and Washington Supreme Court Order.

Melissa Blythe Jaffe (WSBA No. 46036, admitted 2013) of Seattle, was suspended for 120 days, effective 3/30/2021, by order of the Washington Supreme Court imposing reciprocal discipline in accordance with an order of the Supreme Court of the state of Oregon. For more information, see https://www.osbar.org/_docs/dbreport/2021/JAFFFE_MelissaBlythe19-64.pdf. Henry Cruz acted as disciplinary counsel. Melissa Blythe Jaffe represented herself. The online version of Washington State Bar News contains a link to the following document: The Washington Supreme Court Order.

Donna L. Johnston (WSBA No. 23630, admitted 1994) of Renton, was suspended for nine months, effective 6/30/2021, by order of the Washington Supreme Court. The lawyer’s conduct violated the following Rules of Professional Conduct: 1.3 (Diligence), 1.4 (Communication), 3.3 (Candor Toward the Tribunal), 8.4(c) (Dishonesty, Fraud, Deceit or Misrepresentation), 8.4(d) (Prejudicial to the Admin of Justice).

In relation to her representation of client A in a criminal matter, and client B in a personal injury matter, Johnston stipulated to suspension for: 1) failing to appear at one or more of client A’s court hearings; 2) making misrepresentations to the court and to client A; 3) failing to communicate with client B; and 4) failing to promptly finalize the settlement of client B’s matter.

Henry Cruz and Francesca D’Angelo acted as disciplinary counsel. Anne I. Seidel
represented Respondent. Timothy Michael Moran was the hearing officer. Bradley R. Duncan was the settlement hearing officer. The online version of Washington State Bar News contains links to the following documents: Disciplinary Board Order Approving Stipulation to Suspension; Stipulation to Suspension; and Washington Supreme Court Order.

Reprimanded

Marne B. Whitney (WSBA No. 41606, admitted 2009) of Las Vegas, NV, was reprimanded, effective 6/07/2021, by order of the Chief Hearing Officer. Whitney’s conduct violated the following Rules of Professional Conduct: 1.7 (Conflict of Interest: Current Clients), 1.8 (Conflict of Interest: Current Clients: Specific Rules).

In relation to her work as a public defender representing parties charged with crimes by the city of Marysville, Whitney stipulated to a reprimand for engaging in an intimate relationship with a prosecutor at the Marysville City Attorney’s Office who was representing a party adverse to Respondent’s clients.

Joanne S. Abelson acted as disciplinary counsel. Kenneth Scott Kagan represented Respondent. The online version of Washington State Bar News contains links to the following documents: Order Approving Stipulation to Reprimand; Stipulation to Reprimand; and Notice of Reprimand.

Interim Suspension

Douglas Lowell Davies (WSBA No. 16750, admitted 1987) of Bainbridge Island, is suspended from the practice of law in the state of Washington pending the outcome of supplemental proceedings, effective 5/27/2021, by order of the Washington Supreme Court. This is not a disciplinary sanction.

Transfer to Disability Inactive Status

Antoinette Marie Ursich (WSBA No. 13667, admitted 1983) of Spokane, was by stipulation transferred to disability inactive status, effective 5/17/2021. This is not a disciplinary action.

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, Sept. 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).

Dave Hawkins (WSBA No. 23064, admitted 1993) of Seattle, is suspended from the practice of law in the state of Washington pending the outcome of supplemental proceedings, effective 6/23/2021, by order of the Washington Supreme Court. This is not a disciplinary sanction.

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Profitable Oregon estate planning law firm ready for new owner (#1153). This busy law firm has a reputation of delivering excellent results. The firm’s service by revenue breakdown is 35% estate planning, 30% probate, 25% FED/real property, and 10% other. As of June 2021, the practice has approx. 50 active clients with over 23,000 clients in the practice’s database inherited from a firm more than 30 years old. With consistent YOY growth, the practice is positioned for continued growth under new ownership. The current owner has offered to transition the practice over the course of up to six months, to continue to help drive business to the new owner. This firm is completely turnkey and ready for the new owner. To take advantage of this opportunity, call us at 253-509-9224 or send an email to info@privatepracticetransitions.com with “1153/Profitable Oregon Estate Planning Law Firm Ready for New Owner” in the subject line.

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Washington medical malpractice law firm (#1098) with average gross revenue of over $1,500,000 the last three years (2018-2020), and weighted Seller’s Discretionary Earnings (SDE) of over $1,200,000. This successful firm is completely turnkey and employs five staff, including the owner. The firm’s processes are very well documented and the practice uses Google Suite allowing for easy remote access. If you are interested in exploring this opportunity, would like the freedom to be your own boss, and/or increase your current book of business substantially, then this is perfect for you. Email “#1098/Washington Medical Malpractice Law Firm” to info@privatepracticetransitions.com or call 253-509-9224.

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Beyond the Bar Number

Jim Senescu

BAR NUMBER: 27137

I am entering my 25th year practicing law: 10 years as a deputy prosecutor and the last 14 years as a civil attorney focusing on protecting vulnerable adults (mostly elders) from abuse and financial exploitation. I am married with a 16-year-old son and am an avid golfer.

What is the most interesting case you have handled in your career so far and why? I tried a murder case to a jury exactly 59 days after the crime/arrest, as the 46-year-old defendant refused to waive a speedy trial. It involved the rape and murder of a 14-year-old girl from the defendant’s neighborhood who attended the defendant’s underage parties. We were five days into the trial before we even got the DNA evidence results. The case involved every type of evidence possible: witness, DNA, fingerprint, cell tower records, alibi witnesses, handwriting exemplar, surveillance video, toxicology, autopsy, and over 50 minor-aged witnesses. This was my first murder trial and it was a doozy. Fortunately, this defendant will not be able to harm any more children for the remainder of his life.

How is being a lawyer different from the way you thought it would be? There is a lot more paperwork and non-legal-related minutiae involved in the practice of law. Sometimes it seems that only a small amount of my time involves arguing and trying the client’s case to a tribunal.

How did you become interested in your practice area? I prosecuted a criminal case involving the abuse of an elder by a family member. I realized that no civil law firm focused on combating this epidemic on the civil side. It is easy to get motivated to fight for those who can’t fight for themselves.

What is your best piece of advice for someone who’s just entered law school? Be nice. No matter who you encounter and under whatever circumstance. Just be nice and respectful to all. It will pay off.

If you could go back in time, where/when would you go? Early 1800s on the Northwest coast.

What is one thing your colleagues may not know about you? I am a sucker for crime drama TV shows and movies.

What is your favorite word? Antidisestab-lishmentarianism.

What is your favorite podcast? What is a podcast?

What book have you read more than once? Where the Red Fern Grows by Wilson Rawls.

What is the last thing you watched on TV? The Golf Channel.

What is the best fictional representation (TV, movie, book) of a lawyer? Jack McCoy from Law & Order (Sam Waterston).

What is your best random fact that you would share with others at a party? The official U.S. Centers for Disease Control and Prevention (CDC) has a real website devoted to “zombie preparedness.”

What is the worst movie you’ve ever seen? Biloxi Blues.

What did you think was cool when you were younger that makes you cringe to think about now? Break dancing.
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