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FEDERALISM AND SCHOOLS

The Washington Supreme Court holding the Legislature in contempt for not appropriating money to their satisfaction for state support of school districts? [“Kicking the Can: Education Funding in Washington on the Heels of McCleary,” SEPT 2016 NWLawyer] What is this? Who are the “educational associations” who are part of news, which is a party to this litigation? Are they teachers’ unions? How can all this be?

The U.S. Constitution, article IV, section 4, guarantees to each state a republican government, which in this case means a government of a legislature, an executive, and a court system. But where the Washington Supreme Court overrules the complex acts of the Legislature, and supervises the Legislature, there is no “republican” government. We have government by a legislature supervised by another legislature — a super-legislature.

There are reasons for having a legislature. Legislatures are directly responsible to the people. We want a democratic government, responsible to the people, no matter how messy and detestable to some its acts may be. Legislatures are lobbed by all the parties, all the interests, as they should be, and perhaps by First Amendment constitutional right. Legislatures allocate the taxpayers’ money among many interests, again subject to more or less direct public review.

The U.S. Constitution limits federal court authority to cases and controversies. The Washington Constitution is vague on the authority of the Supreme Court, but if a state court acts beyond its case-and-controversy authority, it probably violates the republican clause and other clauses of the federal constitution; it violates the whole structure of representative government.

For these reasons it is neither proper nor beneficial, nor constitutional for courts to supervise or instruct the Legislature as to education.

Roger B. Ley, Svensen, OR

STATE OF FORECLOSURES

I write to address the several inaccuracies in Wendy Walter’s Sept. 2016 article in NWLawyer [“Washington Foreclosure Law: Is Our State Ready for the Next Chapter in Real Estate Finance?”]. First, the warnings regarding zombie foreclosures are unfounded. The case cited, Jordan v. Nationstar, explicitly confirms a beneficiary’s right to enter abandoned property and protect its security — it simply cannot dispossess the true owner until the foreclosure sale occurs. Second, legislative amendments to the Deed of Trust Act in the wake of the Great Recession were not designed to “slow down the process,” rather to ensure every homeowner has the opportunity to prevent avoidable foreclosure. In my considerable experience, it is Fannie Mae’s failure to comply with Washington law that prolongs the foreclosure process. The answer is not to change the law, but rather to force Fannie Mae and its agents to comply with it. For instance, the mediation process would be more efficient if these servicers took seriously the requirement to have an actual decision-maker present. Fannie Mae further slows the process when it sells reams of “nonperforming” loans to predatory loan servicers at a deep discount. Though the combined $13 billion in net profit Nationstar and Fannie Mae earned in 2015 certainly mollifies the concern that this “delay” threatens a healthy economy. Third, the Legislature has already commented on the importance of esignatures in our economy, see RCW 19.34. The effort to ease current requirements appears to be another attempt by national mortgage servicers to avoid state consumer protections.

Joseph Jordan, senior attorney, Foreclosure Prevention Unit, Northwest Justice Project, Seattle

RESPONSE FROM THE AUTHOR:

You make a great point about the Jordan case in that some lawyers might view this as a limited case, but in my practice with thousands of foreclosure cases I’m already seeing attorneys who represent borrowers take this decision to mean that the lender has no legal right to do any level of property preservation and cannot even do a drive-by inspection of the property. The due diligence requirements that precede the mediation are required in most Washington residential foreclosures and those are what can increase the process by up to 90 days or more. After Jordan, there will be more blight absent a legislative fix. I get emails, calls, and inquiries daily from cities and counties that are working on properties that they determine to be “zombie foreclosures.”

As to your final point about esignatures, it should be noted that Washington is the only state that hasn’t adopted the Uniform Electronic Transactions Act, and there is a lack of good case law holding up the enforceability of esignatures. Some even argue that the state law might be pre-empted by federal law at the moment. Check out this law review article: http://digital.law.washington.edu/dspace-law/bitstream/handle/1773.1/1252/88WLR559.pdf?sequence=1.

Wendy Walter, Seattle

IS BAIL NECESSARY?

Turtle biologist Krista van Amerongen claims that people held longer in jail before trial have a higher rate of recidivism than defendants released within 24 hours of arrest [“Science and Equity in Public Defense: It’s Numbers, But It’s Not a Game,” by Attorney Krista van Amerongen, OCT 2016 NWLawyer]. She then concludes: “Our charge-based, money-bail system is actually making things worse. We have statistical analyses, which help guide us — however counter-intuitive it may be for us to try them.” Alternatively, one might imagine that judges simply have the wit to require bail for more dangerous defen-
dants who are more likely to commit crimes again. Ms. van Amerongen’s illogical conclusions are part and parcel of an ongoing effort to deem bail itself unconstitutional — yet another leftist mistake dangerous for us all.

James Buchal, Portland, OR

TRAINING NEW BAR MEMBERS

The employment and financial challenges facing new bar members is an uncomfortable subject for state bar associations everywhere, and I commend incoming WSBA President Robin Haynes for her willingness to talk about it [“Q&A With Incoming WSBA President Robin Haynes,” OCT 2016 NWLawyer]. The lack of career launching employment for all new bar members is a result of the competitive market system in which the legal profession operates. Under a basic market analysis, supply of new bar members has been outpacing demand for many years now. My concern is the training of new bar members (or the lack thereof). Law school alone is not enough to complete the formation of the competent attorney. Competency is attained through actual practice. A mentorship model is put forward as a way to address the experience component of competency, but, ideally, what is needed is an apprenticeship model — i.e., paid supervised training for a period of time — be available for the new bar members.

Regarding attorney licensing, it is a distinct feature of the Bar that licenses are granted solely on the basis of academic accomplishment — completing a law degree and passing a written test. There is no experience requirement, i.e., completing a mandatory period of time in actual practice in a supervised setting. Many professions do not rely solely on academic competency. Doctors and plumbers, for instance, must complete a period of supervised training before they qualify for licensing. Interestingly, with respect to the recently created limited license legal technician [LLLT], the WSBA and the Supreme Court of Washington recognize the value of work experience as a necessary component of licensing. To obtain licensure as a LLLT, in addition to passing an examination and attaining a certain level of education, there is a requirement of 3,000 hours of law-related work experience under the supervision of an attorney. I am tempted to query whether the Bar should not also have a work experience requirement before an attorney license is granted.

Peter DeAndreas, Eureka, CA

GRIZZLY BEAR UPDATE

The articles in the October edition of NWLawyer by and about new WSBA President Robin Haynes were quite enjoyable, her “Triple Zag” tag most entertaining. Her quick rise to the presidency was likely a by-product of a Jesuit education, although she apparently missed the class on grizzly bears. In the Proust Questionnaire, President Haynes says her greatest fear is “being eaten by a grizzly while trail running” [“Q&A With Incoming WSBA President Robin Haynes,” OCT 2016 NWLawyer]. I want to assure the president that she need not fear the grizzly because a) we have virtually none in this state (experts estimate that there are five or fewer, all in the North Cascades); b) the chance of even seeing a grizzly in the wild is exceedingly remote; and c) the behavior of a grizzly is far more predictable than that of a human. Having had a number of grizzly encounters, it is clear to me that there is less risk in confronting an angry grizzly than an angry human. While there is a plan to reintroduce grizzlies into the North Cascades ecosystem, which I proudly support, even if that is successful, our president will not find a grizzly within miles of any trail on which she might run. If she does run in grizzly country someday, knowledge of the grizzly will be important and can be gleaned from organizations such as Western Wildlife Outreach (westernwildlife.org) and Friends of the North Cascades (northcascadesgrizzly.org). These organizations provide an immense service to both humans and grizzlies through their educational outreach programs and publications.

Mick Tronquet, Seattle

RESPONSE FROM THE AUTHOR:
Thank you for your thoughts on grizzly bears. My fear of grizzlies is from a twofold source. The first is actually the terrifying Werner Herzog documentary Grizzly Man. The second is from Glacier National Park, which is possibly my favorite place on earth. Several years ago, I was training for a marathon and spending most of my weekends at a lake just outside of the entrance to West Glacier called Lake Five (I made many jokes about Lakes 1-4 that were not well taken that year). The distance around Lake Five was just under six miles. I was told repeatedly by people who owned cabins around Lake Five that grizzlies were rarely seen around Lake Five — including by a cabin owner who had a photo of his grandmother sitting on top of a dead grizzly she shot in her yard outside that same cabin — but there were black bears. I could run to the entry of Glacier National Park in less time than it took me to run around the lake, so I highly doubted the grizzlies at Glacier never came to Lake Five.

This all came to a head when I had an 18-mile training run that was three loops around the lake. On loop two in a wooded area, I heard rustling in the trees and I picked up my pace and blared my music (pro tip: bears seem to hate rap music), but I didn’t see anything. On the final loop in that same spot on the dirt road, there was fresh scat and large bear paw prints. The next morning in the Hungry Horse newspaper, there was a story of the removal of two grizzly bears from Lake Five who had eaten 100 chickens from a pen outside a Lake Five home. That home was not far from the bear prints and the rustling, and I — an average runner with a belly full of carbs — was certainly an easier meal than 100 pecking and clawing chickens.

WSBA President Robin Haynes, Spokane

RESPONSE FROM THE AUTHOR:

Yes, I was trail running in the North Cascades ecosystem and was lucky to not see any grizzly bears. My experience was similar to yours, and I was also surprised to learn that grizzly bears were rarely seen around Lake Five. It is important to be aware of the risks associated with grizzly bears, as they can be dangerous and unpredictable. I encourage people to take precautions and be respectful of their environment when visiting areas where grizzly bears are known to exist.
Who has time to volunteer?

When I was inducted into my Rotary Club, I was newly admitted to the WSBA, just starting a law practice in town, and five months pregnant with twins. Nauseous and uncomfortable, I stood with a local dentist to receive my Rotary pin and recite the Rotary Four-Way Test. I remembered a Rotary meeting some 17 years earlier, when I received a scholarship that helped me to attend journalism school. This moment marked a full circle for me, and the beginning of an opportunity that, like most worthwhile endeavors, has been rewarding and educational.

So what can you gain from volunteering with others? What I have learned is that you can form connections with people who share your passions but not necessarily your experiences. You can learn to prioritize time in your schedule for the good of others, to find your place within a dynamic group, and even to say a firm “no” to projects and requests that don’t match your priorities. While serving on various boards and committees, I have learned to believe that we are stronger together, and most importantly, to appreciate that my children are watching me and learning to value their community by my actions.

In this issue, we share perspectives from attorneys as volunteers in their communities, either through pro bono legal work or through nonprofit organizations. We have an article from a law firm that ran a charity mud run and saw lasting positive effects on its team. We hear from attorneys who volunteer for the YMCA’s Mock Trial and Youth Legislation programs, two service opportunities that might remind many readers about why they chose a legal career. New King County Superior Court Judge David Keenan shares his experiences as a youth offender and offers insight into what drives him to give so much of his time to volunteer service. For those representing nonprofit groups, we have an article about how to structure a nonprofit merger. Did you know you can earn CLE credits for pro bono work? We have an update and helpful information on the rules.

This issue is full of other great articles, including employment law trends for 2017, insight into copyright law from in-house counsel for acclaimed Northwest artist Dale Chihuly, and a report on the results of the civility survey sent to WSBA members in May. Our Young Lawyer Committee (YLC) article on the things that kids say about lawyers is funny, but it’s also a reminder that what we do as legal professionals matters to the next generation.

As I end my first year as editor of this publication, I would like to thank you for reading. I appreciate the comments, letters and support from the many people who have worked with me on articles, illustrations and ideas. Happy holidays and best wishes for 2017.
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The F Word

No, not that one. I will say that I spent a good chunk of my formative years in Connecticut, and New Englanders have colorful vocabularies. I recall a nun or two during my days at Catholic school dropping an F-bomb here or there. What I want to talk about is a more divisive F-word: Feminist.

From Nigerian writer Chimamanda Ngozi Adichie: “Feminist. A person who believes in the social, political, and economic equality of the sexes.” Seems reasonable and straightforward, particularly for attorneys in Washington who have vowed to uphold the laws of our state, which include RCW 49.60, et seq., the Washington Law Against Discrimination (WLAD). WLAD provides “The right to be free from discrimination because of race, creed, color, national origin, sex, honorably discharged veteran or military status, sexual orientation, or the presence of any sensory, mental, or physical disability or the use of a trained guide dog or service animal by a person with a disability is recognized as and declared to be a civil right” (RCW 49.60.030(1)). We are further bound by RPC 8.4(g) (adopted in Washington far before the ABA recommended it in 2016 over much debate), which makes it professional misconduct for attorneys to engage in discriminatory behavior as defined by state law.

And yet the word is loaded with negative connotations, and women, especially women in power or in the public eye, run from it. Even rarer is the man who openly refers to himself as a feminist.

Adichie is a third-wave feminist from Nigeria who gained national attention in the United States when her Ted Talk about feminism was sampled in Beyoncé’s song Flawless. Suddenly Beyoncé, a woman who sang a song with her original girl-group Destiny’s Child that contained the lyrics, “Can you pay my bills,” in reference to a potential suitor, was now openly and publicly embracing the word feminism and challenging the notion that feminists are, quite bluntly, man hating. Beyoncé, a beautiful woman who wears the highest heels and the smallest Givenchy costumes on stage, was openly accepting a word that she had denounced early in her rise to fame. And while Adichie has not been shy in clarifying that she is not the same kind of feminist Beyoncé is, Adichie’s speech that the Beyhive (fans of Beyoncé) embraced includes the following:

“We teach girls to shrink themselves, to make themselves smaller. We say to girls: ‘You can have ambition, but not too much. You should aim to be successful, but not too successful. Otherwise, you will threaten the man.’ Because I am female, I am expected to aspire to marriage...But why do we teach girls to aspire to marriage and we don’t teach boys the same? We raise girls to see each other as competitors, not for jobs or accomplishments...but for the attention of men.”

Adichie’s speech is included in her book, We Should All Be Feminists. It’s considered an entry-level primer to feminism for everyone. It does not require a history lesson and a feminist reading list of The Second Sex, The Feminine Mystique and everything written by Audre Lorde — almost universally considered the black feminist foremother. Adichie’s essay isn’t esoteric about history and theory — it is truly about the ways in which we are failing half of our citizens or in the legal profession’s case half of our lawyers. Adichie begs us, men and women, to do better. We should all be feminist, because feminism is not negative. It is not some form of affirmative action or some way to silence the voices of men. It is not reverse sexism, which does not exist. Not being a feminist also hurts men. As Adichie says, “We define masculinity in a very narrow way. Masculinity is a hard, small cage.” It keeps men being chastised for wanting flex time in their practices and it keeps them from being able to speak out against sexism because of the very real potential for retaliation from their peers and superiors.

Like Adichie, I am angry. I am angry that in 2016 I get asked if I have a wealthy husband so that I can play president. I am angry that I still have to have these conversations about the barriers to success of half of our attorneys. I am angry that I have heard women attorneys say that they are silent and accept the comments...
as part of the job. But, like Adichie, I am hopeful. As she says, she “be-
lieve[s] deeply in the
ability of human beings
to remake themselves for
the better.” I am hopeful
because I have heard from
men and women attorneys
who have never experienced these be-
haviors at their offices or among their
peers. I am hopeful because Brad Fur-
long, the older male president to follow
me, is ready to continue the talk about
sexism and other diversity issues that
continue to dominate our profession.

I am hopeful because in early Sep-
tember the WSBA hosted its first panel
discussion on misogyny and sexism in
the profession. It was live and webcast
and still available for viewing at http://
www.wsba.org/beyond. I was proud to
be a part of that panel, and there was
a follow-up NWSidebar blog post in
which panelist Linda Fang and I shared
takeaways. I ended the presentation ask-
ing for stories from women about inci-
dents of sexism, both overt and subtle.

Since that time, I have received
hundreds of these stories from wom-
en — stories from decades ago and
stories from yest-
erday. I’ve heard from women who
have left firms and cities and even the
entire profession because of explicit
sexual harassment, lack of opportuni-
ties for advancement, or lack of opportuni-
ties to meet clients. These are women
in all practice area, in small and large
firms, and at all years of experience. The
harassment and sexism has come from
colleagues and peers, more senior part-
ners, clients, and most dishearteningly,
from the bench. It has even come from
other women — women who likely do
not identify as feminists. I have asked
permission to share some of these sto-
rries on the NWSidebar blog, and I will
continue to collect them.

The author Lorde regularly talked
about speaking up and speaking out
about these injustices, saying, “My si-
lences [have] not protected me. Your si-
lences will not protect you…What are the
words you do not yet have? What are the
tyrannies you swallow day by day and
attempt to make your own, until you will
sicken and die of them, still in silence?
We have been socialized to respect fear
more than our own need for language.” I
regularly talk about leaders showing up,
which is more than just being present —
it’s about speaking up and being a voice,
even when that voice is unpopular, espe-
cially when that voice is on behalf of the
voiceless.

I take Lorde’s words seriously and I
take very seriously the trust women at-
torneys have placed in me by sharing
their stories and asking that I be a voice.
So in late September when I was sworn
in, I gave a speech challenging the in-
stitutionalized notion of sexism and the
barriers to the success of women attor-
eys. It wasn’t subtle. It included many
of the statistics I presented in my previ-
ous November NWLawyer column “I am
Not a Lady.” My swearing-in speech was
well received with a standing ovation
from all but one or two, whom I assume
were merely tired after a long night at
the WSBA APEX Awards. However, right
after that speech, an older male leader in
the Washington legal community came
to my parents and said, “We are so
excited to have Robin as president. You
must be so proud. She is so pretty.” My
mid-70s father, without skipping a beat,
said, “I didn’t know that was a qualifi-
cation for the position.”

So, back to that F-word. If you don’t
consider yourself a feminist, why? Be-
cause it hasn’t affected you personally?
Because you don’t understand what fem-
inism means? Because you have some
outdated and misinformed notion of
what a feminist looks like? Denying the
social, political, and economic equality
of women in the legal profession is real
and it makes me want to use that other
F-word.

I am what a feminist looks like, and I
hope you are, too. NWL

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professional ethics and need an opinion
or representation before the WSBA or
the Commission on Judicial Conduct, or
representation in the Supreme Court —
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Thomas Fitzpatrick
Former member ABA Ethics and Discipline Committees,
ABA Center for Professional Responsibility,
Member of the Commission that wrote the CJC,
Adjunct Professor Seattle University

Philip Talmadge
Sponsored CJC law in 1981, served on Supreme Court Rules Committee
that addressed ethics rules, handled In re Niemi, In re Marshall

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In June 2016, the Washington Supreme Court adopted significant amendments to the Admission and Practice Rules (APRs) relating to character and fitness proceedings.¹ The amendments were recommended for adoption by the WSBA Board of Governors following a thorough review of the rules by a work group convened in 2014.

The work group included a member of the Character and Fitness Board, representatives from the Board of Governors, a lawyer serving as both president of the Washington Attorneys with Disabilities Association (WADA) and the National Association of Attorneys with Disabilities, the executive secretary to the Governor’s Committee on Disability Issues and Employment, and WSBA staff. The co-authors of this article also served on the work group.²

The work group convened to address whether the APR’s standards to assess applicants’ character and fitness to practice law, as well as some of the procedures used by WSBA admissions staff and the Character and Fitness Board, aligned with current thinking and legal interpretations of both federal and state law. The work group focused specifically on recent interpretations of the Americans with Disabilities Act (ADA) as they relate to bar admissions and on protections afforded under the Washington Law Against Discrimination (WLAD).³ It reviewed the sections of the APRs addressing character and fitness, bar application questions, admissions procedures currently in use in Washington and a variety of other states, and a recent findings letter and settlement agreement between the U.S. Department of Justice (DOJ) and the Louisiana Supreme Court.⁴

The DOJ letter and resulting settlement agreement focused primarily on Louisiana’s bar exam application questions and its conditional admission policies and procedures (Washington’s rules do not permit conditional admission). The work group examined the DOJ’s analysis of the Louisiana bar exam application questions and Louisiana’s other methods of obtaining information related to an applicant’s health diagnosis. At that time, similar bar exam application questions were being used by many other states, including Washington.
For instance, both Washington and Louisiana asked applicants whether they have been diagnosed with or undergone treatment for any mental health condition in the past five years and to state whether, if untreated, this condition would impact their ability to practice law. The DOJ’s view as expressed in its letter of findings to the Louisiana Supreme Court was that such questions improperly single out applicants with mental health conditions and “as currently written, appears rooted in unfounded stereotypes about individuals with these diagnoses, and is not appropriately tailored to assess the applicant’s current fitness to practice law.”

The DOJ also stated in the letter that requests for treatment records based solely on applicants identifying as either seeking treatment or having a mental health condition are prohibited by Title II of the ADA, which prohibits requirements “based on speculation, stereotypes, or generalizations about people with disabilities, rather than actual risks.”

The WSBA work group reviewed the letter and the settlement agreement to consider its broader implications for Washington’s bar exam questions and admissions procedures. For instance, the settlement agreement imposes limits on the types of inquiries the Louisiana Bar can make regarding an applicant’s health diagnosis and on access to the related treatment records. Although it allows for some inquiry into a current mental health or substance abuse condition/diagnosis that might impair the practice of law, it does not permit broad-based inquiries into past conditions. The settlement agreement does not, however, limit inquiries into an applicant’s past and present conduct that may impact the applicant's ability to practice law. In sum, inquiries about conduct are permitted, but ones about a health diagnosis or condition must be narrowly tailored.

The work group worked with WSBA admissions staff to make interim modifications to questions on the admissions application, while it deliberated on broader changes to both the APR and the application. In early 2015, the work group submitted a recommendation to the WSBA Board to submit certain APR amendments to the Supreme Court to address the issues it considered.

The proposed amendments were approved by the WSBA Board and submitted to the Court in April 2015. The Court published the proposed rules for comment in November 2015 and adopted the Rules on June 2, 2016. The amended APR became effective on Sept. 1, 2016. Applicants taking the winter 2017 bar exam will be the first in our state to use the modified bar application, and the amended APRs are already being used for current applicant for admission.

This article highlights four primary changes: the character and fitness definition, how health or substance abuse inquiries are made, the bar application itself, and the policy prohibiting discrimination when making character and fitness determinations.
1. Changes in the definition of “character and fitness”

The amended APRs, like the prior version, require that the applicant must show by clear and convincing evidence that “he or she is of good moral character and possesses the requisite fitness to practice law.” However, the definition of “fitness” has changed from one based on whether the applicant has a mental impairment that could impair his or her ability to practice law, to a conduct and behavior approach that focuses on whether the applicant meets enumerated essential eligibility requirements. The change in how fitness is defined represents a significant change in the APRs, both in terms of substance and organization. However, the change is consistent with the protections afforded under the state law against discrimination, which was originally codified in 1949 and extends to all disabilities, even perceived disabilities.

Under the prior rules, fitness was defined as the “absence of any current mental impairment or current drug or alcohol dependency or abuse, which, if extant, would substantially impair the ability of the applicant, Bar Association member, or petitioner to practice law.” In contrast, the amended rules define fitness as a record of conduct that establishes that the applicant meets essential eligibility requirements for the practice of law. The essential eligibility requirements are defined as:

- The ability to exercise good judgment and to conduct oneself with a high degree of honesty, integrity, and trustworthiness in financial dealings, legal obligations, professional obligations, professional relationships, and in one’s professional business.
- The ability to conduct oneself in a manner that engenders respect for the law and adheres to the Washington Rules of Professional Conduct.
- The ability to diligently, reliably, and timely perform legal tasks and fulfill obligations to clients, attorneys, courts and others.
- The ability to competently undertake fundamental lawyering skills such as legal reasoning and analysis, recollection of complex factual information and integration of such information with complex legal theories, problem solving and recognition, and resolution of ethical dilemmas.
- The ability to communicate comprehensibly with clients, attorneys, courts, and others with or without the use of aids or devices.

Similar factors have been used in other states that have adopted a conduct-based approach to fitness.

Although the definition of fitness has changed, good moral character continues to be defined as “a record of conduct manifesting the qualities of honesty, fairness, candor, trustworthiness, observance of fiduciary responsibilities, adherence to the law, and a respect for the rights of other persons and the judicial process.”

The amended rules also maintain the approach whereby the Character and Fitness Board considers a list of factors to determine an applicant’s good moral character and fitness and then applies aggravating and mitigating factors. However, there are no longer a separate set of factors that apply to cases involving drug or alcohol abuse or mental impairment.

Examples of factors carried over from the prior rules are unlawful conduct, academic misconduct, making false statements on a bar application, employment misconduct, neglect of financial responsibilities, etc. Two new factors have been added, i.e., “conduct demonstrating an inability to meet one or more essential eligibility requirements for the practice of law,” replacing “evidence of a current substantial impairment, including without limitation, drug or alcohol dependency or abuse,” and “conduct that physically threatens or harms another person.” The factors to be considered in aggravation and mitigation, such as recency of the conduct, applicant’s age at the time of the conduct, candor in the admissions process and before the Character and Fitness Board, materiality of any omissions or representations, and applicant’s attitude towards the misconduct, have not significantly changed.

INQUIRIES ABOUT CONDUCT ARE PERMITTED, BUT ONES ABOUT A HEALTH DIAGNOSIS OR CONDITION MUST BE NARROWLY TAILED.
2. Changes regarding inquiries when substance abuse issues arise in the admissions process

It is not unusual for bar applicants to voluntarily disclose information about a health or substance abuse issue to explain past conduct. For example, an applicant might reveal that a severe episode of depression contributed to chronic absenteeism in past employment. Such information could also be disclosed to the WSBA by a third party, as when a court record obtained by the WSBA indicates that the applicant was ordered to attend anger-management classes or obtain substance abuse treatment.

Under the amended rules, when such information is affirmatively disclosed further inquiry by WSBA admissions staff or the Character and Fitness Board must be narrowly tailored. Further questioning is only justified if the applicant has engaged in conduct that demonstrates an inability to meet any of the essential eligibility requirements. In addition, the inquiry must occur in stages. The first stage is to request a statement from the applicant; the second is to request a statement from the applicant’s treatment providers; and the third is a narrowly tailored request for medical records that provides access only to information reasonably necessary to assess the applicant’s ability to meet the essential eligibility requirements — only in those cases where statements from the applicant and his or her treatment providers do not resolve reasonable concerns about applicant’s ability to meet the essential eligibility requirements. The amended rules also require that the statement of the applicant’s treatment providers be accorded “considerable weight.”

As in the past, the Character and Fitness Board has the authority to order an independent medical examination (IME) of the applicant; however, an IME can only be ordered if all other levels of inquiry have been completed and only after testimony and evidence presented at the character and fitness hearing fails to resolve the Character and Fitness Board’s concerns. Under the amended rules, an applicant has 30 days to provide rebuttal information to any ordered IME from his or her treating physicians.

3. Changes to questions on applications for admission

WSBA applications for admission no longer include questions about whether an applicant has “experienced, been diagnosed with, or undergone treatment” for any mental health condition or substance abuse. Instead, the focus is on whether the applicant has engaged in specific conduct that impacts the essential eligibility requirements. For example, there are now inquiries as to whether the applicant has been confronted, questioned, warned or asked or encouraged to resign or withdraw by an employer, supervisor or educator due to lack of truthfulness, excessive absences, failure to maintain confidentiality of information, etc.

4. Updated nondiscrimination policy

The prior version of the rules specified factors the Character and Fitness Board could not consider, including racial or ethnic identity, sex, political beliefs, and others. This led to some confusion as it was unclear whether those factors could be considered or raised by the Character and Fitness Board as a positive factor for the applicant — for instance, if an applicant suffered racial discrimination in her past but nevertheless persevered to obtain a law degree. The amended rules implement a nondiscrimination policy and clarify that when determining good moral character and fitness to practice law the WSBA and the Character and Fitness Board cannot discriminate against any applicant on the basis of the factors enumerated in Washington’s Law Against Discrimination, including the presence of a mental disability.

Conclusion

The goal in enacting the amended APRs was to properly balance the federal and state protections afforded to people with disabilities and the corresponding obligation to ensure that all applicants have the requisite good moral character and fitness to practice law in a competent and professional manner. Consistent with the guidance from the DOJ, these modifications will ensure that all applicants, regardless of their disability status, have the essential eligibility requirements to practice law in our state.

NOTES

1 APR 20-25 (amended effective Sept. 1, 2016).
2 More information regarding DRW’s role leading up to the work group can be found on its website: www.disabilityrightswa.org.
3 RCW 49.60.010 prohibits discrimination “against any of its inhabitants because of race, creed, color, national origin, families with children, sex, marital status, sexual orientation, age, honorably discharged veteran or military status, or the presence of any sensory, mental, or physical disability or the use of a trained dog guide or service animal by a person with a disability.” RCW 49.60.215 also prohibits any unfair practice that “directly or indirectly results in any distinction, restriction, or discrimination.”
4 Settlement Agreement Between the United States Department of Justice and the Louisiana Supreme Court Under the Americans with Disabilities Act, Aug. 14, 2014; see also February 5, 2014, United States Department of Justice letter to Louisiana Supreme Court (DOJ letter) available at www.bazelon.org/LinkClick.aspx?fileticket=7rvNYZzawM%3d&tabid=698 (last retrieved on Sept. 6, 2016).
5 DOJ Letter at page 22.
6 Id. at 26 (citing to 42 U.S.C. § 12101(a)(7); 28 C.F.R. § 35.130(h)).
Beginning in the 1970s, bar admission applications began to include questions as to whether the applicant had mental health disorders and/or substance addictions. An affirmative response required the applicant to consent to disclosure of the names of treatment providers and medical records. See Andrea Stempien, “Answering the Call of the Question: Reforming Mental Health Disclosure During Character and Fitness to Combat Mental Illness in the Legal Profession,” U. Det. Mercy L. Rev. 1, 4-5 (Winter 2016); see also “Suffering in Silence: The Tension Between Self-Disclosure and A Law School’s Obligation to Report,” Conference Panel on Assisting Law Students with Disabilities in the 21st Century, 18 American University Journal of Gender, Social Policy & the Law 121 (2009). After the passage of the ADA in 1992, certain questions, particularly broad based inquiries about whether an applicant had ever suffered from a mental impairment, were held to violate the Act. See, e.g., Ellen S. v. Florida Board of Bar Examiners, 859 F.Supp. 1489 (S.D. Fla. 1994); Clark v. Virginia Bd. of Bar Examiners, 880 F. Supp. 430, 442-43 (E.D. Va. 1995) (finding that questions requiring individuals with mental disabilities to subject themselves to further inquiry and scrutiny discriminate against those with mental disabilities); Medical Society of New Jersey v. Jacobs, 1993 WL 413016 at *7 (D. N.J. 1993) (refusing to allow questions that substitute an inquiry into the status of disabled applicants for an inquiry into the applicants’ behavior and place a burden of additional investigations on applicants who answer in the affirmative). More narrowly tailored questions limiting the time period asked about and/or relating to specific diagnoses were held to not be in violation of the ADA. See, e.g., Applicants v. Texas State Board of Law Examiners, 1994 WL 923404 (W.D. Texas, Oct. 11, 1994); Title II of the ADA prohibits policies that are based on “mere speculation, stereotypes, or generalizations about individuals with disabilities.” See 28 C.F.R. § 35.130(h); 42 U.S.C. § 12101(a)(7) (criticizing unequal treatment “resulting from stereotypic assumptions not truly indicative of the individual ability [of people with disabilities] to participate in, and contribute to, society”). See also S. Rep. No. 116, 101st Cong., 1st Sess., at 7 (1989) (discussing the “false presumptions, generalizations, misperceptions, patronizing attitudes, ignorance, irrational fears, and pernicious mythologies” surrounding disability; H.R. Rep. No. 485, 101st Cong., 2d Sess., pt. III, at 25 (1990) (noting that “many of the problems faced by disabled people are not inevitable, but instead are the result of discriminatory policies based on unfounded, outdated stereotypes and perceptions, and deeply imbedded prejudices towards people with disabilities.”).
The one thing I remember very clearly was someone shouting my last name. I was perhaps 12 or 13 years old — the records have since been destroyed, and it’s a memory I’ve tried to forget. But I remember hearing my name being shouted. Shouted, because I was one of several young boys standing outside the King County juvenile courtroom that day. I can’t recall the racial makeup at the time, but I know today that there are many more black and brown children than there are white ones like me, far out of proportion to the community.

They called my name. My mother raised her hand. Someone handed her something to sign. We didn’t know what we were signing, but the only thing we cared about was that it meant I wouldn’t do any time in juvie. It was my first formal involvement with the juvenile justice system. And for better or worse, over the next 30-plus years, it wouldn’t be my last. That journey has taken me inside and outside the system and now working to help change the system. And like many attorneys, my deeply personal experiences shape much of my service today.

FROM DEFENDANT TO ADVOCATE
For the last couple of years, I’ve been making monthly appearances at King County Juvenile Court. It’s the same courthouse I first appeared in as a defendant more than 30 years ago. Only today I go there for monthly meetings of the Board of Directors of the Community Leaders Roundtable of Seattle. The Roundtable runs the 180 Program, which works to keep young people — especially youth of color — out of the juvenile justice system. One Saturday a month, eligible youth complete a workshop held at Seattle University School of Law, where they work with leaders from their community to try to bring about a 180-degree turn in their lives. The program was started by King County Prosecutor Dan Satterberg and leaders in the legal community, trying to bring about a 180-degree turn in their lives. The program was started by King County Prosecutor Dan Satterberg and leaders in the legal community, trying to recognize the value of second — and third, fourth, and fifth — chances for youth who struggle in our system with the effects of things like racial bias and poverty.

I always arrive early to the juvenile courthouse for our Roundtable board meetings. I walk into the first floor where the courtrooms are. I find a chair, sit down, and remind myself how scared I was at my first visit. I go through that exercise every single time to make sure that I never forget how terrified even the most seemingly hardened children are when they cycle through the system. I go through that exercise to remind myself that we can do better. And we are doing better. I’m grateful to Satterberg and the many attorneys and judges who have recognized the opportunity we have right now to make tremendous strides when it comes to juvenile justice and who are actively working for change.

RECOGNIZING MY PRIVILEGE
Today my family and I continue to have a complicated relationship with our legal system. Despite having been a defendant in juvenile court and dropping out of high school and earning my GED, in a strange twist I eventually spent nearly 15 years as a federal law enforcement agent, making arrests in some of the very neighborhoods where I’d found myself in handcuffs as a young man. It was my law enforcement career that convinced me I needed to go to law school, where I could figure out how to take my personal experience with poverty and the justice system, along with my experience in law enforcement, and channel all of that into working for justice for
our community. In 2014, I was appointed by Seattle Mayor Ed Murray to the Community Police Commission, where I do just that — take all I’ve learned about justice from personal and professional experience, and help be the community’s voice in reforming police accountability.

I earned my law degree at night while working in law enforcement during the day, and the tension between spending my days investigating crimes and making arrests and my nights studying the Constitution continues to shape my views on access to justice. Along the way, I’ve come across members of my family in our jails and our system and I remind myself how fortunate I am that people intervened in my life to get me off that path.

I had many challenges growing up, but I also had the tremendous unearned advantage of being a white male, which meant that I got second chances that young people of color did not. So today I draw upon those personal challenges as a young man, my professional and leadership experience as an adult, and the recognition of my own privilege, to work to improve access to justice for our community. To this day, people continue to take chances on me, investing in me, mentoring me, and believing in me. I don’t know that I deserve those chances, but I’m grateful to my peers and mentors who’ve shared their own journeys with me, helping me turn my experiences into something positive.

**BACK IN COURT — AS A JUDGE**

On November 8, I won election to the King County Superior Court. I won my election almost 30 years to the day from the last time I was in trouble with the law in King County. I’m coming back to King County Superior Court as a judge, not a defendant. My daughter Maggie was at my side as the election results came in, and while I hope she never experiences the challenges I faced at her age, I encourage her to think about ways she can help our community.

When my friends in the legal community ask for advice on where and how to serve our profession and our community, I suggest that they start with an especially painful or challenging time in their life and think about what would have made that experience less painful or challenging; what would have helped and why. In many cases, there is an organization, a board, a committee, or a pro bono opportunity that addresses challenges each of us has had. I think that’s a good start. I made a number of mistakes and had some challenges as a young man and each of those mistakes and challenges informs my work today. We are not the sum of our mistakes or challenges, but I believe that each of us can channel them into service. **NWL**

David Keenan has a civil litigation practice at Orrick, Herrington & Sutcliffe in Seattle. In January, he will begin his first term as a King County Superior Court judge. David has served as board president at both Northwest Justice Project and the Federal Bar Association for the Western District of Washington, board member of the Community Leaders Roundtable of Seattle and Team-Child, a member of the Seattle Community Police Commission, and as a member of the WSBA Character and Fitness Board. He can be reached at dkeenan@orrick.com.

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How might we promote a practice of law that is both exceptionally effective and highly civil? As members of the WSBA, we should all care about this question. The effective practice of law is a cornerstone of our democracy and key to a thriving market economy. Civility promotes justice and reduces transaction costs. Incivility costs us in terms of our business, our health, and our ability to deliver on our legal system’s promise of justice for all. But is incivility really a problem in our state? And even if it is a problem, what can we do about it? These were some of the fundamental questions we set out to answer when Robert’s Fund’s Civility Center for the Law, Seattle University School of Law, and the WSBA joined together in May to survey WSBA members about civility in the profession.

Our inquiry was in five parts. First, we asked participants to name a specific opposing counsel who was both exceptionally effective and highly civil. We hoped to derive an understanding of the language used to describe those we found to be exemplary members of the Bar, both in terms of civility and representing of their clients. The second part of the survey asked participants to rate their exceptionally effective and civil opposing attorney on a number of personality traits. We wanted to see if there was indeed a set of personality characteristics that could be linked to those perceived as both civil and effective. A link to particular traits might give us ideas to best construct learning opportunities that maximize those traits in our profession. The third part of the survey asked participants to rate their exceptionally effective and civil opposing attorney on a number of provisions that commonly occur in civility codes and pledges adopted by bar associations across the country. We were curious to see if the traits and behaviors identified by various codes matched up with practitioners’ views of whom they saw as their most civil and effective colleagues in practice.

The next section of the survey asked participants to report the frequency at which they experienced civility in a variety of practice settings. In this case, we intentionally asked people to rate how often they experienced civil as opposed to uncivil behavior. Most bar surveys conducted across the country ask the opposite — when have people experienced incivility. We were curious to know whether asking individuals to focus on the positive as opposed to the negative would impact the results. We were also curious about whether the phase of proceeding or type of activity involved had an impact on civility. For example, was there more civility in written as opposed to spoken communication or more civility in court than in discovery? Finally, we asked participants to tell us what they thought the legal community could do to promote civility in the profession.
A REPRESENTATIVE SAMPLING OF THE NARRATIVE RESPONSES SHEDS MORE LIGHT ON THE CHARACTERISTICS OF EXCEPTIONALLY EFFECTIVE AND CIVIL OPPOSING ATTORNEYS:

1. “Calm, communicates with clarity. Shows courtesy to everyone, even under pressure. Speaks and acts in a way that is inclusive of persons who do not share the same characteristics (e.g., persons of different racial or ethnic backgrounds, different physical disabilities, persons who might not speak fluent English, persons who are younger, older, etc.).”

2. “This attorney returns phone calls and emails promptly, is pleasant to talk to, not in a hurry, not egotistical or condescending, a gentleman, respectful, offers professional advice, wants younger attorneys to be successful, cares about the local justice system.”

3. “The attorney is trustworthy, cordial, and cooperative. We respect one another, and I consider the attorney to be a friend. When I need extra time or a continuance on some matter, the attorney cooperates to find a better time. Depositions invariably are scheduled and rescheduled by agreement. I reciprocate when litigating with this attorney.”

4. “The attorney understood both sides of the issues, and when we completed the transaction, both of our clients were happy... In fact, our clients have gone on to do other transactions successfully and cordially.”

5. “The other attorney was kind, courteous, and sought to come to a resolution in the case. She was a true pleasure to work with, and I never felt anxiety when her calls or emails came through. I also knew I wasn’t going to be hit with any unexpected or unnecessary surprises. She fought for her client well but did so while maintaining respect for me and my client’s position.”

6. “They are cordial, accommodating, and friendly regardless of the outcome of the hearing or trial or how emotional the case may be for their clients. They have high integrity and don’t attempt to gain advantage by underhanded tactics.”

They were also identified as having exhibited virtually all of the behaviors in the civility codes. For example, 90% of respondents moderately or strongly agreed that the person they identified conducted him/herself with dignity in matters related to the case both in and out of court, avoided making groundless objections, and was not rude or disrespectful; and 89% moderately or strongly agreed that the person showed respect for the court, the legal profession and the litigation process in his/her attire and demeanor.

In addition to gathering quantitative data, we asked survey participants to describe the exceptionally effective and civil opposing counsel by providing a short narrative response. Narratives were provided by 874 survey respondents. There were several commonly cited characteristics of highly effective and civil opposing counsel. The most common words used when listing these traits were honest (15%), listens (12%), prepared (8%), sense of humor (5%), responsive (5%), kind (4%), and straight forward (3%).

The comments about opposing counsel offer an impression of the practice different than what is typically portrayed in popular culture. But how common is the behavior overall in the WSBA? To begin to address this question, we asked survey takers to identify how often they experienced civil behavior in various parts of their practice.

Experiences of civility
Overall, the results were encouraging. Survey respondents experienced civility often or always over 50% of the time in every practice category as opposed to less than 10% reporting never or infrequently. The only exception to this result was in the discovery process where 11% reported experiencing civility never or infrequently.

Similarly, mode of communication seemed to impact how frequently an attorney experienced civility. Survey respondents indicated that email is a mode of communication in which they are less likely to encounter civility as compared to face-to-face or phone communication.

Overall, the data gathered in this study may be used to both understand the climate of civility in our profession and perhaps to give clues as to how to improve. Future analysis of this survey will look at the differences in perceptions of civility when we take factors such as age, gender, and size of jurisdiction into account. Further analysis will also focus on what respondents thought should be done to increase civility in the profession.

The authors would like to thank Professor Paula Lustbader for her work as a co-investigator on the survey and for her help in writing this article.
In the 1990 movie Kindergarten Cop, Arnold Schwarzenegger introduced the world to the wonderful game called “Who is your daddy and what does he do?” The admissibility of the resulting answers aside, most kids can easily understand the professions of teacher, police officer, or doctor. But explaining to children that mommy is negotiating a collective bargaining agreement requires a bit more thought.

It’s difficult to explain to children what lawyers do, partly because there are so many different kinds of lawyers. But it’s also hard for kids to understand the circumstances that cause a person to need the help of an attorney. The concepts of life and death, bankruptcy, and divorce are more difficult to understand than “the good guys” and “the bad guys,” and there is good reason that we shield kids from the uglier of these grown up problems. This is why my twins, 2 years old at the time, chose to play in the fountain outside the courthouse instead of watching their mother take the oath of attorney. They and their sister had a bit more of an understanding five years later when they watched me getting sworn in to practice in Idaho. What they remember most about their trip to Boise was visiting the Harley Davidson dealership.

While the weight we shoulder on behalf of our clients can be too intense for a child to understand, some aspects of lawyering are not completely foreign to children. They can understand the essence of lawyerly tactics — a child who is offered one cookie makes a counteroffer for three and settles for two has doubled his expected return through negotiation.

I have found myself cross-examining my children more than once:

**MS. ARNESON:** Whose dirty socks are in the living room again?

**DEAREST CHILD:** I don’t know.

**MS. ARNESON:** Were you or were you not wearing socks when you came into this room?

**DEAREST CHILD:** I was.

**MS. ARNESON:** And are these my Phineas and Ferb socks?

**DEAREST CHILD:** No.

**MS. ARNESON:** You are the only child who has been in this room today, correct?

**DEAREST CHILD:** Yes.

**MS. ARNESON:** And are your feet bare right now?

**DEAREST CHILD:** ...

Lawyer jokes are part of the job for those in our esteemed profession. We all have that canned response and fake laugh to change the subject (e.g., “Good one, Frank. Just as funny the third time you told it. Hey, how about those Sea-hawks?”). It seems that those who need our help are often those who laugh the loudest at these tired jokes. But not kids — while honest to a fault, they have not yet been conditioned by society to have a disdain for lawyers. So what do kids say about attorneys?

Not surprisingly, how kids describe attorneys is colored by whether they have a parent or family member who is a lawyer. I smile every time I recall when one of my three daughters asked me if boys were allowed to be lawyers, and upon my affirmative answer, the hysterical laughter that ensued. Then there is the young man who had yet to master the subtleties of lawyerly vocabulary, assuming that his mother’s bar card was something she used to buy beer. Or the daughter of a prosecutor who proudly proclaimed to her teacher, “My mom is a prostitute!” Not unlike the son in Liar Liar who proudly proclaimed that his dad was a liar:

**MAX REEDE:** My dad? He’s… a liar.

**TEACHER:** A liar? I’m sure you don’t mean a liar.

**MAX REEDE:** Well, he wears a suit and goes to court and talks to the judge.

**TEACHER:** Oh, you mean he’s a lawyer.

**(2)** Be a role model.

We all have bad days occasionally, and in this profession a bad day can easily be a very bad day. But on those days it helps to remember to strive to be fair and helpful and to do good work. Each one of us is a representative of the legal profession, and we should strive to exemplify the best qualities of our chosen profession, especially in front of children. If all else fails, talk more than the other guy. After all, the kids are counting on us.

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**Notes**


What it means to be a lawyer - a kid's view

**Fairness:** Lawyers make sure things are fair.
Inevitably, kids whose parents are lawyers seem to have some concept that their parents make sure that the laws are fair, and help people settle arguments. Judges enforce the rules much like the referees in football games. But mommy is not allowed to yell at judges like she yells at the referees on TV when the referees make calls that mommy disagrees with.

**Helpfulness:** Lawyers help people.
Lawyers both help put people in jail and help keep people out of jail. They both help people fire employees, and help prevent employees from getting fired. They help some laws get passed, while preventing others from seeing a vote. It’s no wonder kids are confused!

**Homework:** Lawyers do homework all day.
There is also the homework theme. Lawyers have tasks and assignments that often come with rigid deadlines, not much unlike homework. Children associate doing homework all day with sitting at a desk all day, working on the computer. Kids know that sometimes lawyers’ bosses get mad at them if they don’t go to work every day. One kid even offered to call her mom’s boss to ask for a day off to take her to the park — I say she’s a future mediator.

**Verbosity:** Lawyers talk a lot.
As attorneys, our words are our swords and our shields. Kids understand the concept of argument and debate and can appreciate how that is a more agreeable way to solve a problem than having their brother smack them with the shoe they were fighting over.

**Negotiation:** Lawyers negotiate resolutions to problems.
Lawyers help people solve problems that they are unable to resolve on their own. Kids may not realize it, but as soon as they hit toddlerhood they start to use their own developing negotiation skills to get what they want — whether it be three more bites of dinner to get an ice cream cone or putting their shoes back on in exchange for 10 more minutes of play time at the park.
A merger in the nonprofit world is no less complicated than the merger of a for-profit corporation, but the metrics of success are different. Nonprofit organizations structured around values and achieving a mission as opposed to a bottom line may need to think even harder about whether a merger aligns with their goals, clients, and world view.

The dynamics of bringing donors, board members, and employees onto the same page is the greatest challenge faced by nonprofits seeking to merge or acquire another entity. This article shares some wisdom borne from the experience of our firm and others on how to get from pitching the idea to the donors to successfully merging organizations. For each stage of the merger process, we provide best practices so nonprofit organizations can be well-armed to think several steps ahead and ultimately end at a bright future post-merger.

STAGE 1: PREMERGER NEGOTIATIONS
The premerger negotiations phase sets the stage for the entire merger. At this point, the parties must develop the values critical for the negotiations, agree on a means of formalizing their desire to move forward, and assemble a team whose task is to shepherd the merger.

Values Consensus
The start of any merger process begins with the most important discussion of all — developing a common values-based goal that both corporations can rally around. The importance of this cannot be overstated. “When organizations were able to identify potential mutual gains that could be realized in the merger there was a statistically greater likelihood that staff would integrate well into the new organization.”

Memorializing a Memorandum of Understanding
Once the parties are on the same values page, they should draft a brief document akin to a letter of intent or memorandum of understanding, memorializing the framework for the deal, disclosure schedules, and confidentiality requirements.

Assembling the Merger Team
At this stage, many experts recommend putting together a “dream team” to manage the merger. In addition to board members and various stakeholders, there are three other types of people that could be of value at this stage:

**Merger consultant.** The 2012 MAP for Nonprofits report cited above found in its study sample that 86% of the mergers it studied included a merger consultant. They were found to add value as experts, facilitate discussions, and sometimes take on highly specialized roles such as interim executive directors.

**Joint merger committee.** The benefits of a joint merger committee include creating a smaller decision-making group, ensuring both boards have representatives, always communicating, and maximizing technical skill already available on the boards. Several articles and studies have concluded that a task force or committee focused on the merger minimizes procedural mistakes and the escalation of tensions. It is also worth considering adding a special staff merger team to ensure proper staff integration and investment.

**Lawyers.** Joint defense/representation agreements are common in this space to reduce costs; however, joint representation — much as in any other context — should be approached with caution, especially if the law firm chosen typically represents one of the merger entities.

STAGE 2: MERGER AGREEMENT
The strength of the merger agreement depends on the thought that goes into its foundation. The parties should engage all relevant stakeholders when drafting the terms and try to preempt possible issue areas to minimize disagreements down the line.

Building Stakeholder Support
Before any serious drafting may occur, it is crucial to begin reaching out to stakeholders and generating buy-in. MAP for Nonprofits identifies four stakeholder groups of particular importance: executive staff champions; board members; clients, consumers, and funders (treated as one group of external stakeholders); and the nonprofits’ staff members.

**Executive staff champions.** Studies indicate that having internal leadership on board with the transaction has a potent effect on steering the process along. A key leader with
a vision becomes the executive champion — the one who pushes along the agenda and keeps morale high.

**Board members.** A unified board front is fundamental. Each merging corporation’s board has independent authority to approve or reject the merger. The board takes on a particularly active role by laying all of the merger groundwork. If there are any rifts on the board or disgruntled members, the process will hit logjams each step of the way.

**Clients, consumers, and funders.** Early and frequent communication with customers, clients, and funders ensures that everyone is on board as the merger agreement and formal contracts take shape. Customers and clients should feel comfortable with the surviving corporation and its ability to continue the services they have come to expect. Each board should sit down with major funders and get substantive buy in from each — essentially pledges to financially support the new entity. Throughout this process of outreach, it is important to think of those shadow stakeholders whose interests will fundamentally affect the success of a merger, such as well-connected community members, committed volunteers, and government officials.

**Staff members.** Staff should be brought on board early to give them a sense of ownership in the merger process. “[I]nvolvelement of non-administrative staff prior to merger are all associated with a significant number of positive outcomes following merger. Specifically: financial stability, service quality and/or expansion, organizational reputation, and the alignment of staffing with client needs.” The staff members need to feel that their interests matter. “Whether a merger results in re-assigning roles, creating graceful exits, or developing new leadership positions in the merged entity, crafting a plan for senior staff that the staff itself considers fair and in the organization’s best interests is a critical step if the parties are to actually tie the knot.”

**Drafting the Merger Agreement:**
**Issues to Consider**

Once all the right parties are invested in the merger, the actual drafting of the merger agreement can happen. Here is a list of considerations (beyond what is required by state statutes) that should inform the drafting of the agreement.

**Brand stewardship.** Select the merged entity’s brand based on the emotional and financial strength of each merging company’s brand. This may involve dropping one of the brands, creating a public brand partnership, or creating a new amalgam brand.

**Mission/vision.** As discussed in earlier sections, the parties need to have an honest conversation about why the merger is taking place, who it serves, and what the larger goals of the new organization should be. Reaching a consensus on this will inform the rest of the transaction.

**Timeline.** The parties need to be realistic about how long negotiations may take, with the exact timeline that reflects how much legwork the organizations have already done and the relative complexity of the parties. If organizations are smaller and/or on tight budgets, the merger could take place surprisingly quickly.

**Board structure and executive leadership.** Crucial questions remain about board, leadership, and programming. A common approach is combining the boards and allowing for attrition to eventually get the new board to the right size over a few years.

**Transfer of liabilities and contracts.** It is crucial to discuss which liabilities and contracts will transfer and which will be closed out before the merger finalizes. Con-
recommends a merger to shareholders or members can be personally and individually responsible if untoward results occur from the merger and the board members had failed to closely examine the merger partners in advance. Due diligence is thus an insurance policy for each governing board involved in the merger.”

9 Each corporation should conduct independent as well as joint due diligence in order to maximize information. The categories of exchanged information include corporate documents, financial materials, fundraising records, third-party contracts, and personnel records. The timing of the due diligence is just as important as the substance of the exchange: phase the due diligence and make sure highly sensitive information (i.e., donor lists) is not exchanged too early in the process.

STAGE 4: APPROVALS
The actual legal enactment of the merger follows the state law requirements for approval. Note that third parties may have to approve a merger, such as government entities, funders or donors with restrictions, banks, and insurance companies.

STAGE 5: CLOSING AND INTEGRATION
The closing itself is rarely an issue. State law dictates the required filings. The larger concern is what to do after closing: the process of integrating staff, programs, and boards. The integration process consists of two parts: cultural integration and board/member integration.10

The best way to address each type of integration concern is to ensure that there is constant communication with staff, a clear mission from the beginning of the merger process, and several opportunities for continued discussions during the first few years, allowing for systems changes when needed. If the steps laid out in the earlier sections are followed, the integration should be smoother due to opportunities for staff and stakeholders to interact repeatedly in forums designed for such impactful conversations.

CONCLUSION
The moving pieces in a nonprofit merger require looking several steps ahead at every point and always balancing the interests of the board, donors, and staff. With proper planning, a nonprofit merger can be an invaluable tool for increasing an organization’s social impact and finances. But only if the two corporations follow best practices, align their visions early, and check in frequently. NWL.
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NOTES
5. MAP 2012, supra note 1, at 12.
8. MAP 2011, supra note 4, at 35.
10. MAP 2011, supra note 4, at 33.
When I proposed to our nine-member firm that we all participate in the Whistler Tough Mudder Half, I figured we’d have fun, bond a bit, and share a collective memory that we could look back on fondly when we’re back in our office poring over legal documents.

What I didn’t expect was the immediate benefit we would see from this grueling experience — a five-mile, 14-plus-obstacle course through steep terrain that required all of us to go way outside our comfort zones both physically and socially.

We are a diverse group, from a litigator who never participated in competitive sports, to a lawyer who practiced business law in China, to an Indian immigration attorney who speaks Spanish, to me — a former U.S. trade attaché who founded the firm. But once we hit the mud, we quickly realized that our pasts didn’t matter. We were forced to confront the present messy situation and dig deep to help each other get through it.

In addition to the desire to push my partners and staff, I also chose this June event because money raised supports PATH (formerly Program for Appropriate Technology in Health), an international health organization driving transformative innovation to save lives. PATH is a nonprofit organization that fits our firm’s motto of helping clients change the world. We volunteer as a firm because we strongly believe that we can make the world better through our efforts as lawyers.

We signed up in January to give everyone enough time to train for the course, which required stamina, teamwork, and grit. Teams with names like Pyramid Scheme, The Everest, and Blockness Monster took to the obstacle course at Whistler’s Callaghan Valley, home to the 2010 Winter Olympics ski jumping and cross-country skiing events.

I’m proud to say that everyone in the firm competed in the event. Racers included Mona McPhee, Andy Le, Sara Xia, Victor King, Akshat Divatia, Alex Folkerth, and Candace Wilkerson. Even Amrita Srivastava, an attorney who had her baby two months earlier, participated as a coach, since she felt she couldn’t yet do the obstacles.

APPREHENSION OVERCOME

After the race, I asked some of the lawyers to reflect on what this event meant to them. Wilkerson said she entered the event apprehensively, never having participated in a competitive sporting event. “I thought that there was no way that I could do it. I was somewhat dubious for a while. But I wanted to participate.”

She got completely soaked on the last obstacle. Washing off the mud in a hot shower, she reflected on what she and her teammates had accomplished. “I felt a great elation for having accomplished something like that,” she says. “It shows I can push myself farther than I thought in a way that I’m not used to. I’ve always been an academic — books, research, writing, and talking. But competitive athletic events are out of my comfort zone.”

On the other hand, attorney Mona McPhee, a former college athlete, called it one of the most fun things she’s done in a long time. For her, it also painted attorneys in a new light.

“We truly, truly had each other’s back,” she says. “We were not going to let somebody drop.” Her comment referenced one attorney who, when he saw that his teammates were struggling to help him over an obstacle, told them to just let go of him. They refused.

BRINGING IT HOME

We carried that experience back into our office. One attorney told me that our firm is the first place he’s worked where if he makes a mistake, people will help him learn from it rather than tear him down. He said the experience made that part of the culture even stronger.

“Statistically, practicing law is one of the most depressing, hard jobs out there,” McPhee adds. “Some people are not happy. They work with Type A competitive personalities, which can create a toxic culture. The Tough Mudder Half is the vaccine for toxic culture. It makes people want to come in and work every day and provide good service for their clients. You know the guy in the office will support you, not tear you down further.”

The Tough Mudder also changed the traditional law firm dynamics. For example, although Andy Le, an associate attorney who works on immigration and naturalization law, is one of the younger members of our team, he found himself as an anchor on the course, helping lead the more experienced lawyers through the obstacles.
“For most of the obstacles, I was helping create the base to push people up over walls,” says Le, who has run three half marathons and numerous fun runs. “I was a baseboard and people were stepping onto my knee and I was shoving them over, and that’s not something I would do in a typical work day.”

Before the event, we added strategy sessions to our weekly staff meetings to prepare for the obstacles. We put an obstacle on the screen and discussed what our strategy would be when we got there. Months after the event, we’re still seeing that cooperation translate to the office. “It was a good chance for us to collaborate,” Le says. “We’re all different attorneys with different clients. A lot of the work doesn’t cross-pollinate. We don’t always get the opportunities to work together as close as we would when we did this event. We’re now inclined to support each other when you see one of your colleagues neck deep in work.”

I agree that our law firm is still reaping the benefits of this event. We better understand that preparation is key — not only for the event, but for long-term strengthening and skill-building. Being ready at the right fitness level and being ready for obstacles and strategizing helped, as did thinking through the strategy and being ready once we were there. We really got to build on the idea of team work.

Universally, there are different ability levels in law firms. On the challenge course, we recognized that we each came in with different strengths and, as a team, we learned a lot more about how to work together and to trust each other. We’ve found that the team is more than the sum of its parts. On the challenge course, as in the firm, the level of trust needed was enormous. When you’re 40 feet in the air at a mud run, the only thing between falling on your head and staying safe is your colleagues. That experience carried into the firm immediately. I was amazed to see that on the first Monday back after the event, everyone so quickly applied what they had learned to real legal issues. NWL.

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Why I Will Continue to Support the Washington State Bar Foundation  
by Tom Lerner

With many of you, I share the privilege of practicing law. In its early days, along with medicine, the military, and the clergy, law was one of a narrow group of professions defined by a common thread of service. I try to keep that in mind when I also remember that as lawyers and legal professionals, most of us have been able to make a pretty fair living doing this work — in no small part because of our knowledge and special access to the workings of the courts. So how do we reconcile the notion of service and the privileges that allow us to charge hundreds of dollars for a few hours of our thinking, writing, and communicating?

I live in fear of having to hire a lawyer. I understand how legal fees accrue and how they can mushroom beyond anyone’s control. One of my definitions of hell is getting sued... and winning. You end up with severe financial losses for having been proven right. Then I think about friends and family who are not lawyers and who do not have our facility with what the law is and how it works. How do they access the system to have their concerns addressed without the cure being worse than the ailment? What happens to the school teacher, the sales representative, or the nurse when they need legal services? Our profession is not designed to serve the interests of the middle class, certainly not when nearly half the country says that they could not pay an unexpected $400 bill without selling something or borrowing.

Lawyers extend themselves in many ways to address this problem. Thousands of hours are donated in pro bono service and at neighborhood legal clinics. Most of us don’t track those calls we get from friends or strangers seeking just enough guidance to figure out a direction that makes sense to solve the problem at hand. Our service in our community shows when we participate in charitable organizations and nonprofit boards, where we give our time and contributions and ask others for theirs.

With funding that began with dollars raised through the Foundation and other avenues, the WSBA has supported and grown participation in the Moderate Means Program, which connects prospective clients with lawyers willing to accept their cases on a sliding fee scale. Often those are lawyers who are seeking to grow their own practices or work in underserved communities. Law students are the starting point for that program, and Washington’s three law schools have student volunteers who engage in the initial client screening, developing client interviewing skills at the same time.

Funds raised by the Foundation have also helped support the foreclosure clinics that popped up to meet an urgent need during the crucible of the Great Recession. The first responders’ will clinics began after 9/11, so that when we ask people to run into the fire they have the comfort of knowing they have planned for their families. One of my sons is an EMT now in training as a firefighter. This resonated with me, and it became personal in a different way.

People turn to the courts because they promise a forum for the peaceful resolution of disputes. When folks don’t believe they are able to access the courts, they are left to other alternatives that can turn ugly, or they give up. Neither of those answers is right. It is not right that we should have a system that makes hardworking individuals give up on their legal rights because they cannot afford help to assert them. If we want to preserve the system that we have — which is not all that bad a system for solving disputes — we have to make it accessible.

I rely in part on the WSBA to help make the legal system more accessible; because that helps make our society fairer and more peaceful, I am willing to donate to improve access to justice. There are lots of payments that we can complain about, and few find joy in paying any. But donate for justice? Sign me up. Wedge my lawyer dollars to prop open the courthouse door for others.

Lawyers work 2,000 hours in a typical year. Perhaps you bill half that time or three-quarters of that time or more. Consider donating what you ask others to pay you for just one of your billable hours. For those of you billing just 1,000 hours a year, that is one-tenth of a percent of your time. Can you spare one-tenth of a percent of your time to contribute to access to justice so that the middle-class families in your community can seek legal help when they need to?

For those of you who are weighing that against the other ways you want to spend or give your money, I want to come back to the notion that what we do is a privilege grounded in a history of service, and it only continues to work as long as everyone in our society believes that they have a chance at getting justice. The value of an hour of your billable time is a tiny amount to contribute so that the courthouse door is a little more open than it is shut.

I am ending my term as a trustee of the Foundation, as there is virtue in fresh eyes and hearts coming into that role. But I am not ending my support of the Foundation, nor will I stop asking my partners and my colleagues to add their contributions to my own. When we all help, we pay so little and gain so much, and it becomes another way to remember that what we do — what we are supposed to do — is serve. NWL

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The Problem of “Bad” Clients

Ponzi Schemes and Law Firm Exposure

by Mark J. Fucile

One of the most searing problems a law firm can face is the discovery that a seemingly good client has used the firm’s services in perpetrating a fraud. Circumstances vary, but a common theme in this unhappy genre is that an apparently successful businessperson is running a Ponzi scheme that has defrauded hundreds of investors. In many instances, the law firm is among the duped. As a King County trial court put it in one recent case, Norton v. Graham and Dunn, P.C.: “[The bad client] was so charismatic and his Ponzi scheme so sophisticated that he duped everyone, including the . . . [law firm].” (2016 WL 1562541 at *11 (Wn. App. Apr. 18, 2016) (unpublished)).

Although there are certainly regulatory duties that quickly come into play in this context, liability concerns also loom large. Unless the perpetrator is truly a lone wolf operating on the fringes of an otherwise solid business, the discovery of fraud usually sends the business into bankruptcy. The mastermind, in turn, is often on the way to jail. And if it is a classic Ponzi scheme, there is no money available to pay off expectant investors and other creditors. In that toxic mix, law firms can soon become targets for both defrauded investors and bankruptcy trustees seeking to salvage any remaining assets. In hindsight, the plaintiffs in the resulting litigation will ask pointed questions about why the law firm did not have the foresight to warn them.

When a law firm learns that a client is engaging in a continuing fraud, three questions usually rush forward. First, does the firm have to withdraw? Second, must the firm reveal the fraud? Third, what exposure does the firm face? In this column, we’ll look at all three.

Withdrawal

If the miscreant was an outlier in an otherwise upstanding company that fired the offender and immediately went to the authorities, the law firm might remain to assist a corporate client in cleaning up the mess. Even in this situation, however, developments such as a lawyer-witness or other conflict might trigger the firm’s withdrawal later. The firm would also need to carefully monitor potential conflicts moving forward. In Grassmueck v. Ogden Murphy Wallace, P.L.L.C., 213 F.R.D. 567 (W.D. Wash. 2003), a law firm that had represented a business group and its principal was put in the middle of a fight over its confidential files, after the business collapsed. The former principal was indicted on securities fraud charges. A court-appointed receiver for the business group sought the law firm’s confidential files and difficult issues of privilege followed, including the crime-fraud exception. Although the law firm had withdrawn, Grassmueck provides an excellent illustration of how conflicts can quickly make remaining with the client untenable.

In many circumstances, however, the master of the scheme is effectively the company and may try to continue the fraud. In that scenario, the firm should withdraw. RPC 8.4(c) includes “conduct involving dishonesty, fraud, deceit or misrepresentation” within the definition of professional misconduct. Similarly, RPC 1.2(d) prohibits a lawyer from knowingly assisting a client in criminal or fraudulent conduct and RPC 4.1(b) prohibits a lawyer from failing “to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client.” Finally, RPC 1.16(a)(1) counsels that a lawyer must withdraw when continuing in a representation “will result in violation of the Rules of Professional Conduct or other law.” Again as Grassmueck illustrates, the practical need for the firm to defend itself will almost always create acute conflicts dictating withdrawal.

Revealing Client Fraud

In the situation where the perpetrator is the lone wolf in an otherwise honest company, RPC 1.13(b) counsels that a lawyer’s principal duty upon discovery of fraud (or other illegal conduct) by an entity constituent that “is likely to result in substantial injury to the organization” is to report the findings to management so that the organization can take action appropriate to the circumstances. In the vernacular of RPC 1.13, this is often called “reporting up.”

If, however, the perpetrator is the company, then both the confidentiality rule (RPC 1.6) and the entity client rule (RPC 1.13) permit reporting out. RPC 1.6(b) (2) permits a lawyer to reveal otherwise confidential information to prevent a continuing course of criminal conduct by a client, and RPC 1.6(b)(3) permits a lawyer to reveal confidential client information “to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client’s commission of a crime or fraud in furtherance of which the client has used the lawyer’s services.” RPC 1.13(c), in turn, also permits a lawyer to reveal similar information if management of the business involved does not take action. The exceptions in both RPC 1.6 and 1.13 are discretionary through the use of the word “may” rather than “shall.” As the Court of Appeals noted in Dewar v. Smith, (185 Wn. App. 544, 563, 342 P.3d 328 (2015)), which dealt with the analogous area of accountant confidentiality, another option is a so-called “noisy withdrawal,” in which the firm on withdrawing disavows any representations it has made to third parties. In many instances, however, the firm will not need to parse these fine distinctions because the fraud has become public through a dramatic failure of the business rather than the perpetrator confessing in private to a lawyer.

Exposure

A lawyer who knowingly participates in a client’s fraud is likely looking at a new line of work. In In re Smith, (170 Wn.2d 721, 246 P.3d 1224 (2011)), the Supreme Court disbarred a lawyer following the lawyer’s federal conviction for conspiracy to commit securities and wire fraud. Litigation following the collapse of Ponzi schemes and other large-scale frauds that used legal services, however, usually involve...
more nuanced facts and a focus on civil claims rather than regulatory discipline.

The potential claims asserted against a law firm will turn on the facts of the particular case involved. Securities claims against law firms, for example, often depend on whether the law firm participated in the sale of securities to the investors (see generally Hines v. Data Line Systems, Inc., 114 Wn.2d 127, 147-51, 787 P.2d 8 (1990)). Aiding and abetting claims are more common and were discussed extensively in the Ponzi scheme context, albeit as it related to a bank, not a law firm, in In re Consolidated Meridian Funds, (485 B.R. 604 (Bankr. W.D. Wash. 2013)). Ironically, traditional legal malpractice claims — at least by defrauded investors — have less traction because, under Hizey v. Carpenter (119 Wn.2d 251, 260-61, 830 P.2d 646 (1992)), a plaintiff generally must have been the client of the lawyer to have the requisite standing. In the Norton case noted earlier, for example, summary judgment was entered on a legal malpractice claim because the defrauded investors were not clients of the law firm.

When a law firm has represented a client who turned out to be the mastermind of a Ponzi scheme, there is probably no practical way to avoid the fallout entirely. Firms can, however, take three proactive steps that will lessen their risk.

**FIRST**, define the client at the outset in a written engagement agreement. A relatively common scenario after a Ponzi scheme unravels is for the mastermind of a corporate client to argue that he or she was also an individual client of the firm to disqualify the firm from assisting the corporation or to assert privilege over conversations with firm lawyers. Both state (Bohn v. Cody, 119 Wn.2d 357, 363, 832 P.2d 71 (1992)) and federal (United States v. Graf, 610 F.3d 1148, 1159-61 (9th Cir. 2010)) law will give great weight to written engagement agreements in determining whether an attorney-client relationship exists.

**SECOND**, define the scope of the representation in a written engagement agreement. If, for example, you have been hired to handle a very discrete matter, make that plain in your engagement agreement. Assuming you acted consistent with that agreement, it will be more difficult for a third party — such as a defrauded investor — to argue later that you were privy to the client’s inner workings in other areas.

**THIRD**, be wary about making statements on your website about being a client’s general counsel. As the Consolidated Meridian Funds case explains, theories of aiding and abetting fraud or breaches of fiduciary duty are predicated on knowledge of the fraud or breach. Firms that openly advertise that they are a client’s general counsel will have a much more difficult time explaining why their lawyers weren’t aware of incendiary facts. **NWL**

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On Oct. 28, guests gathered at the Sheraton Hotel in Seattle to pay tribute to 71 attorneys and judges who celebrated 50 years of WSBA membership in 2016. WSBA President Robin Haynes welcomed honorees, their families, and guests, and expressed gratitude to the 50-year members for their decades of dedication to the law. Haynes and members of the Board of Governors presented certificates and lapel pins to the members who joined the Bar in 1966.

Haynes spoke about the changes in the legal profession and the changing face of diversity. She reviewed notable events from 1966, both worldwide and at the WSBA. Washington Supreme Court Chief Justice Barbara A. Madsen congratulated the honorees on their professional contributions. Carole Grayson, chair of the WSBA Senior Lawyers Section, invited members to join the Senior Lawyers Section. The luncheon concluded with the attending honorees gathering for a commemorative group photo.

The WSBA class of ’66 has seen many changes — cultural, political, and historical — during their decades in the legal profession. We thank them for their inspirational work, trail-blazing achievements, and half-century of public service. NWL
1966 — A MOMENT IN TIME

1966 saw noteworthy historical milestones. Here are some memorable events from that year.

In January 1966, 83 people took the bar exam and 51 passed. By comparison, in February 2016, 367 candidates took the exam and 215 passed. In July 1966, 171 take the bar exam and 130 pass.

In June, the U.S. Supreme Court rules in the landmark case *Miranda v. Arizona* that if suspects are not told of their right to remain silent and to counsel, information from interrogation is inadmissible.

In August, the Beatles play two concerts at Seattle Center Coliseum. Meanwhile, The Doors record their self-titled debut LP.

In November, actor Ronald Reagan is elected governor of California.

In December, the federal government selects Boeing to design and produce a prototype supersonic transport for civil airline use.

The Oscar for Best Picture goes to The Sound of Music (receiving five Academy Awards in total), while Best Actress goes to Julie Christie for Darling and Best Actor goes to Lee Marvin for Cat Ballou.

At the Tonys, *Man of La Mancha* wins five awards, including Best Musical.
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IN MEMORIAM

PAUL CRESSMAN, SR.
1922 - 2016

We are saddened that Paul Cressman, Sr. passed away on October 7, 2016. He was an icon in Seattle’s legal and business community and a giant in the evolution of the Pacific Northwest construction industry. Paul will be greatly missed by his family, friends and colleagues, and all those who had the honor of knowing him.

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2016 WSBA APEX AWARDS
ACKNOWLEDGING PROFESSIONAL EXCELLENCE

On Sept. 29, Washington’s legal community gathered to honor some of its best and brightest at the WSBA APEX Awards Dinner. Formerly known as the Annual Awards, the APEX (Acknowledging Professional Excellence) Awards celebrate attorneys and community members who represent the legal profession’s core values: integrity, professionalism, diversity, service, justice, and courage.

Outgoing WSBA President Bill Hyslop welcomed over 350 attendees. Past-president Anthony Gipe and outgoing governors Brad Furlong, Elijah Forde, Philip Brady, and Karen Denise Wilson were acknowledged and thanked for their service. Chief Justice Barbara Madsen swore in new governors Rajeev D. Majumdar, Dan Bridges, Christina Meserve, and Athanasios P. Papailiou, as well as President-elect Brad Furlong and incoming President Robin L. Haynes.

The recipients’ stories were shared in short videos as President Hyslop welcomed each honoree to the stage. You can view the videos online at www.wsba.org/News-and-Events/Awards.

PRO BONO AWARD
This award is presented to a lawyer, non-lawyer, law firm, or bar association for outstanding cumulative efforts in providing pro bono services.

PERKINS COIE AND MICROSOFT
This joint award was in recognition of the work of Perkins Coie and Microsoft in providing volunteer legal assistance to immigrant youth in the community. In 2012, President Obama announced a new immigration policy called Deferred Action for Childhood Arrivals (DACA), which provides temporary protection from deportation to children and youth who came to the United States at a young age. Within a few months, Perkins Coie and the legal department of Microsoft began a partnership with Northwest Immigrant Rights Project (NWIRP) to administer legal clinics to help address the needs of DACA-eligible youth. Perkins Coie and Microsoft offer the legal staff and office space to run the clinics, while NWIRP provides the referrals and technical assistance for pro bono attorneys. Thousands of community members have participated in the legal clinics and received protection from deportation.

PRO BONO AWARD
This award is presented to a lawyer, non-lawyer, law firm, or bar association for outstanding cumulative efforts in providing pro bono services.

DAVID A. BATEMAN
David Bateman was honored for his work in creating the Cyber Civil Rights Legal Project (CCRLP) to provide pro bono legal services to victims of non-consensual pornography, or “revenge porn.” Bateman, a Seattle partner at K&L Gates, joined Elisa D’Amico, a K&L Gates partner in Miami, Florida, who was already working with local women to advocate for the passage of a revenge porn statute in Florida. Realizing that lawyers representing revenge porn victims often lacked the necessary computer-forensic expertise, D’Amico collaborated with Bateman to found the project in 2014. With over 20 years of experience in technology and intellectual property law, Bateman contributed his extensive knowledge of spam, phishing, spyware, and other types of online fraud, volunteering more than 900 hours to the project.

SALLY P. SAVAGE LEADERSHIP IN PHILANTHROPY AWARD
This award is presented by the Washington State Bar Foundation. Sally Savage led the Foundation’s renaissance and was a catalyst for its refocused mission to sustain the WSBA’s efforts to advance justice and diversity. Sally’s spirit of generosity and leadership continue to inspire all who recognize the transformative potential of philanthropy. Sally Savage emulated the spirit of philanthropy in her life, and it is in her memory that we honor donors, volunteers, and friends of the Washington State Bar Foundation who embody Sally’s spirit.

GONZAGA UNIVERSITY SCHOOL OF LAW, SEATTLE UNIVERSITY SCHOOL OF LAW, UNIVERSITY OF WASHINGTON SCHOOL OF LAW
The award recognized the three law schools’ leadership, support, and advocacy through their partnership with the WSBA Moderate Means Program. The Moderate Means Program adds a vital component to Washington’s legal services delivery system that expands access to justice to a previously underserved population (clients whose income
is within 200–400% of the Federal Poverty Level). Over the last five years, Washington’s three law schools have recruited and trained over 300 law students to conduct intake, analyze cases, and refer clients to lawyers; the WSBA provides the law schools with funding for staffing.

**PRESIDENT’S AWARD**

The President’s Award may be given annually by the WSBA president in recognition of a person’s or entity’s contribution to the WSBA and/or profession which the president deems worthy of acknowledgement during his/her term.

**RUSS AOKI**

Russell M. Aoki received the President’s Award in appreciation of his commitment and leadership as chair of the WSBA Escalating Costs of Civil Litigation Task Force, as well as his extraordinary service to the legal community. During Aoki’s 30-year career, he has served as a judge pro tem, mediator, arbitrator, special master and special disciplinary counsel for the WSBA. He also serves as a coordinating discovery attorney for the Administrative Office of the U.S. Courts, Defender Services Office, providing litigation support assistance on complex criminal cases.

From 2006–09, Aoki served on the WSBA Board of Governors, including a year as treasurer. He also served as the Washington State Supreme Court's appointee to the Office of Public Defense Advisory Committee for 12 years. He is the past board president of Northwest Defender Association, past president of the Asian Bar Association of Washington, and a past trustee of the King County Bar Association.

**PUBLIC SERVICE AWARD**

This award recognizes a WSBA member who exemplifies the WSBA’s culture of service: one who gives back in meaningful ways to others, to his/her community, or to the profession.

**ADAM CORNELL**

Since 2002, Cornell has been a deputy prosecuting attorney in Snohomish County. Cornell was one of the first deputies assigned to Everett’s Dawson Place Child Advocacy Center, where child interview specialists conduct forensic
interviews of children aged 3 to 17 at the request of any law enforcement agency. A former foster child, Cornell has been a continual advocate for improvements to the foster care system at both state and federal levels.

He planned and drafted Oregon House Bill 2431, the Foster Child Scholarship Bill, which became law on July 2, 2001. It established a fund endowed by the Legislature to help foster children attend college. In 2004, Cornell received a governor's appointment to the Washington Commission for National and Community Service (now ServeWashington). Cornell has been on the Advisory Committee for the Center for Children and Youth Justice (CCYJ) for a decade, working to put children on a path to success by reforming the foster care and juvenile justice systems. In 2014, he received the prestigious Norm Maleng Service to Youth Award from the Center for Children and Youth Justice.

OUTSTANDING YOUNG LAWYER AWARD

This award recognizes one attorney who has made significant contributions to the professional community, especially the community of young lawyers, within their initial years of practice. Recipients must be active WSBA members within five years of admission to any bar association or under 36 years of age.

VERÓNICA QUIÑÓNEZ

Veronica Quiñónez is the director of clinics for the Latina/o Bar Association of Washington (LBAW). In 2016, she coordinated the first-ever legal clinic in Pasco, in partnership with Benton-Franklin Legal Aid Society and Anderson Law, which served 77 clients. Also in 2015, she added the Dispute Resolution Center of King County to the Schroeter Goldmark and Bender and Latina/o Bar Association’s legal clinic held at El Centro de la Raza, which served over 500 clients last year; it is now the only clinic in Washington that offers conflict coaching and mediation services. In 2016, Quiñónez coordinated the first-ever legal aid clinic in Skagit County, in partnership with Community Action of Skagit County and the Latinx Law Student Associations of Seattle University and University of Washington.

PROFESSIONALISM AWARD

This honor is awarded to a WSBA member who exemplifies the spirit of professionalism in the practice of law, as defined in the WSBA’s Creed of Professionalism.

ANTHONY R. HINSON

Lieutenant Commander Hinson is in private practice with Hinson Law Firm, PLLC of Poulsbo, where his practice focuses on estate planning, tax planning, business planning and probate. For over eight years, he worked with the Internal Revenue Service as an estate tax attorney. Since 2015, Hinson has also served as an operational law attorney with the Legal Reserve unit attached to Commander, US Pacific Fleet.

Hinson is the recipient of seven U.S. Navy Commendation Medals for “distinguishing oneself by heroism, meritorious achievement or meritorious service.” He is the recipient of both the Global War on Terrorism Service Medal related to his post-9/11 service and the Armed Forces Expeditionary Medal, related to his service supporting U.S./United Nations efforts in Bosnia-Herzegovina.

OUTSTANDING JUDGE AWARD

This award is presented for outstanding service to the bench and for special contribution to the legal profession at any level of the court.

HON. KATHLEEN M. O’CONNOR (RET.)

Judge Kathleen O’Connor is being honored for her groundbreaking 37-year judicial career. O’Connor opened the first women-owned law firm in Spokane with her law partner D. Jean Shaw, focusing on family, real estate and civil law. In 1979, O’Connor became the first full-time female superior court commissioner in Spokane County. In 1988, she became the county’s first female superior court judge. Upon her retirement in January 2016, Judge O’Connor was the most senior sitting judge in Washington state.

O’Connor was a founding member of the Spokane chapter of Washington Women Lawyers. She also founded a group for women judges in Spokane County to promote and preserve excellence in the judiciary, which now has over 30 members. In 2009, O’Connor received the Gonzaga University School of Law Award for Distinguished Judicial Officer. In 2008, she received the Washington Women Lawyers Foundation Award.
EXCELLENCE IN DIVERSITY AWARD
This award is made to a lawyer, law firm, or law-related group that has made a significant contribution to diversity in the legal profession.

CHALIA STALLINGS-ALA’ILIMA
Chalia Stallings-Ala’ilima is being honored for her work in promoting diversity and inclusion at the Washington State Attorney General’s Office (AGO). She has been an assistant attorney general at the Washington State Attorney General’s Office since 2008. She recently joined the Wing Luke Civil Rights Unit, which investigates discrimination in a range of areas. Previously, Stallings-Ala’ilima represented DSHS in child welfare cases.

Stallings-Ala’ilima is the 2016–17 president of the Loren Miller Bar Association and is the AGO’s liaison to the organization. She helps lead the AGO’s Diversity Advisory Committee, having served as its co-chair for over four years. She served for several years on the WSBA Committee for Diversity. Stallings-Ala’ilima serves on the governing council of the Initiative for Diversity, established in 2004 to advance diversity in the legal profession. In 2015, Stallings-Ala’ilima received the William V. Tanner Award from Attorney General Bob Ferguson for outstanding achievements early in her career. In 2014, she received the Attorney General’s Office Excellence Award.

NORM MALENG AWARD
This award is given jointly by the WSBA and the Access to Justice Board, in honor of Norm Maleng’s legacy as a leader. He was an innovative and optimistic leader committed to justice and access to justice in both civil and criminal settings. Within the profession, his leadership was characterized by his love of the law and commitment to diversity and mentorship. This award recognizes those who embody these qualities.

MICHIE STORMS
Michele Storms is the new deputy director for the ACLU-WA. Formerly, she was the assistant dean of students at the University of Washington School of Law. Since 2006, she has been the executive director of the Gates Public Service Law Program, supporting the Gates Foundation-funded public service law scholar-ship program. Previously, Storms was a statewide advocacy coordinator at Northwest Justice Project and Columbia Legal Services; the founding director of the University of Washington School of Law’s Child Advocacy Clinic; a senior lecturer and supervising attorney at the University of Washington Clinical Law Program; and a staff attorney at Evergreen Legal Services.

From 2010–16, she served on the board of OneAmerica (formerly Hate Free Zone), an organization that advances the fundamental principles of democracy and justice at local, state, and national levels by building power within immigrant communities. She has served as a board member of the Management Information Exchange, an organization that provides training, consulting and leadership within the legal aid community. She is a member and former chair of the WA State Access to Justice Board. She also served on the self-help committee for Legal Voice for many years.

COURAGEOUS AWARD
This award is presented to an individual who has displayed exceptional courage in the face of adversity, thus bringing credit to the legal profession.

KING COUNTY DEPARTMENT OF PUBLIC DEFENSE: LEO HAMAJI, WILLIAM PRESTIA, KATHRYN ROSS
Leo Hamaji, William Prestia, and Kathryn Ross are being honored for their work as public defenders at the King County Department of Public Defense (DPD) in State v. Joseph McEnroe, a capital case. Joseph McEnroe was convicted of joining his then-girlfriend Michele Anderson in the killing of six members of Anderson’s family on Christmas Eve 2007 in rural Carnation. McEnroe and Anderson admitted to the killings shortly after being arrested at the crime scene the day the bodies were discovered.

After King County Prosecutor Dan Satterberg announced he would seek execution in the case in October 2008, defense attorneys for Anderson and McEnroe fought vigorously to have capital punishment removed as an option. McEnroe was convicted of participating in the killings and sentenced to life in prison without the possibility of parole after the jury could not agree on the death penalty.
COURAGEOUS AWARD
This award is presented to an individual who has displayed exceptional courage in the face of adversity, thus bringing credit to the legal profession.

KING COUNTY DEPARTMENT OF PUBLIC DEFENSE: TODD GRUENHAGEN, CARL LUER, STACEY MACDONALD
Todd Gruenhagen, Carl Luer, and Stacey MacDonald are being honored for their work as public defenders at the King County Department of Public Defense (DPD) in State v. Christopher Monfort, a capital case. Christopher Monfort had planned a series of bombings and attacks against Seattle police officers. On Oct. 31, 2009, Monfort fired an assault rifle at Officer Timothy Brenton and Trainee Officer Britt Kelly, who were parked in Seattle’s Central District; Brenton was fatally wounded and Kelly was injured. Monfort escaped, but was shot a week later while being arrested outside his apartment in Tukwila.

In a statement, King County Prosecuting Attorney Dan Satterberg said he initially sought the death penalty because the “intentional, premeditated and random slaying of a police officer is deserving of the full measure of punishment under the law.” After an insanity defense was rejected, Monfort’s defense team urged jurors to spare him from the death penalty and consider his mental health, along with his rough childhood, when deciding his fate. In 2015, Monfort was convicted of aggravated first-degree murder, two counts of attempted murder, and one count of arson by a King County Jury. He has been sentenced to life in prison.

COURAGEOUS AWARD
This award is presented to an individual who has displayed exceptional courage in the face of adversity, thus bringing credit to the legal profession.

KING COUNTY DEPARTMENT OF PUBLIC DEFENSE: COLLEEN O’CONNOR AND DAVID SORENSON
Colleen O’Connor and David Sorenson are being honored for their work in State v. Michele Anderson, a capital case. Michele Anderson was convicted of joining her then-boyfriend, Joseph McEnroe, in the killing of six members of her family on Christmas Eve 2007 in rural Carnation.

King County Prosecutor Dan Satterberg said he initially sought the death penalty against Anderson because the deaths met the criteria for seeking capital punishment. O’Connor and Sorenson asked Satterberg to consider mitigating factors, including Anderson’s mental illness, and the defense’s argument that McEnroe was more culpable for the homicides. The King County Prosecutor’s Office announced in July 2015 that they were no longer seeking the death penalty for Anderson. In March 2016, Michele Anderson was found guilty of six counts of aggravated first-degree murder and was sentenced to life in prison without the possibility of release.

AWARD OF MERIT
This award is the WSBA’s highest honor and is given for a recent, singular achievement. It is awarded to individuals only — both lawyers and non-lawyers.

MATTHEW H. ADAMS
Matthew H. Adams is the legal director of the Northwest Immigrant Rights Project (NWIRP), where he has served as a staff member for 18 years. Adams has served on the King County Public Defenders Advisory Board since 2014.

Adams was co-counsel in Franco-Gonzalez v. Holder (along with the ACLU, Public Counsel, Mental Health Advocacy Services, and the law firm of Sullivan & Cromwell). This case was the first time that the federal government has been required to appoint government-funded counsel to a class of individuals facing deportation hearings in immigration court. The class-action case represented a class of individuals with mental disabilities facing deportation hearings in immigration courts in California, Washington, and Arizona (the three states with long-term immigration detention facilities within the Ninth Circuit Court of Appeals’ jurisdiction). Until Franco, people with mental disabilities who could not afford attorneys were required to represent themselves in immigration court. The permanent injunction also required the federal government to implement a screening system to determine whether persons suffer from a mental disability that may impair their ability to represent themselves in deportation proceedings. Following the initial Franco ruling in 2013, the federal government announced that it would expand the procedural protection nationally.

Photos by Jon and Rach Photography
Top to bottom:
Courageous Award Winners: I-r, William Prestia, Leo Hamaji, Kathryn Ross, Todd Gruenhagen, Stacey MacDonald, Carl Luer, Colleen O’Connor and David Sorenson;
Awards Winner Matthew Adams;
Sally P. Savage Award Winners Jane Korn, Clay Wilson and Catherine Brown;
Eric Pedersen, Professionalism Award Winner Tony Hison, and Hunter Abell
## Bloggers Wanted!

Write for WSBA’s award-winning blog, NWSidebar [nwsidebar.wsba.org]. Ask about our contributing writer program. For more information, contact blog@wsba.org.

### UPCOMING CONFERENCES AROUND THE STATE

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When most people think of copyright infringement in the arts, it’s usually the music industry that comes to mind. Recent cases in the news include the family of Marvin Gaye bringing suit against Robin Thicke and Pharrell Williams for their 2013 hit “Blurred Lines.” Gaye’s family alleged that the musicians infringed upon Gaye’s 1977’s “Got to Give It Up,” making for interesting reading and many of us taking to YouTube for online comparisons of the two songs. A few years before that, Australian band Men at Work, which disbanded in the mid-1980s, was briefly back in the news when the copyright owner of the beloved children’s classic, “The Koalaburra Song,” claimed the band stole the melody and used it in their hit, “Down Under.” Both sets of musicians lost the lawsuits brought against them.

Claims by one visual artist against another for copying visual artwork are less frequent, but can be just as controversial. In 2008, photographer Patrick Carihou sued self-described “appropriation artist” Richard Prince for using Carihou’s photographs of Rastafarians (which Carihou published in a book in 2000) in his paintings and collages. The dispute was good for discussion in the arts and legal communities alike, and even prompted the Andy Warhol Foundation for the Visual Arts to weigh in with an amicus curiae brief (supporting Prince). Making the appellate case even more interesting was Prince’s admission that he did not intend to create anything with a new meaning or a new message and did not have any interest in Carihou’s original intent. The lower court used that assertion to reach its conclusion that Prince’s work was not fair use. However, the Second Circuit overturned most of the decision, finding, in part, that it was not significant how Prince viewed his work but, rather, more “critical how the work in question appears to the reasonable observer.” The court concluded that Prince’s use of 25 works was “fair use” but that, somewhat inexplicably, the remaining five works “present[ed] closer questions” for the district court to consider on remand. What constituted fair use in the visual arts after Carihou remains as imprecise as ever.

What is Fair Use?
The U.S. Copyright Act specifically contemplates “fair use” and provides:

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work... for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include —

- The purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- The nature of the copyrighted work;
- The amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- The effect of the use upon the potential market for or value of the copyrighted work.

Fair use is a mixed question of law and fact. “[T]he doctrine is an equitable rule of reason and no generally applicable definition is possible, and each case raising the question must be decided on its own facts.” (Gaylord v. U.S. 595 F.3d 1364, 1372 (2010), citations omitted.) Federal courts agree that all four factors presented in the Copyright Act must be considered for copyright infringement claims. Beyond that, however, the courts differ as to what “fair use” is, and why its consideration is prescribed by the statute, with some courts noting that it is an “affirmative defense” to infringement, and others, at least more recently, that it is “wholly authorized by law.” Reversals and divided courts are commonplace. Decisions are not governed by consistent principles, but seem rather to result from intuitive reactions to individual fact patterns.¹⁹

**Beyond Copyright Considerations**

In addition to copyright, artists of some forms of artwork are afforded certain protection by the Visual Artists Rights Act (VARA), 17 U.S.C. §106A, a codification of the doctrine of moral rights that originated with an 18th century French concept, droit moral. Droit moral “refer[s] to rights of a non-economic but spiritual or personal nature, existing independently of an artist’s copyright.” Moral rights include:

- Disclosure or divulgence, which allows the artist to determine when a work is complete and may be displayed;
- Paternity or attribution, which allows an artist to protect the identification of his name with his own work, and to disclaim it when applied to another’s;
- The right of withdrawal, which permits the artist to modify or withdraw a work following publication; and
- Integrity, which allows the artist to prevent his work from being displayed in an altered, distorted, or mutilated form.⁹

17 U.S.C. §106A.

VARA contains a number of significant exceptions, however, and recent Ninth Circuit cases illustrate a trend toward further limitations on artists’ rights.¹⁰ VARA is also specifically subject to the fair use limitations of 17 U.S.C. §107.

**Applications of Fair Use in Real Time**

Copyright and moral rights are separate and distinct rights that may help artists maintain the integrity of their artwork. The waiver of one (e.g., a waiver of moral rights by contract) does not affect the other (e.g., retention or transfer of copyright). Each is valuable and, in the instance of copyright, the value may be equal to or exceed the value of the artwork itself. As counsel for artist Dale Chihuly and Chihuly Studio, I am tasked with protecting the value of copyright.

Copyright uses are pervasive. Photo software and the internet have made reproductions of visual artwork easy to make and easy to sell. Websites like Amazon, eBay, Redbubble, and CafePress cater to amateurs and professionals alike as platforms for the advertising and sale of anything from posters and apparel to phone cases and mousepads. The ubiquity of products potentially diminishes the value of the copyrighted property and may affect the value of past and future work created by an artist. They also affect the market for other uses of artwork, including derivative copyright licensing.

Protecting visual art copyright through digital searches is a laborious process and the procedure for infringement removal is equally time-consuming. A seller may have used one image in multiple products sold in multiple locations. If a website subscriber does not use the artist’s name to sell products,¹¹ finding potential infringement is even more difficult.

In 1998, Congress passed the Digital Millennium Copyright Act (DMCA) to address the ease by which copyrighted materials are distributed through the internet.¹² DMCA is comprised of five titles, the second of which created a safe harbor for online service providers (OSP) to escape liability in the event a user of its service violated copyright laws. Title II contemplates limitations on liability for OSPs that engage in four separate categories of conduct, including where information resides on an OSP system or network at the direction of a user, such as a person selling products on Amazon. There are steps an OSP must take to avail itself of the protections afforded by DMCA, including designating a copyright agent and establishing notice and take-down procedures when a copyright owner notifies an OSP of an infringement. If the OSP promptly removes the infringement, it is exempt from liability.¹³

There are also burdens placed on the copyright owner for making a take-down request. The owner must submit a notification to the OSP, under penalty of perjury, listing the specific statutory elements of the notification. The subscriber has the opportunity to respond to the notice and file a counter-notification complying with statutory requirements. Then, unless the copyright owner files an action against the subscriber, the OSP must repost the material within 10 business days after receiving the counter-notification.

A new Ninth Circuit decision interpreting the DMCA has the potential to make this process even more difficult — and risky — for in-house counsel and unrepresented artists alike. In Lenz v. Universal Music Corp., the court interpreted a copy-
right owner’s burden under DMCA to include the obligation to consider fair use before making a take-down request. The decision is an interpretation of the statute that no appellate court had previously made. In that case, plaintiff Stephanie Lenz posted a brief clip of her young children dancing to Prince’s “Let’s Go Crazy” on YouTube.14 While monitoring the website, an assistant working in Universal Music Group’s legal department saw the posting.

The legal assistant sent a take-down notification to YouTube requesting removal of the video. After YouTube did so, Lenz filed a counter-notice asserting fair use, and YouTube reinstated the video. Lenz then sued Universal, alleging Universal’s takedown notification constituted a misrepresentation by Universal under § 512(f) of DMCA because it had not considered fair use before sending the take down notice.15

When reviewing videos, testimony states, the assistant “evaluated whether they embodied a Prince composition by making significant use of the composition, specifically if the song was recognizable; was in a significant portion of the video or was the focus of the video,” and contrasted the video to other videos using much less of the song or beyond reasonable recognition.16 However, “none of the video evaluation guidelines [used by Universal] explicitly include[d] consideration of the fair use doctrine.”17 The court agreed with Lenz that her misrepresentation claim should have survived summary judgment:

Universal faces liability if it knowingly misrepresented in the takedown notification that it formed a good faith belief about the video’s fair use or lack thereof.18

Significantly, the court amended its opinion in March 2016, and deleted from it nearly two pages that might have been used by copyright owners for guidance regarding what constitutes “subjective good faith.” The amended language included the following:

...[F]ormation of a subjective good faith belief does not require investigation of the allegedly infringing content. We are mindful of the pressing crush of voluminous infringing content that copyright holders face in a digital age....[I]n the majority of cases, a consideration of fair use prior to issuing a takedown notice will not be so complicated as to jeopardize a copyright owner’s ability to respond rapidly to potential infringement.... We note, without passing judgment, that the implementation of computer algorithms appears to be a valid and good faith middle ground for processing a plethora of content while still meeting the DMCA’s requirements to somehow consider fair use.

Copyright holders could then employ individuals like Johnson to review the minimal remaining content a computer program does not cull.... During oral argument, Universal explained that service providers now use screening algorithms. However, we need not definitively decide the issue here because Universal did not proffer any evidence that—at the time it sent the takedown notification to Lenz—it used a computer program to identify potentially infringing content.19

With removal of the language that suggested computer algorithms could be used to determine fair use, a copyright owner is left without any clear guidance as to what she must do to comply with §512. Even if use of algorithms would fall within a court’s approved methodology for good-faith consideration, not all copyright owners confronted with voluminous uses to consider have the benefit of their use, visual artists included. Lenz poses more questions than it answers.

Beyond DMCA Considerations

Statutory obligations are, of course, not the only considerations for artists and their attorneys representing them. Most artists want to encourage certain uses of their copyrighted artwork, such as by museums, book publishers, and authors. One arts writer suggests that artists professionals are equally concerned about copyright as artists to the extent that they are sometimes unnecessarily self-censoring their use of it.20

In navigating through copyright use issues, attorneys must keep their artist clients’ legal interests as well as business interests, in mind. Equally important, we must appreciate the creative vision and legacy of the artist. Chihuly’s large-scale artwork installations, for example — exhibited in gardens, desert environs, glass houses, and museums around the world — exist for enjoyment by the public. I experience firsthand their impact on the public when I receive inquiries from people who have seen Chihuly’s artwork and want to share their emotional and intellectual experiences with others. These factors put me in a very unique position as a lawyer, requiring forethought before acting.

Courts and scholars repeatedly emphasize that copyright law serves a public benefit. “It is not to be viewed as an inevitable, divine, or natural right that confers on authors the absolute ownership of their creations. It is designed rather to stimulate activity and progress in the arts for the intellectual enrichment of the public.”21 Most artists would probably agree, yet for those of us representing artists, finding a fair and legally enforceable boundary between intellectual enrichment and property rights that will be upheld in court in an ever-changing digital world that is not simple, nor the path clear. NWL
The Tate Gallery defines “appropriation art” as “the practice of artists using pre-existing objects or images in their art with little transformation of the original.”

The Australian court ordered the band to pay the copyright owner 5% of their royalties earned from 2002 onward. For another online comparison of the two songs, see www.bing.com/videos/search?q=kookabura+down+under+chihuly." Accessed Oct. 1, 2016.

The court noted that YouTube is a for-profit company that generates revenues by selling advertising. If users choose to become “content partners” with YouTube, they share in a portion of the advertising revenue generated. Lenz is not a content partner and no advertisements appear next to the video. Lenz, 815 F.2d at 1149.

11 Chihuly is trademarked, raising the possibility of a trademark claim, too.

12 DMCA amended the U.S. Copyright Act and superseded Title II of DMCA, sometimes called the Online Copyright Infringements Limitation Liability Act (OCILLA) is codified at 17 U.S.C. §§512(a) through (f).

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15 512(f) states: “Any person who knowingly materially misrepresents under this section—

(1) that material or activity is infringing, or
(2) that material or activity was removed or disabled by mistake or misidentification, shall be liable for any damages, including costs and attorneys’ fees, incurred by the alleged infringer, by any copyright owner or copyright owner’s authorized licensee, or by a service provider, who is injured by such misrepresentation, as the result of the service provider relying upon such misrepresentation in removing or disabling access to the material or activity claimed to be infringing, or in replacing the removed material or ceasing to disable access to it.”

16 Lenz, 801 F.2d at 1149.

17 Id.

18 Id. at 1154.

19 Lenz v. Universal Music Corp, 815 F.3d 1126, 1135-1136 (9th Cir. (Cal.) Sept. 14, 2015) (citations omitted), amended and superseded on denial of reheg., 815 F.3d 1145 (9th Cir. (Cal.) Mar. 17, 2016), pet. cert. docketed Aug. 16, 2016.


EMPLOYMENT LAW TRENDS FOR 2017

Game-Changing Developments in the Law
by Linda Fang

Employers and workers in Washington and throughout the country saw a number of sweeping changes in 2016 that will have continuing impact for years to come. As we enter 2017, we can expect at least five important developments and trends, as states, courts, employers, and workers grapple with the changes in the law, increased enforcement by governmental agencies, and potentially game-changing legislation on the horizon.

#1: NEW DOL OVERTIME RULE WILL NOT TAKE EFFECT DEC. 1, 2016
In May, the U.S. Department of Labor (DOL) announced sweeping revisions to federal overtime rules under the Fair Labor Standards Act (FLSA). They included more than doubling the minimum salary threshold – from $23,660/year to $47,476/year – for the “white collar” exemptions from overtime pay and provided for triennial adjustments based on national wage data. These changes would have expanded overtime pay requirements to more than 4 million salaried workers who currently earn less than $47,476 per year (or $913 per week), even if they satisfy the duties test under the FLSA and are currently considered exempt from overtime.

Federal Judge Blocks DOL’s New Overtime Rule
On November 22, in an unexpected ruling, U.S. District Judge Amos Mazzant from the Eastern District of Texas issued a nationwide preliminary injunction prohibiting the DOL from implementing its new overtime rule. The court found that the DOL had exceeded its delegated authority and ignored Congress’s intent by increasing the minimum salary levels so as to supplant the duties test under the FLSA.

What This Means for Employers and Workers
As long as employees continue to meet the duties test under the FLSA, the minimum salary threshold for the executive, administrative, and professional exemptions will remain at $23,660 per year (or $455 per week) and employers will not be required to satisfy the DOL’s proposed increase to $47,476 per year. The injunction is only a temporary measure until Judge Mazzant can issue a ruling on the merits, but the decision portends that a permanent injunction may be forthcoming and, in the meantime, the new Congress and President may intervene. Employers should remain apprised of updates in this area and continue to comply with their obligations under state and local laws.

#2: SEATTLE’S NEW SECURE SCHEDULING LAW: CONTINUING EFFORTS TO INCREASE PROTECTIONS FOR LOW-WAGE EMPLOYEES
In September, a little more than two years after passing its landmark $15 minimum wage law, the Seattle City Council unanimously passed, and Mayor Ed Murray signed into law, the Secure Scheduling Ordinance, which will go into effect on July 1, 2017. The stated intent of the law is to combat problems associated with unpredictability in the workplace, including last-minute schedule changes, inadequate work hours for part-time workers, back-to-back shifts (“clopening”) that prevent a good night’s sleep, and being on-call without pay. Seattle is the second city in the country (after San Francisco) to pass secure scheduling legislation.

The new law only applies to large retail employers, including fast food chains and coffee shops, with 500 or more employees worldwide as well as full-service restaurants with at least 500 employees and 40 locations globally that have employees who work within Seattle city limits at least 50% of the time. However, the business community has expressed concerns that the law’s requirements could be broadened in the future to include businesses of all sizes.

Under the new ordinance, covered employers are required to:
• Provide new hires a “good faith estimate” of work schedules, including the average number of hours employees can expect to work each week.
• Inform employees of their schedules 14 days in advance and pay half of an employee’s hourly rate for each hour cut from the schedule or pay for one extra hour when hours are added to the schedule (the extra pay does not apply when changes are requested by the employee, employees find replacement coverage, or the employer fills open shifts by asking for volunteers through mass communication methods).
• Pay on-call employees for half of their hours if they are not called in to work.
• Allow employees at least 10 hours off between shifts unless they request or consent to work several shifts.
• Offer additional work hours to existing employees before hiring new employees.
• Maintain records for three years.

The scheduling law allows employees to state preferences for work shifts and locations based on major life events, such
as their health, transportation, housing, caregiving responsibilities, other jobs, and attending school. Employees will also have the right to decline work hours added after the schedule has been posted or when shifts are separated by fewer than 10 hours. The law also gives employees a private right of action to enforce its provisions.

The secure scheduling law is another attempt by the City of Seattle to promote greater economic security for its residents amid rising rents and cost of living in the area. As with the increase in the minimum wage, the economic impact of these changes remains to be seen.

#3: CONTRACTORS AND THE GIG ECONOMY: ONGOING EFFORTS TO COMBAT WORKER MISCLASSIFICATION AND EXPANSION OF LIABILITY

With the increase in the number of workers classified as independent contractors and the advent of the "gig economy" in the past several years, the DOL, IRS, and other federal agencies have stepped up enforcement against employers believed to have misclassified workers. Federal agencies are entering into partnerships with 35 states (including Washington) to share information and resources, conduct joint investigations, and coordinate enforcement efforts. In January 2016, the DOL announced that the Bureau of Labor Statistics will work with the Census Bureau to gather additional data on the size and nature of the so-called "contingent workforce," which includes a range of work arrangements from independent contractors to temporary employees, and workers who hold multiple jobs at the same time, through the May 2017 Census. Enforcement efforts in Washington also remain strong, largely through coordination among the Department of Labor and Industries, Department of Revenue, and Employment Security Department.

As a counterpart to the government's enforcement efforts, the National Labor Relations Board (NLRB), DOL, and Equal Employment Opportunity Commission (EEOC) attempted to expand the federal joint employer doctrine to companies that rely on third-party contractors, such as vendors, staffing agencies, and franchisees. Under the expanded definition of joint employer, these companies would no longer be shielded from employment-related liability merely by their use of third-party contractors and would be jointly responsible for compliance with applicable employment laws, such as wage and hour laws, leave laws, and employee benefits laws, thereby removing many significant benefits of engaging with these third parties in the first place.

Several recent high-profile worker lawsuits against FedEx, Uber, and Amazon have also thrust the practice of classifying workers as independent contractors or owner-operators into the national spotlight, but, as these lawsuits have demonstrated, many important legal issues in this arena remain undecided. In the face of this uncertainty, competing interest groups have called for legislation either to rein in independent contractor abuses or for industry-specific carve-outs from misclassification laws, but these proposals have stalled.

It remains to be seen whether further developments in 2017 will clarify or further confuse these issues.

#4: LEGISLATION AIMED AT PROMOTING EQUAL PAY

In 2016, equal pay was on everyone's mind. In January, California and New York enacted legislation strengthening equal pay laws and lowering the bar for equal pay lawsuits. In May, Maryland’s governor signed a law that prohibits employers from not only pay discrimination but “providing less favorable employment opportunities based on sex or gender identity.” In June, 28 businesses nationwide, including Amazon and Expedia, signed an equal pay pledge, committing to conduct annual audits of their pay by gender across all job categories. In August Massachusetts passed a new law, which will go into effect in July 2018, that requires equal pay for work that is of comparable character. It is the first state to bar employers from asking about applicants’ prior salaries before offering them a job, ensuring that historically lower wages and salaries paid to women and minorities do not follow them for their entire careers.

Washington’s Equal Pay Opportunity Act (HB 1646), which passed in the House in 2015 but stalled in the Senate in 2016, could get another look in 2017. Beginning in 2017, the EEOC will collect pay data broken down by gender, race, and ethnicity from employers with 100 or more employees in
order to help identify and combat pay discrimination.

In light of the continuing and significant emphasis on pay equity issues, employers should be advised to review their compensation data, policies, and practices and ensure that all pay decisions are well supported and documented.

#5: PERILS AT THE INTERSECTION OF TECHNOLOGY AND THE WORKPLACE

The intersection of technology and the workplace is a minefield for employers and their employees. A number of high-profile data breaches in 2016 put the spotlight not only on businesses’ protection of customer data but also sensitive data belonging to their own employees. At the other end of the spectrum, the Defend Trade Secrets Act of 2016 gave employers an additional weapon against the theft of trade secrets by current and former employees by adding a federal cause of action accompanied by ex parte relief in extraordinary circumstances, a royalty on future use where injunction is impractical, and attorneys’ fees in cases of willful or malicious theft. The fight between Apple and the FBI over information on a locked iPhone raised questions about how employers must manage the integrity of corporate data against employees’ privacy rights and public safety. Bring-your-own-device policies encourage employee productivity and ease communication between employers and their employees but at the risk of overtime and off-the-clock work claims. Finally, increasingly popular employer wellness programs that rely on smartphone apps and wearable devices raise questions of privacy and potential discrimination claims.

OTHER IMPORTANT ISSUES AFFECTING EMPLOYERS AND EMPLOYEES IN 2017

There are numerous other important issues that are likely to affect employers and employees in 2017. Some of those issues include:

- Increased restrictions on the pre-employment process, including laws barring employers from inquiring into applicants’ credit and/or criminal history, and the sharp increase in class actions challenging employers’ use of background checks.
- “Ban the box” laws, which seek to prohibit employers from asking applicants about their criminal records during the hiring process.
- The validity of class waivers in arbitration agreements, given the current circuit split on the issue.
- Legislation banning or limiting enforcement of noncompete agreements in Washington, which have been delayed until at least 2017.
- Paid sick leave laws with differing requirements that have swept the nation.
- The expansion of LGBT rights in the workplace.
- Increased efforts to preserve family and caregiving obligations through paid family leave legislation and expansion of the EEOC’s enforcement efforts.
- The increase in OSHA fines for the first time since 1990, along with the expansion of employers’ illness and injury reporting requirements, expansion of available remedies, and investigation of issues unrelated to the complaint that brought OSHA to the workplace in the first place.

NOTES

3. According to the Washington State Underground Economy Benchmark Report in Fiscal Year 2015 (July 2014–June 2015), available at www.lni.wa.gov/Main/AboutLNI/Legislature/PDFs/Reports/2015/UndergroundEconomyBenchmarkReport.pdf, the three agencies exchanged 96,000 tips and leads, found more than 6,000 unreported or misclassified workers through audits, performed more than 860 audits on unregistered accounts which led to assessments of more than $8.2 million, and assessed taxes totaling more than $87 million from more than 740 businesses. Another 2015 study by the National Employment Law Project, available at www.nelp.org/content/uploads/Independent-Contractor-Costs.pdf, reports that Washington found misclassification violations in 62% of audited cases, leading to $26.4 million in assessments, and noted that the state programs brought in more than $7 for every dollar invested in enforcement efforts.
6. Maryland Equal Pay for Equal Work, Labor and Employment, § 3-301.
7. Massachusetts Act to Establish Pay Equity, M.G.L. ch. 149, § 105A.

LINDA FANG is a co-founder of Banyan Legal Counsel LLP, helping businesses, entrepreneurs, and workers comply with employment laws, successfully manage their business relationships, and avoid litigation. When disputes arise, Banyan represents clients in state and federal court, administrative and regulatory proceedings, mediation, and arbitration in Washington and California. Fang is chair of the WSBA Editorial Advisory Committee and a member of the executive board of the Women’s Business Exchange, and she serves as a pro bono attorney and volunteer business coach with Wayfind and Ventures nonprofits. She can be reached at lfang@banyancounsel.com.
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Over the last 30 years, American political discussion has become increasingly fractured with political figures from both parties pledging fealty to partisan agendas and rejecting any notion of compromise with their political opponents. The resulting legislative gridlock hardly serves the public or advances our common interests. Our courtrooms, too, are often viewed cynically, where only the well-heeled obtain justice.

If there were ever a lesson our children needed to hear, it is that listening, compromising, and working to forge solutions are what government service is all about. Fortunately, Washington has a program that is remarkably effective at teaching these very lessons. Established in 1948, YMCA Youth & Government supports two statewide programs, Youth Legislature and Mock Trial, to teach democratic values and skills to young people through hands-on experiences. Supported entirely by program fees, contributions, and volunteer service, these programs serve over 1,100 high school and middle school students annually.

**Youth Legislature**

Each year for four days in May, more than 400 students from more than 37 delegations across the state convene in Olympia, where they take over the Capitol campus to elect a youth governor and other student officers and to consider, debate, and adopt legislative proposals offered by the student representatives and senators. Students also serve as lobbyists, attorneys general, journalists, and pages.

For many students coming from a wide variety of backgrounds and experiences and holding vastly different perspectives and opinions, Youth Legislature is the first time they will meet and collaborate with other students from outside their local areas. Students write and propose legislation that has meaning to them and their communities. Legislative proposals have included gun control, banning tackle football for safety reasons, requiring metal detectors in schools, and protecting farm lands.

Legislation, it’s often said, is the art of compromise. Politics requires negotiation and discussion — a lesson that’s hard to digest in the abstract. But on the floor of the Capitol’s marble steps, it’s a face-to-face lesson that becomes indelible.

Students in Youth Legislature bring personal knowledge, passion, and experiences to their legislative debates. They decide whether to speak and vote for or against different proposals based on those experiences. It’s those different ideas and perspectives that lead many students to the realization that the task is not to shout more loudly but to work with their colleagues to identify and solve pressing problems.

Students as young as eighth graders quickly become adept at proposing and debating original pieces of legislation. Civility is a core principle of the program. Washington legislators, lobbyists, and political officials often watch student debates with interest, and from the program’s inception student proposals have formed the basis of actual Washington laws.

**Mock Trial**

Washington’s Mock Trial program has long been regarded as one of the strongest high school mock trial programs in the country. Hundreds of students from more than 40 schools and organizations across Washington work with legal professionals in their community to prepare and try cases in regional, state, and national mock trial competitions. The program is also supported by state and federal judges from around the state who allow the use of courtrooms for practice and tournaments.

Each year the program is focused on one civil or criminal case. For many years, the cases have been created and written by King County Superior Court Judge William Downing, who carefully constructs complex legal scenarios presenting difficult evidentiary problems, thorny witness issues, and always-fas-
Cinematic stories pulled from the headlines and court dockets. In recent years, Washington students have tackled issues such as the impact of social media on privacy rights, wrongful criminal convictions, eco-terrorism, and sexual harassment in schools. This year’s case centers on a traffic collision involving a self-driving vehicle. The students are limited to the facts presented in the case materials but can build witness characters around them and develop direct and cross examinations using legal research to support their case.

Mock trial students act as both attorneys and witnesses. Participants develop oral advocacy, research, and critical thinking skills. But mock trial isn’t designed to be a law school precursor. Instead, it teaches lessons that are far more valuable and long-lasting — how our civil and criminal justice systems work and the role of thoughtful lawyers, witnesses, judges, and participants.

The winning state champions go on to represent Washington in the National High School Mock Trial Championships. Washington’s winning team has placed in the top 20 in the national competition for the past 17 years, taking first place in 2000 and 2014. Seattle Preparatory School has won the state championship for a decade running thanks in part to its coach, Andy McCarthy, a history teacher at the school and a lawyer.

How Can You Help?
Volunteer
These important programs rely on volunteers to coach and lead. Currently, nearly 400 volunteers provide more than 23,000 volunteer hours to support the programs each year. Volunteer lawyers are the heart of Mock Trial. Indeed, some of the state’s leading lawyers regularly devote time to teaching students the fine points of evidentiary rules, modeling an effective cross examination, or discussing an approach to a case theory.

You can help in three ways:
1. **Coach a team.** Work with a group of students from a local school over
a four- or five-month period to help them hone their advocacy and presentation skills in preparation for spring competitions.

2. Visit a team. Some teams are coached by volunteers who are not lawyers; a visit from a trial lawyer to observe and coach is inspiring.

3. Act as a competition volunteer. Serve as a presiding judge or scoring rater during regional or statewide competitions. This is only a four-hour time commitment for one trial, and you’ll come away inspired by the talent, passion, and commitment of these students. And if you are a litigator, you’ll be thankful that one of these talented lawyers-in-training is not your trial opponent.

Donate
There are students across the state who would love to participate in the program but can’t afford even the modest program fees or travel expenses. As a program of the YMCA, Youth & Government has a budget to support deserving kids wishing to participate, but the budget is lean. Leading Northwest companies, law firms, and individuals contribute every year to the program’s annual operating and endowment funds. Your financial support of the annual campaign and endowment is critical to increasing access to all young people interested in participating.

Can you imagine a better investment than developing civilized discussion and teaching the values of compromise and citizenship? It’s a contribution that will pay off for our students for years into the future. NWL

Lucy Helm is the executive vice president, general counsel, and secretary of Starbucks Corporation. As a student, Lucy was active in both Youth Legislature and Mock Trial. She has served on the board of the YMCA Youth & Government Program since 1999, including as the board chair. She can be reached at lhelm@starbucks.com.

Kevin J. Hamilton is a partner at Perkins Coie LLP. He first became involved with the program as a volunteer coach for the Seattle Prep Mock Trial team. He has served on the YMCA Youth & Government Board since 2008. He can be reached at khamilton@perkinscoie.com.

The Robert F. Utter Endowment for Civic Education supports youth development through financial assistance to current YMCA Youth Legislature and Mock Trial program participants and college scholarships to deserving program alumni. Many leaders in the Washington Bar have supported the creation and sustainment of the endowment as a tribute to Justice Utter. For more information or to contribute, go to www.youthandgovernment.org.
It is with profound regret and sadness that Mark Johnson and Michael Sprangers announce that Donovan Flora has gone to a better place.*

*Not “that” better place, he’s retiring!

Congratulations on your retirement, Dono!

Effective January 1st, the firm will be renamed Johnson Flora Sprangers PLLC.
Although Leo Tolstoy wasn’t a lawyer, he most likely would agree that his famous quote “Everything intelligent is so boring” applies to CLEs. With exception to a few rare and awe-inspiring CLE topics like “All My Children Wear Fur Coats: How to Leave an Estate for Your Pet,” most CLEs are relatively dry, primarily because they are designed to help you learn a tremendous amount in a short period of time and usually presented by fellow lawyers with deep knowledge in their practice area but no TED Talk training. Last year, however, something remarkable happened in the CLE world that now makes it possible to earn credits outside the classroom.

Thanks to the Washington Supreme Court, new Admission and Practice Rule (APR) 11 went into effect on Jan. 1, 2016, and lawyers can now earn almost half of their required CLE credits through pro bono service. This means that instead of passively sitting through CLEs, attorneys can now go into the community, actively learn and apply their skills, and do good to earn their mandatory credits.

### The Breakdown

Now, 24 of the required 45 CLE credits may be fulfilled by providing pro bono legal services to low-income people. APR 11 increases the number of CLE credits available through pro bono from six to 24.
Leah Medway, pro bono counsel at Perkins Coie, works with more than 1,000 attorneys nationwide and 300 in Seattle alone. She says it’s too early to tell whether attorneys are taking advantage of the rule, but she believes that it is mostly a matter of getting the word out. “Attorneys need time to understand the scope, conditions, and the benefits of the rule, so increased participation over time is probable, but it’s too early to identify the full impact just yet,” she says.

THREE BIG BENEFITS
First, the change will confer huge professional development benefits on attorneys. “CLEs can be very educational and provide substantive value, but there is no better way to gain real legal skills than getting early experience as lead counsel in court or providing critical advice to clients trying to navigate real legal issues,” Medway says. “In other words, through pro bono legal work, attorneys can advance their legal skills while providing direct representation to vulnerable clients and underserved communities.”

And probably the biggest professional development benefit to earning CLE credits through pro bono work is “that you are practicing law, not training for it,” according to David Keenan, an associate attorney at Orrick and soon to be King County Superior Court judge.

“Under the new rule, it will be important for lawyers to find the right balance between keeping their skills sharp, learning about emerging topics in the law, and putting both of those things together to provide effective pro bono representation,” Keenan says. “It’s this last piece that should provide great benefits to attorneys and the pro bono clients they serve.” This means early exposure to direct client interaction, lessons in case management, learning how to navigate a new area of law, managing expectations, and working well with all different types of attorneys on the other side. “Pro bono enables me to contribute to causes I’m passionate about but which are outside of my normal, billable practice, including in areas like civil legal aid for low-income communities and juvenile justice,” Keenan says.

Erick Reitz is a second-year associate attorney at Song Mondress PLLC who volunteers regularly on pro bono cases. He says this new rule may also help expand legal services to traditionally underrepresented communities. “Beyond the professional development piece, pro bono can also be meaningful on a personal level because the human element is there and you’re helping someone who otherwise would not have access to justice,” Reitz says. “This is especially important given the results of the 2015 Civil Legal Needs Study (CLNS).”

According to the CLNS, 18% of Washington’s population lives in poverty and more than 76% does not get the legal help they need. A second benefit of CLE credit for pro bono service is that this may inspire attorneys who generally do not do pro bono to try it, giving more people access to justice and a voice in court.

There are thousands of low-income people of color, survivors of domestic violence, people with disabilities, and youth who show up to court day in and day out and do their best to navigate an already complicated legal system completely alone. According to the CLNS, these people feel like fair treatment in the courtroom is next to impossible.

Recently, attorney Michelle Peterson assisted a man who was dealing with criminal charges in federal court while also trying to regain visitation rights with his child. She agreed to go to his next hearing regarding his child to determine whether there was something she could do for him. “It quickly became clear that he had not filed the documents in the proper order and the judge was unable to follow what my potential client was trying to communicate to the court,” Peterson says. “The opposing counsel was also doing everything to make the situation more confusing for the court.” Her new client just needed someone who knew how to navigate the system, which could mean a win or a loss for him. “As lawyers, we have the power to help people during their darkest times and to achieve results that change their lives, and even an hour of free legal advice can be beneficial to someone struggling to understand the legal system.”

Peterson’s pro bono practice is a product of her dedication to give back to the community, but with this recent rule change she will also be able to save on CLE credits as a small business owner. Which brings us to our third major benefit: big cost savings for firms of all sizes. “As a solo practitioner, I look for CLE opportunities that are inexpensive or free to keep my overhead low,” says Peterson. “The ability to claim CLE credits for hours spent on pro bono work not only encourages me to do more pro bono work but also has the potential to save my small growing firm money.”

CLE credits can be expensive, especially in a reporting year. Washington requires attorneys to earn 45 CLE credits every three years, with at least six dedicated to ethics. The WSBA offers a wide range of CLEs in every major practice area (and even in niche areas including pet and wedding law), ranging approximately $20–$50 per credit on average. There are also private companies that charge a premium for programs ($60–$220 per credit), but unless your firm is large and has a subscription these seminars can be cost prohibitive. Because attorneys can now dedicate 24 of those credits to pro bono, solos, law firms, and in-house legal departments can save significantly on mandatory credits while developing their young lawyers and doing good in the community.

THE FINE PRINT (NO PREREQUISITES)
For pro bono service to count, however, the organization the attorney volunteers for must be a recognized qualified legal service provider (QLSP). A QLSP is a nonprofit legal service organization dedicated to serving low-income clients. These organizations usually have 501(c)3 status and are recognized as a nonprofit organization that confers some sort of legal benefit on the community. These QLSPs also hold annual or sometimes monthly volunteer trainings that come with access to valuable materials. For a comprehensive list of non profits, visit http://www.wsba.org/Legal-Community/Volunteer-Opportunities/Public-Service-Opportunities/Other-Opportunities.
Working with a QLSP is smart because the cases are prescreened for client income eligibility and merit, giving attorneys the chance to check for conflicts. Peterson regularly accepts pro bono assignments through the Federal Pro Bono Program for these reasons and because of the quality of cases that come through her desk. Only after a federal judge has reviewed the case and found it suitable to refer to the pro bono panel is it sent out to a pro bono attorney like Peterson. “These individuals are so passionate about their cases that they are willing to go it alone,” she says. “I find it difficult to say no when the individual has a meritorious case and is diligently trying to navigate the legal system on their own.”

Identifying the right QLSP to contact regarding pro bono opportunities can seem daunting, but running through Keenan’s two-step determination process can help. “Think about two things: what you’re good at, and what you’re most passionate about,” he says. “If you can find the intersection between your strongest practice skills as an attorney and the issues you care most about, you will be able to find the right pro bono cases for you and make the most impact.”

The next time you’re sitting at a CLE think about the impact you’re making on your profession and community. Think about whether the other half of your credits could be dedicated to giving a low-income person access to justice and a voice in court. I assure that you will find this activity the farthest thing from boring (sorry, Leo) because not only will it make you a better lawyer, but a better person.
OnBoard

WSBA BOARD OF GOVERNORS MEETING

NOV. 18, 2016, SEATTLE

Summary

The WSBA Board of Governors (Board) met Nov. 18 at the WSBA Conference Center in Seattle. The Board had a lunch meeting with Washington Leadership Institute (WLI) fellows. In executive session, it approved the minutes of the Sept. 29–30 meeting executive session, heard reports from the president and executive director; and heard the discipline report and litigation report.

In public session, the Board heard about and discussed the WSBA Legislative Committee’s 2017 recommendations and priorities. The Board delayed discussion on the proposed WSBA Religious and Spiritual Practices Policy. The Board discussed suggested amendments to Bylaws Article XI regarding sections. After discussion and input, the Board voted to delay a vote on the proposed Bylaw amendments to Article XI to its January meeting. The next meeting of the Board will be Jan. 26–27, 2017, in Spokane.

State Legislative Action

The Board took action on legislative issues in preparation for the legislative session that begins Jan. 9, 2017. The Board approved WSBA sponsorship of two bills that would amend statutes pertaining to corporate matters and trust documents. Legislative Affairs Manager Alison Phelan and Michael Carrico, Real Property, Probate and Trust Section representative, explained that the trust decanting proposal seeks to provide a relatively simple and low-cost procedure for modernizing trust documents while protecting the interests of beneficiaries. The statute would allow complete replacement of the original trust document with a new, updated trust document. The proposed statute is based on the Uniform Trust Decanting Act, approved by the National Conference of Commissioners on Uniform State Law in 2015.

Eric DeJong, Business Law Section Corporate Act Revisions Committee co-chair, explained that the corporate act revisions proposal seeks to modernize portions of the Washington Business Corporation Act (RCW 23B) to better reflect current corporate business practices, create process efficiencies, and potentially attract corporations to conduct future business in Washington. The proposal seeks to establish a statutory procedure for ratification and validation of defective corporate actions; authorize and enable forum selection provisions; permit asset drop-down transactions without parent corporation shareholder approval; eliminate 10-year term limits on voting trusts and shareholder agreements; and permit short-form downstream mergers.

Legislative Priorities

2017 WSBA legislative priorities seek to make improvements to the practice of law and administration of justice that benefit both members of the public as well as legal professionals across the state. The new addition for 2017 is regarding civil legal aid funding.
Civil Justice Reinvestment Plan Resolution
The Board approved a resolution from the Legislative Committee that affirms the WSBA’s strong support for civil legal aid funding, through state general fund dollars and not through a tax or fee increase on legal services. Further information is available at www.wsba.org/About-WSBA/Legislative-Affairs.

Religious and Spiritual Practices Policy Update
General Counsel/Chief Regulatory Counsel Jean McElroy provided an oral update on the Religious and Spiritual Practices Policy, stating that she has not received any additional feedback yet. It was suggested that stakeholders and any interested WSBA sections should be included in further discussions about the policy. The Board will hear an update on the policy at its January meeting.

Suggested Amendments to Bylaws Regarding Sections
Governor James Doane, Director of Advancement/Chief Development Officer Terra Nevitt, and Sections Program Manager Paris Eriksen presented the suggested amendments to Bylaws Article XI regarding sections. Section members attended the meeting and provided input.

The Board discussed the effect of expanding the definition of active member in Article III to include LLLTs and LPOs in Article XI, requiring that they be eligible for membership and officer positions in all of the WSBA’s 28 sections. The Board heard feedback from section members that WSBA membership is compulsory but section membership is voluntary, so sections should be able to individually decide their rules, including who can be included as members or officers. Section members noted that the Board had recently voted to include LLLTs and LPOs as members of the WSBA and had given them a seat on the Board, but limited the Board’s officers to attorney members only. In contrast, the suggested Bylaws amendments would allow LLLTs and LPOs as both section members and section executive committee members. The Board serves a dual role as the legal profession’s licensing and regulatory body along with providing member services, which is different from the functions that WSBA sections provide. The Board has also designated a seat on the Board for LLLTs and LPOs. It was noted from the audience that the concerns about LLLTs and section membership were specific to certain sections. It was suggested that perhaps a section might seek a waiver or carve-out of the Bylaws requirements which would not negate having a general framework for all WSBA sections within the Bylaws.

Further discussion and vote were tabled to the Board’s January meeting. General Counsel/Chief Regulatory Counsel Jean McElroy noted that under the Bylaws amendments that were already passed, LLLTs and LPOs are members of the WSBA as of Jan. 1, 2017, and therefore LLLTs and LPOs will already be able to become members and officers of all sections before the January Board meeting, under the wording of the currently existing Art. XI regarding sections.

For more information on any of these topics, email questions@wsba.org. For more on the WSBA Board of Governors and future meeting dates, see www.wsba.org/about-wsba/governance.

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Need to Know

News and information of interest to WSBA members

Email nwlawyer@wsba.org if you have an item you would like to share.

Opportunity for Service

Interested in running for Board of Governors?

Nomination/Application Deadline for District positions is Feb. 15, 2017

Five positions on the WSBA Board of Governors are up for election in 2017. The open positions represent the following congressional districts as well as one at-large seat:

- District 3
- District 6
- District 8
- District 7-North
- At-large position

The three-year term of office begins Oct. 1, 2017. These positions are currently held by Jill Karmy (District 3), Keith Black (District 6), Ann Danieli (District 7-North), Andrea Jarmon (District 8) and Mario Cava (At-Large).

Eligibility:

Any active member except one previously elected to the Board of Governors may be nominated or run for the office of governor from the congressional district in which the member is entitled to vote.

Becoming a candidate:

To run for the Board of Governors or to nominate another WSBA member, you must file a statement of interest and a biographical statement of 100 words or less. The required form is available on the WSBA website at www.wsba.org/elections or by contacting Pam Inglesby at pami@wsba.org or 206-727-8226. The WSBA executive director must receive the forms for district races by 5 p.m. PST on Feb. 15, 2017. Note: Biographical statements of nominated candidates will be published in the April/May issue of NWLawyer. The deadline to run for the at-large position is 5 p.m. PST on April 10, 2017.

Voting:

The four district-based positions are elected by their peers. Generally, a member is entitled to vote in the congressional district in which he or she resides. All out-of-state active WSBA members are eligible to vote in the district of the address of their agent within Washington for the purpose of receiving service of process as required by APR 5(f), or, if specifically designated to the executive director, within the district of their primary Washington practice. The WSBA will use an electronic voting system, and members will not receive a paper ballot unless they request one. Email ballots will be sent on March 15 and must be received by 5 p.m. PDT on April 1. The at-large governor will be elected by the Board of Governors at its May 18-19 meeting.

BOG Candidate Forum:

A candidate forum is scheduled for Wednesday evening March 1, 2017. All candidates for the four district seats are strongly encouraged to participate. The forum will be held at the WSBA Conference Center in Seattle beginning at 5:30 p.m. Members are encouraged to attend and bring questions for the candidates. The forum will also be webcast and accessible statewide for live viewing.

WSBA News

2017 License Renewal, MCLE, and Sections Information

Complete your license renewal and MCLE certification online — it’s easy. License renewal must be completed by Feb 1, 2017. WSBA bylaws require a 30% late-payment fee if the annual license fee remains unpaid after that date.

Demographic information. This year you may update your demographic information when filing your annual license renewal. With this information we can better understand the demographics of our membership. Providing confidential demographic information is optional.

Certify MCLE compliance. If you are in the 2014–2016 reporting period, then you are due to report CLE credits and certify MCLE compliance. The deadline for completing credits is Dec 31, 2016. The certification must be completed online or postmarked or delivered to the WSBA by Feb 1, 2017. Visit wsba.org/MCLE to learn more.

Judicial members. Please note that you are required to inform the Bar within 10 days of your retirement or your ineligibility for judicial membership (and you must apply to change to another membership class or resign). Visit wsba.org/licensing to learn more.

Important Dates

- Dec. 31, 2016: Members in the 2014–2016 reporting period must complete required MCLE credits.
- Feb. 1, 2017: Request deadline for optional one-time hardship exemption.
- Feb. 1, 2017: License renewal, payment and MCLE certification must be completed online, postmarked, or delivered to WSBA.

Just Released: Updates to Washington Real Property Deskbook Land Use Volumes


WSBA Call to Duty Pledge

There are over 600,000 U.S. military veterans in Washington state. Many veterans, especially those returning from Iraq and Afghanistan, are facing distinct barriers to successful reintegration into civilian life, and legal issues are a part of these barriers. The WSBA Call to Duty Pledge asks you to commit to serve Washington veterans in 2017. As part of the pledge, we will support you by providing legal and nonlegal resources, education and CLEs, and the chance to answer the various calls to duty in serving veterans. Sign up for the pledge at www.wsba.org or email publicservice@wsba.org with questions.

Supreme Court Pro Bono Publico Honor Roll

Did you serve as CLE faculty, on a community board in a legal capacity, or volunteer at a legal clinic in 2016? All of these activities — and more — qualify for pro bono publico hours. RPC 6.1 states that “a lawyer should aspire to render at least 30 hours of pro bono publico service per year.” In addition, those who
provide at least 50 hours of pro bono publico in a calendar year will be placed on the Supreme Court Honor Roll and receive a commendation certificate. These hours include, but are not limited to, your MCLE pro bono credits. Report your 2016 hours on your annual license form. Go to www.wsba.org or email publicservice@wsba.org with questions and to see the 2015 Honor Roll. We thank you for your service to your community.

WSBA Launches CLE Faculty Database

If you are currently serving as CLE faculty, or are interested in working with the WSBA as a future CLE faculty member, we encourage you to register in our CLE faculty database. Serving as a faculty member provides you the opportunity to engage with other attorneys across the state, give back to your profession, and expand your professional growth. Whether it’s upcoming changes in the law, emerging hot topics, or substantive content, our goal is to ensure we are engaging with the right faculty at the right time, matching practice expertise and knowledge to our educational programming needs. We hope to capture the information of all of those who plan to teach in the future, both current CLE faculty and those interested in future opportunities. Please log on and register in the CLE faculty database today at www.mywsba.org/CleFacultyApplication.aspx.

Join the WSBA New Lawyers List Serve

This list serve is a discussion platform for new lawyers of the WSBA. In addition to being the best place to receive news and information relevant to new lawyers, this is a place to ask questions, seek referrals, and make connections with peers. To join, email newlawyers@wsba.org.

ALPS Attorney Match

Attorney Match is a free online networking tool made available through the WSBA-endorsed professional liability partner, ALPS. This resource allows attorneys to set up a profile and indicate whether they are looking for or available to act as a mentor. Mentorship programs that meet requirements are now eligible for MCLE credits. The WSBA provides information and links to the ALPS Attorney Match online system as a service to the legal community. For more information, email mentorlink@wsba.org.

WSBA Board of Governors Meetings

Jan. 26–27, 2017 (Spokane); March 9-10, 2017 (Olympia)

With the exception of the executive session, Board of Governors meetings are open, and all WSBA members are welcome to attend. RSVPs are appreciated but not required. Contact Margaret Shane at 206-727-8244, 800-945-9722, ext. 8244, or margarets@wsba.org. The complete Board of Governors meeting schedule is available on the WSBA website at www.wsba.org/bog.

Volunteer Custodians Needed

The WSBA is seeking interested lawyers as potential ELC 7.7 volunteer custodians. An appointed custodian is authorized to act as counsel for the limited purpose of protecting a client’s interests whenever a lawyer has been transferred to disability inactive status, suspended, disbarred, dies, or disappears and no one appears to be protecting the clients’ interests. The custodian takes possession of the necessary files and records and takes action to protect clients’ interests. The custodian may act with a team of custodians, and much of the work may be performed by supervised staff. If the WSBA is notified of the need for a custodian, the WSBA would affirm the willingness and ability of a potential volunteer and seek their appointment as custodian. Costs incurred may be reimbursed. Current WSBA members of all practice areas are welcome to apply. Contact Sandra Schilling at sandras@wsba.org, 206-239-2118 or 800-945-9722, ext. 2118 or Darlene Neumann at darlenen@wsba.org, 206-733-5923 or 800-945-9722, ext. 5923.

Legal Community

Bellevue Attorney Honored as King County Bar Association’s Pro Bono Attorney of the Year

Attorney Michael Cherry was honored as the King County Bar Association’s Pro Bono Attorney of the Year at its annual awards dinner on June 23. Cherry volunteers at the Housing Justice Project in Kent and the Bellevue Youth Court. He is often asked how he manages to volunteer so many hours. “I set a goal to try to do a significant amount of pro bono work,” he says. “I put the time I volunteer into my calendar so that it is already blocked off every week.” Cherry notes that pro bono work can fit into almost any schedule. “Even when I am unable to attend in person, I have worked on my own on training materials and other contributions to these groups.”
Need to Know

Ethics

Facing an Ethical Dilemma?
Members facing ethical dilemmas can talk with WSBA professional responsibility counsel for informal guidance on analyzing a situation involving their own prospective ethical conduct under the RPCs. All calls are confidential. Any advice given is intended for the education of the inquirer and does not represent an official position of the WSBA. Every effort is made to return calls within two business days. Call the Ethics Line at 206-727-8284 or 800-945-9722, ext. 8284.

Search WSBA Advisory Opinions Online
WSBA advisory opinions are available online at www.wsba.org/advisoryopinions. You can search opinions by number, year issued, ethical rule, subject matter, or keyword. Advisory opinions are issued by the WSBA to assist members in interpreting their ethical obligations in specific circumstances. The opinions are the result of study and analysis in response to requests from WSBA members. For assistance, call the Ethics Line at 206-727-8284 or 800-945-9722, ext. 8284.

WSBA Lawyers Assistance Program (LAP)

WSBA Connects
WSBA Connects provides free counseling in your community. All Bar members are eligible for three free sessions on topics as broad as work stress, career challenges, addiction, anxiety, and other issues. By calling 800-765-0770, a representative will arrange an eferal using APS’s network of clinicians throughout Washington. We encourage you to make the most of this valuable resource.

Weekly Job Search Group
The Weekly Job Search Group provides strategy and support to unemployed attorneys. The group runs for seven weeks and is limited to eight attorneys. We provide the comprehensive WSBA job search guide, “Getting There: Your Guide to Career Success,” which can also be found online at www.tinyurl.com/7xhebb8b. If you’d like to participate or schedule a career consultation, contact Dan Crystal at danc@wsba.org or 206-727-8267.

Mindful Lawyers Group
A growing number of legal professionals across the nation are applying mindfulness-based skills and training to lawyer- ing. The Washington Contemplative Lawyers group meets on Mondays from noon to 12:45 p.m. on the 6th floor of the WSBA offices in the LAP group room. For more information, contact Greg Wolk at greg@rekhiwolk.com.

The “Unbar” Alcoholics Anonymous Group
The Unbar is an open AA group for attorneys that has been meeting for over 25 years. Meetings are held Wednesdays from noon to 1:30 p.m. at the Skinner Building at 1326 Fifth Ave., 7th floor, in Seattle. If you are seeking a peer advisor to connect with and perhaps walk you to this meeting, the LAP can arrange this and can be reached at 206-727-8268.

Financial Stress?
Concerned about balancing your books? Wondering if you are on track for retirement? Thinking about upcoming financial obstacles? WSBA Connects provides a free financial consultation with a licensed advisor. Call 800-765-0770.

WSBA Law Office Management Assistance Program (LOMAP)

LOMAP Lending Library
The WSBA LOMAP and LAP Lending Library is a service to our WSBA members. We offer the short-term loan of books on health and well-being as well as the business management aspects of your law office. How does it work? You can view available titles at www.wsba.org/resources-and-services/lomap/lending-library. Books may be borrowed by any WSBA member for up to two weeks. If you live outside the Seattle area, books can be mailed to you; you will be responsible for return postage. For walk-in members, we recommend calling first to check availability of requested titles. To arrange for a book loan or to check availability, contact lomap@wsba.org or 206-733-5914.

Casemaker Online Research
Casemaker is a powerful online research library provided free to WSBA members. Read about this legal research tool on the WSBA website at www.wsba.org/casemaker. As a WSBA member, you already receive free access to Casemaker. Now, we have enhanced this member benefit by upgrading to add Casemaker+ with CaseCheck+ for you. Just like Shepard’s and KeyCite, CaseCheck+ tells you instantly whether your case is good law. If you want more information, you can find it on the Casemaker website, or call 877-659-0801 and a Casemaker representative can talk with you about these features. For help using Casemaker, call the WSBA Service Center at 800-945-WSBA or 206-443-WSBA.

Learn More about Case-Management Software
The WSBA Law Office Management Assistance Program maintains a computer for members to review software tools designed to maximize office efficiency. LOMAP staff is available to provide materials, answer questions, and make recommendations. To make an appointment, contact lomap@wsba.org.

Usury Rate
The maximum allowable usury rate can be found on the Washington State Treasurer’s website at www.tre.wa.gov/investments/historicalUsuryRates.shtml.

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Announcements

**KSB Litigation, P. S.**
Announces the November 1 opening of the firm

**Principals**
William J. Schroeder  
Jane E. Brown  
Gerald Kobluk  
William C. Schroeder  
Anne K. Schroeder, Associate  
Patrick E. Miller, Sr. Counsel (Coeur d'Alene, ID)  
David L. Broom, Sr. Counsel

KSB Litigation, P.S.  
221 North Wall Street, Suite 210  
Spokane, WA 99201  
Tel: 509-624-8988

www.ksblit.legal

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**Forsberg & Umlauf, P.S.**
is pleased to announce the following attorneys recently joined our firm.

**Stephanie S. Andersen**  
Of Counsel Attorney with over 27 years of experience, focusing primarily on insurance coverage and alleged bad faith cases.

**Kimberly A. Reppart**  
Of Counsel Attorney with over 16 years of experience, focusing primarily on civil defense litigation and insurance coverage.

**Lesley J. Fleming**  
Associate Attorney with over 14 years of experience, focusing primarily on general liability defense cases.

Forsberg & Umlauf, P.S.  
901 Fifth Avenue  
Suite 1400  
Seattle, WA 98164  
Tel: 206-689-8500

One North Tacoma Ave  
Suite 200  
Tacoma, WA 98403  
Tel: 253-572-4200

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**Wallace, Klor, Mann, Capener & Bishop, PC**

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Wallace, Klor & Mann, PC  
is pleased to announce that effective October 1, 2016 the firm will be officially known as  

Wallace, Klor, Mann, Capener & Bishop, P.C.

Over 25 years ago, Schuyler T. Wallace, Jr. founded the firm when he saw a need for Pacific Northwest employers to have a more sophisticated and cost-effective approach to workers’ compensation defense. He was joined by John Klor and Lawrence E. Mann as the firm developed a strong reputation as a leading Pacific Northwest workers' compensation defense firm. As the firm grew, it later added shareholders Jeffery H. Capener and Christopher A. Bishop. Jeff and Chris will now be added as named shareholders as the firm moves forward with its team-based approach to handling workers' compensation claims and related employment matters.

Wallace, Klor, Mann, Capener & Bishop, P.C. will continue to be one of the largest Pacific Northwest firms devoted to workers’ compensation defense and employment related matters.

For more information about the firm, please visit our new website at www.wkmcblaw.com.

WKMC&B  
www.wkmcblaw.com

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The WSBA regrets the error it made in the November issue of NWLawyer by running the wrong announcement for Wallace, Klor & Mann, PC, announcing its name change. Below is the corrected version, announcing its new name.
THE MERYHEW LAW GROUP is pleased to announce that

David L. Donnan has joined the firm as of counsel.

David’s practice will focus on the defense of individuals and businesses facing criminal and civil liability in state and federal courts with an emphasis on appeals and post-conviction relief.

david@meryhewlaw.com

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New partner or associate at your firm?

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Contact David Long at advertisers@wsba.org or call 206-498-9860.

Why join a section?
Membership in one or more of the WSBA’s sections provides a forum for members who wish to explore and strengthen their interest in various areas of the law.

Who can join?
Any active WSBA member can join.

What are the benefits?
• Professional networking
• Resources and referrals
• Leadership opportunities
• Being “in the know”
• Advancing your career
• Effecting change in your practice area
• Skill development in involvement with programs and the legislative process
• Sense of community among peers

Is there a section that meets my interest?
With 28 practice sections, you’ll find at least one that aligns with your practice area and/or interest.

What is the membership year?
Oct. 1 to Sept. 30.

What about law students?
Law students can join any section for $18.75.

What about new attorneys?
Newly admitted attorneys can join one section for free during their first year.

It’s easy to join online!
Learn more about any section at www.wsba.org/legal-community/sections.
Resignation in Lieu of Discipline

Cecilia K. Cervantes (WSBA No. 18750, admitted 1989) of Ephrata, resigned in lieu of discipline, effective 9/23/2016. The lawyer agrees that she is aware of the alleged misconduct in disciplinary counsel’s Statement of Alleged Misconduct and rather than defend against the allegations, she wishes to permanently resign from membership in the Association. The Statement of Alleged Misconduct reflects the following violations of the Rules of Professional Conduct: 1.5 (Fees), 1.7 (Conflict of Interest: Current Clients), 1.8 (Conflict of Interest: Current Clients: Specific Rules), 3.3 (Candor Toward the Tribunal), 3.4 (Fairness to Opposing Party and Counsel), 4.1 (Truthfulness in Statements to Others), 5.3 (Responsibilities Regarding Nonlawyer Assistants), 8.1 (Bar Admission and Disciplinary Matters), 8.4 (Misconduct). Jonathan Burke acted as disciplinary counsel. Stephen Christopher Smith represented Respondent. Joseph Nappi, Jr. was the hearing officer. John H. Loeffler was the settlement hearing officer. The online version of NWLawyer contains a link to the following document: Resignation Form of Cecilia K. Cervantes.

Disbarred

Anne K. Block (WSBA No. 37640, admitted 2006) of Gold Bar, was disbarred, effective 7/15/2016, by order of the Washington Supreme Court. The lawyer’s conduct violated the following Rules of Professional Conduct: 8.4 (Misconduct). Linda B. Eide acted as disciplinary counsel. Anne K. Block represented herself. Linda O’Dell was the hearing officer. The online version of NWLawyer contains links to the following documents: Hearing Officer’s Decision; Disciplinary Board Order; and Washington Supreme Court Order.

Suspended

Raj Bains (WSBA No. 22459, admitted 1993) of Gig Harbor, was suspended for three months, effective 8/02/2016, by order of the Washington Supreme Court. The lawyer’s conduct violated the following Rules of Professional Conduct: Former 1.14 - (prior to 9/1/2006) (Preserving Identity of Funds and Property of a Client) and 1.15A (Safeguarding Property), 1.15B (Required Trust Account Records), 8.4 (Misconduct). Kathy Jo Blake acted as disciplinary counsel. David Allen represented Respondent. Matthew Lane Harrington and Lance Alan Pelletier represented Respondent. The online version of NWLawyer contains links to the following documents: Order Approving Stipulation to Suspension; and Washington Supreme Court Order.

Reprimanded

Matthew Mattson (WSBA No. 37165, admitted 2005) of Kirkland, was reprimanded, effective 8/18/2016, by order of the Chief Hearing Officer. The lawyer’s conduct violated the following Rules of Professional Conduct: 1.9 (Duties to Former Clients). Francesca D’Angelo acted as disciplinary counsel. Matthew Lane Harrington and Lance Alan Pelletier represented Respondent. The online version of NWLawyer contains links to the following documents: Order on Stipulation to Reprimand; Stipulation to Reprimand; and Notice of Reprimand.

Harold J. Moberg (WSBA No. 13924, admitted 1984) of Moses Lake, was reprimanded, effective 8/19/2016, by order of the Hearing Officer. The lawyer’s conduct violated the following Rules of Professional Conduct: 1.15A (Safeguarding Property). Francesca D’Angelo acted as disciplinary counsel. Harold J. Moberg represented himself. Lisa J. Dickinson was the hearing officer. Mark Triplett was the settlement hearing officer. The online version of NWLawyer contains links to the following documents: Order on Stipulation to Reprimand; Stipulation to Reprimand; and Notice of Reprimand.

Transfer to Disability Inactive Status

Deborah Ann Frederick (WSBA No. 34344, admitted 2003) of Bellingham, was by stipulation transferred to disability inactive status, effective 9/27/2016. This is not a disciplinary action.

Terry Margaret Rosell (WSBA No. 21134, admitted 1991) of Bellevue, was by stipulation transferred to disability inactive status, effective 9/27/2016. This is not a disciplinary action.
CLE seminars are subject to change. Please check with providers to verify information. To announce a seminar, send information to clecalendar@wsba.org. Information must be received by the first day of the month for placement in the following issue’s calendar.

**CREDITOR/DEBTOR**

**Liens: How to Create ‘em. How to Enforce ‘em.**
Dec. 9, Seattle and webcast. 6.5 Law & Legal Procedure CLE credits. Presented by the WSBA in partnership with the WSBA Creditor Debtor Rights Section; 800-945-WSBA or 206-443-WSBA. www.wsbacle.org.

**Fall Probate and Trust Seminar: Updates, Planning, and Disputes**
Dec. 6, Seattle and webcast. 6 CLE credits (5 Law & Legal Procedure + 1 Ethics). Presented by the WSBA in partnership with the WSBA Real Property, Probate & Trust Section; 800-945-WSBA or 206-443-WSBA. www.wsbacle.org.

**INTELLECTUAL PROPERTY**

**2016 Inland Empire Intellectual Property Institute CLE**
Dec. 9, Spokane. 1.5 Law & Legal Procedure CLE credits. Presented by the WSBA in partnership with the WSBA Intellectual Property Section; 800-945-WSBA or 206-443-WSBA. www.wsbacle.org.

**LEGAL LUNCHBOX SERIES**

**December Legal Lunchbox**
Free recorded seminar available for download during the month of December. 1.5 CLE credits. Presented by WSBA in partnership with the WSBA Solo & Small Practice Section; 800-945-WSBA or 206-443-WSBA. www.wsbacle.org.

**NEW LAWYER EDUCATION**

**Parenting Plans I**

**Parenting Plans II**

**Parenting Plans III**

**REAL PROPERTY**

**Ethical Issues in the Practice of Real Property Law**

**FAMILY LAW**

**Family Law Annual Seminar: Plain Talk on Plain Language Issues**
Dec. 14, Seattle and webcast. 6 CLE credits (5 Law & Legal Procedure + 1 Ethics). Presented by the WSBA in partnership with the WSBA Family Law Section; 800-945-WSBA or 206-443-WSBA. www.wsbacle.org.

**GENERAL PRACTICE**

**Best of WSBA CLE (Day 1)**
Dec. 28, webcast moderated replay. 6 CLE credits (4.25 Law & Legal Procedure + 1.75 Other). Presented by the WSBA; 800-945-WSBA or 206-443-WSBA. www.wsbacle.org.

**Best of CLE (Day 2)**
Dec. 29, webcast moderated replay. 3.5 CLE credits (2.5 Ethics + 1 Other). Presented by the WSBA; 800-945-WSBA or 206-443-WSBA. www.wsbacle.org.

**BEST OF CLE**

Dec. 16, Seattle and webcast. 6.25 CLE credits (3.25 Law & Legal Procedure + 3 Ethics). Presented by the WSBA in partnership with the WSBA Real Property, Probate & Trust Section; 800-945-WSBA or 206-443-WSBA. www.wsbacle.org.

**SOLO AND SMALL PRACTICE**

**Essential Marketing Plan Workshop: Strategies to Attract Your Ideal Candidates**
Dec. 13, Seattle and webcast. 6 Law & Legal Procedure CLE credits. Presented by the WSBA in partnership with the WSBA Solo & Small Practice Section; 800-945-WSBA or 206-443-WSBA. www.wsbacle.org.

**Protecting Yourself and Your Client Information from Ransomware and Cyber-Attacks**
Dec. 16, webinar. 1 Ethics CLE credit. Presented by WSBA in partnership with the WSBA Solo & Small Practice Section; 800-945-WSBA or 206-443-WSBA. www.wsbacle.org.

**Solo and Small Practice Section Annual Seminar**
Jan. 26, Seattle and webcast, CLE credits pending. Presented by WSBA in partnership with the WSBA Solo and Small Practice Section; 800-945-WSBA or 206-443-WSBA. www.wsbacle.org.

**TAX**

**2016 Annual Taxation Seminar**
Dec. 15, Seattle and webcast. 3.5 Law & Legal Procedure CLE credits. Presented by the WSBA in partnership with the WSBA Taxation Section; 800-945-WSBA or 206-443-WSBA. www.wsbacle.org.
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Before law school, I was naive, albeit happily.
My greatest talents as a lawyer are relationship building and communication.
My greatest accomplishments as a lawyer are my litigation successes.
In my practice, I continue to work on improving my communication skills so that I effectively represent my clients’ losses and harms, while ensuring that I also voice and promote the possibilities of their future. I work for my clients and always aim to maximize their results.
My career has surprised me by how quickly I was exposed to litigation and by how much I have learned about the practice of law through that exposure.
The best advice I have for new lawyers is to be authentic. Few attorneys can create a persona separate from themselves and effectively do the job. I have learned a lot about myself as a result of my legal practice and, generally speaking, that has been a really good thing for me in law and in life.
My long-term professional goal is to adapt a traditional law practice into a more client-friendly, technologically advanced business which maximizes solutions for the legal challenges our clients face.
The worst part of my job is that I have not yet achieved sustainable personal balance.
I look up to my attorney mother, who I have partnered with in law and who has mentored me tremendously through my career.
I have recently tried or want to try paragliding. Recently I attended a film festival at the Bear’s Tooth — a wonderful Anchorage, AK establishment — which created a fire in my belly to learn to paraglide. I am a licensed private pilot, but paragliding is a whole new adventure offered only in the sky.
I create work/life balance by dreaming about the yoga I wish I was doing. I really love yoga, and when my life seems especially imbalanced I know yoga and meditation are the right tools to correct the internal wrong.
If I could do something over, it would be learning a second language while attending college and law school.
My favorite place in the Pacific Northwest is my home state of Alaska and the beautiful and tasty Walla Walla Valley.
Nobody at work would ever suspect that I am quite adventurous and a bit spontaneous. In my work life, organization, and planning are key components to my success, so people are a bit surprised that I am different outside of work.
Aside from my career, I am most proud of this: Hands-down I am most proud of learning to pilot out of high school, having a little Cessna in college and law school, and getting to be a member of the flying community. But I am also quite proud of buying my long-desired 1979 Volkswagen Type-2 bus a couple of years ago. My family and friends continue to believe I will regret paying way too much on something far too unreliable, but I love her, am incredibly proud of her, and share road trips with her every chance I get — hopefully including a spring trip next year up the Alaska Highway from Walla Walla to Anchorage. Buying the bus represents a lot to me, but mostly that the beauty of life is not only measured by wise and practical decisions but also the impulsive and passionate ones.
This makes me roll my eyes: Masquerading a humblebrag, i.e., #sohumbled — at least be upfront with a #humblebrag.

This makes me smile: My niece Minka wanting to play in the “ban” (my VW bus).

If I could pick a superpower, it would be to be able to fly.

My favorite band/musical artist is Dave Matthews Band, since I was in seventh grade.

If I could get free tickets to any event, I would fulfill a life ambition of attending Burning Man.

You should give this a try: Learning to fly. Learning something new always gives a person a large sense of accomplishment. For some reason, learning to fly enhances that sense.

My dream trip would include a couple of months backpacking in Southeast Asia, uninterrupted and on the cheap.

My name is Whitney Power. I was born in Alaska and raised in the Western Alaskan community of Bethel. Following the death of my older brother, my sister and I moved to Walla Walla to attend high school. In 2007, I graduated with a bachelor of science in both economics and political science from the University of Idaho, earning honors distinction and working as a Martin Scholar. I attended the University of Idaho College of Law and obtained my law degree in 2009. I also earned a certification from the Northwest Institute of Dispute Resolution. I joined Power and Brown, LLC in 2010 and was promoted to partner attorney in 2013.

I represent people handling a variety of legal claims including wrongful deaths, aviation accidents, serious personal injury, and criminal defense. I have successfully tried many cases in communities throughout rural and urban Alaska. My achievements have resulted in my earning the National Trial Lawyers Top 40 Under 40 Civil Plaintiff Award, and the National Academy of Personal Injury Attorneys (NAOPIA) Top 10 Under 40 Award. I am licensed to practice in Alaska, Washington, and Oregon and I am a member of the Alaska Association for Justice, the American Association for Justice, and the Anchorage Association of Women Lawyers. I can be reached at 907-222-9900 and whitneypower@powerbrown.com.
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