The Therapist and the Murderer

A psychiatrist and a lawyer analyze

Volk v. DeMeerleer
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AMENDMENT
HATE SPEECH, GUNS, AND THE FIRST AMENDMENT
When I saw this article [“Hate Speech, Guns, and the First Amendment,” by Judy Endejan, Dec 2017/Jan 2018 NWLawyer] I knew it was going to be an interesting read; however I have to take exception to the author’s statement that “Although Washington is not an ‘open carry’ state, guns have been at protests involving hate speech here.” Washington is in fact an open carry state, provided there is no intent to intimidate or that warrants alarm for the safety of other persons. See RCW 9.41.270. Merely carrying a weapon at a protest, rally, or any other place is not against the law. While it may “dampen” the enthusiasm of counter-protestors, it is not illegal.

Ray G. Deonier, Spokane Valley

In response to the article by Judy Endejan, I must first say her use of the terms alt-right and conservative to describe “hate” speakers is highly offensive to me. She ignores (using her terminology) the alt-right and conservative to describe “hate” speakers is highly offensive to me. In response to the article by Judy Endejan, I must first say her use of the terms alt-right and conservative to describe “hate” speakers is highly offensive to me. She ignores (using her terminology) the alt-right and conservative to describe “hate” speakers is highly offensive to me. She ignores (using her terminology) the alt-right and conservative to describe “hate” speakers is highly offensive to me. She ignores (using her terminology) the alt-right and conservative to describe “hate” speakers is highly offensive to me. She ignores (using her terminology) the alt-right and conservative to describe “hate” speakers is highly offensive to me. 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Ms. Endejan’s constant derogation of conservatives is hate speech. I don’t know why she hates us but she does have a right to. White Supremacists are not right wing or conservative. I believe it is likely the counter-protesters caused the violence in Charlottesville. They could have held their counter-protest in an entirely different area or stayed a safe distance away. Shouting “Nazi scum!” as the author used as an illustration is not a way to reduce violence.

When the Black Lives Matter group took over a Bernie Sanders speech and would not allow him to continue he did not get abusive. I am sure he would have liked to finish his speech, but he stepped aside.

Apparently Ms. Endejan works with and adores the First Amendment but does not like the Second. I took up part of her closing suggestion to start speaking, but am offended that she suggests I not carry a gun. I can carry a gun if I want to.

Jeanette Burrage, Des Moines

I disagree with the premise of Judy Endejan’s article that my First Amendment rights can only be exercised while surrendering my Second Amendment rights. The author sets up straw-man arguments that equate an individual, described as an “alt-right speaker” hurling invective at a full synagogue while brandishing a rifle, with others who may somehow incite a response by speaking on controversial topics. “Speak, but do not carry a gun,” is hardly the answer to either situation....

In the second scenario, that of an organized demonstration in which speakers might incite reactive speech but for the presence of guns in the hands of the former, I would similarly not meekly agree to surrender my Second Amendment rights, or demand that others do so. I could legally be carrying a concealed firearm; ideally, nobody else would ever know it. But whether or not that were true, I would still have the right to speak out against offensive or unpopular speech being aired in the public square. I would still have the obligation to exercise my own judgment about whether to speak, and how. Just as the hate-speaker has a right to air his views, I have that right, regardless of whether either of us carries a firearm, visibly or not. I simply reject the premise that “gun violence...is reasonably foreseeable when a controversial group applies to march to disseminate known hate speech,” as Ms. Endejan suggests. This kind of assumption does a disservice to millions of law-abiding citizens who exercise Second Amendment rights every day without incident, and also subordinates Second Amendment rights to others, with no suggestion in the Constitution that this was intended.

Gordon G. Hauschild, Fife

I read Judy Endejan’s article with both interest and disgust. The interesting...
part was her excellent review of the development of First Amendment law. The disgust was generated by her overt political bias.

Apparently, Ms. Endejan can find only so-called “alt-right” examples of “hate” speech coupled with potential violence, while painting a very sympathetic view of left-leaning people and groups.

Marc Bond, Anchorage

What was immediately noticeable about Judy Endejan’s position in her article, “Hate Speech, Guns, and the First Amendment,” is that the article discounts the act of carrying a gun as itself a protected expression under the First Amendment. Regardless of the expression created by carrying a gun, or the expression of attending a protest without a gun, the First Amendment protects those expressions.

Any gun-carry restriction is addressed not initially through the First Amendment, but through a state’s police power which, subject to the Constitution, accords it the authority to pass legislation to keep its citizens safe—including no open-carry laws—or restricting firearms at a demonstration.

James Joel Sitterly, Norwalk, Ohio

I read with interest Judy Endejan’s excellent article applying the First Amendment to hate speech.

When it comes to political speech, Ms. Endejan correctly observes that one’s conservative or liberal viewpoint “must not matter, because the First Amendment should be agnostic, or view-point-neutral, in its application.” She opines that protecting the free speech rights of liberal protesters is no longer the courts’ principal concern, as in the 20th century; instead, she contends that the Supreme Court now seems concerned with “protecting more powerful and conservative voices,” and that “[c]urrently the most strenuous voices arguing for free speech come from the conservative right, rather than the liberal left.” This may be true, but why?

Some conservatives are advocating for their free speech rights because those rights are, ironically, being trampled by powerful persons: university administrators, for example, who are permitting students and faculty members to suppress speech with which they disagree. In 2014, student and faculty protesters bullied Rutgers University administrators into canceling a commencement speech by Aayan Hirsi Ali, a prominent, female Muslim intellectual who is insistently critical of the more radical aspects of Islam. During 2017, violent protests intended to suppress speech erupted at UC-Berkeley against conservative commentators Ann Coulter and Ben Shapiro, and at multiple colleges against David Horowitz and political scientist Charles Murray. A Middlebury College professor with Murray was assaulted and injured. Epithets such as “Nazi,” “KKK,” “fascist,” “bigot,” “racist,” and “sexist” are examples of “dialogue” shouted by mobs of protesters, whom administrators, including those at state universities, allowed to suppress the scheduled speeches. Are such epithets “fighting words,” not protected by the First Amendment? See Cohen v. California, 402 U.S. 15 (1971). Does hate speech come only from the far right? You tell me.

Ms. Endejan makes a strong case that the First Amendment protects hate speech. She posits an exception for when the hate-speaker has a gun, because then the hearer may be in reasonable fear of bodily harm, or death. One relevant consideration is whether a gun is visible. If you have a gun, but I’m unaware of it, I’m less likely to be afraid. But if you’re obviously armed with a pistol (or other deadly weapon?) while screaming hate speech, Ms. Endejan aptly questions whether such speech should be protected.

As Ms. Endejan says, these situations are extremely fact-dependent, and the jurisprudence is evolving. May we all remain free to express our views in a civilized manner.

Mark Adams, Gig Harbor

RESPONSE FROM THE AUTHOR:
The intent of “Hate Speech, Guns and the First Amendment” was to examine the First Amendment protection for controversial public speech, a topic of increased public debate due to the recent number of clashes between speakers with widely divergent political views. When I wrote that Washington is not an “open carry” state it was my view that RCW 9.41.270 would prohibit the carrying of firearms by either a public speaker or his or her opponents at a political rally. This statute makes it unlawful to “carry, exhibit, display, or draw any firearm...at a time and place that either manifests an intent to intimidate another or that warrants alarm for the safety of other persons.” I do not believe that statute violates the Second Amendment any more than reasonable time, place, and manner restrictions violate the First Amendment. Both constitutional rights have limits to protect overarching public interests such as public safety in a crowd. These limits reflect the balancing of rights and responsibilities in our constitutional system. In other contexts Washington is an “open carry” state and I apologize for failing to make clear why Washington law prohibits, or should prohibit, the presence of guns at a rally such as the Charlottesville rally. While others are certainly free to differ with me on this, I think that most judges would agree that the presence of firearms at a public rally or speech would “intimidate” others present and warrant alarm for their safety. The article does not advocate sacrifice of Second Amendment rights as the price to exercise First Amendment rights. In my opinion, the remedy to be applied when you disagree with speech is to use more speech as the weapon rather than firearms. No one has the right to use a gun to get me to change my mind.

IT’S NEVER TOO EARLY TO ARGUE ABOUT BASEBALL

This is my first issue as editor of NWLawyer. I came onboard at the end of November and hit the ground running. We settled on this month’s cover story, “The Therapist and the Murderer,” after two pieces came together on the same Washington Supreme Court decision—Volk v. DeMeerleer. (The title is a play on Janet Malcolm’s classic “The Journalist and the Murderer”—highly recommended.)

I have worked as an editor and writer for years. From the Seattle P-I to the Poetry Foundation, from the alternative to the mainstream, I have been in the trenches and I have also cultivated prizewinning writers. I see editing as a form of searching—for a compelling story, a buried lead, a voice of truth and authority. Working on stories about the law is proving to be both a challenge and a pleasure. We are always looking for new ideas! See our submission guidelines on page 4 or reach out to us at nwlawyer@wsba.org.

Cheers,
Emily White

League expansion franchise teams, which become the Seattle Pilots, and later the Mariners.”

Not correct. The Seattle Pilots played for one inglorious season, 1969, in Emil Sicks Stadium in the Rainier Valley. Mt. Rainier could be seen deep over the right center field fence.

Before the 1970 season, a used car salesman (not kidding) named Bud Selig (who would later become baseball commissioner) stole the Pilots on April Fools Day and established them as the Milwaukee Brewers. They still are the Brewers.

Among the angry baseball fans was Slade Gorton. Major League Baseball was sued for breach of contract, Slade Gorton leading the way, and in 1976, the lawsuit was dropped in exchange for a baseball team: the Seattle Mariners.

So the Pilots still exist today, but as the Brewers.

Leslie Tidball, Everett

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At the end of each year, the Washington State Bar Association (WSBA) hires an independent certified public accounting firm to audit our financial statements.

In addition to verifying financial statement accuracy, the auditors review, analyze, and test WSBA’s internal controls for its reporting, management oversight, and other systems related to the WSBA’s finances and the overall operations of the organization.

During our regularly scheduled January 2018 meeting, the Budget and Audit Committee reviewed WSBA’s year-end financial results for the fiscal year that ended on September 30, 2017 and received a report from the Clark Nuber accounting firm on the results of its latest audit of WSBA’s finances. Clark Nuber reported that it was issuing an “unmodified opinion” concerning the accuracy of WSBA’s financial records. An unmodified opinion means Clark Nuber determined that no adjustments to WSBA’s financial records need be made, it found no material weaknesses in WSBA’s accounting system, and Clark Nuber could not identify anything in WSBA’s financial system that needed improvement. This very positive audit report indicates that the WSBA’s finances are well managed and accurate in all material aspects. For more information, the audit report and WSBA’s audited financial statements can be viewed at www.wsba.org/about-wsba/financial-info.

Please take note that WSBA’s audited financial report for FY2017 shows that the WSBA exceeded FY17 budget expectations by $1.4 million. This result is due to significant cost savings that reduced operating expenses, higher-than-anticipated revenues, and the hard work of our dedicated WSBA employees. These results are particularly helpful as we continue to look into the future and consider budgeting needs for fiscal year 2019 and beyond.

Many thanks to the leadership of WSBA Executive Director Paula Littlewood and Chief Operations Officer Ann Holmes, the expertise of Controller Mark Hayes, and the hard work of our employees for another clean WSBA audit and strong year-end results.

Please don’t hesitate to contact me. I look forward to any questions or feedback that you may have. NWL

G. Kim Risenmay was elected to the Board of Governors in September 2015. He can be reached at kim@risenmaylaw.com
The United States is unique among nations in that its armed forces personnel do not swear or affirm allegiance to a country, person or deity, but to the rule of law, namely the U.S. Constitution. Their oath is to “support and defend the constitution against all enemies foreign and domestic; to bear true faith and allegiance to the same; . . . .” What does it mean to support, defend, and bear true faith and allegiance to a document when there is a great distance between the values espoused in that document and the reality of how you are treated under the law? This reality is something people who have dedicated themselves to service on behalf of the United States have faced ever since the enactment of the Constitution.

A good example to start with dates back to World War II and involves Jackie Robinson—an African American better known for integrating major league baseball than for his service in the military—and the court martial that almost ended his military service. On August 2, 1944, Second Lieutenant Jack Robinson stood trial at Camp Hood in Texas for events related to his refusal to move to the back of a bus transporting soldiers and civilians. On July 9, 1944, he boarded a shuttle bus and sat next to the wife of a fellow officer with a fair complexion. In a letter Robinson described his perception of what happened next: “It is evident that the driver seemed to resent my talking to her and told me to move to the rear. He didn’t ask the lady to move so I refused. When I did he threatened to make trouble for me when we reached the bus station.”

The driver and others succeeded in making trouble for Robinson. In the immediate aftermath of the incident Robinson was subjected to insults and racial slurs from military and civilians upset by his actions on the bus. An anonymous letter to the National Association for the Advancement of Colored People (NAACP) from an individual who described himself as a fellow officer of Second Lieutenant Robinson described the trouble endured by Robinson as “a typical effort to intimidate Negro officers and enlisted men.” Robinson was charged with showing disrespect toward a superior officer and failing to obey a lawful command; interestingly, he was not charged with refusing to move to the back of the bus. Robinson was acquitted of all charges on August 9, 1944.

Approximately two years before standing trial, on April 3, 1942, Robinson took an oath to support and defend the United States Constitution against all enemies foreign and domestic. Like many before and after him, he faced an initial and ongoing decision about his relationship to the oath to support the Constitution and the distance between the ideals espoused in the document and the realities of his everyday existence as a person of color.

On July 26, 1948, four years after the court martial of Jack Robinson, President Truman signed Executive Order 9981 prohibiting racial discrimination in the U.S. armed services, eventually leading to an integrated armed services.

What are the ongoing challenges, opportunities, and call to service of the oath today?

I spoke with Lieutenant Colonel Dylan Williams, who leads the legal office of McChord Field at Joint Base Lewis McChord. Lieutenant Colonel Williams first took the oath in 2002, soon after taking the Arizona oath of attorney. In addition to being motivated to serve by the events of September 11, 2001, Williams shared:

I have a very developed and passionate sense of justice and society’s inherent right to punish offenders. That was what I wanted to do. But the Air Force opened up this whole new way to serve with my J.D. while still getting to prosecute. But I got to take my passion for justice to a new level by turning it to protecting the U.S. from its enemies, ‘both foreign and domestic’ . . . not just supporting,
but defending it from those who seek to destroy it. An oath not to a person or people, but to an idea, a principle, enshrined in a document that forms the very foundation of our nation. The initial execution of that idea was flawed (even the language of the document itself had flaws in the way it classified people by race) and 231 years later we are still trying to get it right, but the underlying idea itself is great, unique, and worth dedicating one’s life and even dying for.

When asked about how often he thinks about his oath and any disconnect between his oath and his service, Williams stated: “Again, my oath is not to a person or people. I keep that in the forefront of my mind whenever I am dissatisfied with the actions of the elected/appointed officials charged with authority over the military (or even superior officers). At the end of the day, I don’t serve the President or Congress or Secretary of Defense or Secretary of the Air Force. I serve the Constitution of the U.S., and that endures beyond the term of an elected official. But I also have to remember the ‘domestic’ enemies and always be ready to oppose unlawful actions ordered by those within the military or national command authority. It’s one of the primary duties of a Judge Advocate General (JAG).”

With regard to disconnect, Williams noted, “the only disconnect I felt was the ideals of equality espoused in the Constitution and the fact that I had to hide my sexual orientation in order to serve. I was taking an oath to a document that purported to protect me in order to serve in an organization that actively discriminated against me. I resolved that disconnect by accepting that we all make sacrifices to serve something greater than ourselves and that was one of my sacrifices. One I am thankful I no longer have to make.” Williams’s comments present the rule of law and the commitment to the rule of law, not as a commitment to perfection, but to process, engagement, and persistent struggle.

Oaths, especially national oaths, get at the most basic political question: who do “we” define as “us” (e.g., “We the People”) and how are those who are not “us” defined? The United States is a great and ongoing experiment in answering this question with the rule of law. John Adams, a major contributor to our great national experiment, famously described it as, “a nation of laws, not of men.”

The 2015 film “Bridge of Spies” addresses this issue head-on. Tom Hanks plays James Donovan, an attorney enlisted to defend a Russian spy accused of espionage during the Cold War. Donovan is asked to breach attorney-client privilege and share insights from his client, an accused spy, with intelligence agents of the U.S. government. Donovan resists and is told to stop being a “boy scout” and to accept that “there’s no rule book here”—the implication being that the circumstances Donovan found himself in superseded his commitment to the rule of law. Donovan responds by saying, “My name’s Donovan. Irish, both sides. Mother and father. I’m Irish and you’re German. But what makes us both Americans? Just one thing. One. Only one. The rule book. We call it the Constitution, and we agree to the rules, and that’s what makes us Americans. That’s all that makes us Americans. So don’t tell me there’s no rule book…”

Is the rule of law the fundamental element that defines the United States? Can a nation function and thrive when it is built upon the rule of law? What occurs when that ideal is challenged?

One of many examples in U.S. history that strained the primacy of the rule of law is Executive Order 9066. This month marks the 76-year anniversary of President Franklin D. Roosevelt’s Executive Order 9066 calling for the forced relocation and mistreatment of Japanese Americans, a prime and persisting example of the principles and tensions between the U.S. Constitution and those rules of an era.
bound by oath to it. F.D.R. initiated the process, military servicemen and women carried out the order, and ultimately the Supreme Court of the United States decided upon the lawfulness of the order in *Hirabayashi v. United States*, 320 U.S. 81 (1943), and *Korematsu v. United States*, 323 U.S. 214 (1944). All involved held an independent and ongoing accountability to the Constitution above all else. The aftermath of the Supreme Court’s decisions to uphold the lawfulness of executive order 9066 is still playing out today. Some believe that *Korematsu* has clearly been superseded; others believe that something similar could once again take place. Does the rule of law supersede national security interest, popular sentiment, or political expediency? These questions have been, and will continue to be, argued and answered by members of the legal profession, local and federal government officials, and persons who have placed their trust in the ongoing great experiment we all take part in each day.

We began with the example of Second Lieutenant Jack Robinson, part of a long line of African Americans and others who bore faith and allegiance to the rule of law and the struggle to make the ideals it espouses a reality for all who place their trust in it. Robinson’s oath and service, like so many others’, highlight the poignant complexities of taking an oath—it is a momentary statement of acceptance of a continued duty in an ever-changing landscape. It is an oath to engage in an ongoing relationship, and like all relationships, how the actors involved relate to each other is constantly being defined and redefined, ideally within agreed-upon parameters.

The struggle for this nation to “rise up and live out the true meaning of its creed,” as Martin Luther King Jr. phrased it, hinges upon the acts or omissions of those who have taken an oath to its creed—the Constitution.

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**Washington Admission and Practice Rule 5** contains eight statements which serve as the current oath of attorney for Washington. As you read them, consider:

- What if anything does the oath of attorney mean to you?
- How do you respond when you encounter a disconnect between the values espoused in the oath and the realities you or others around you face?

**OATH OF ATTORNEY**

1. I am fully subject to the laws of the State of Washington and the laws of the United States and will abide by the same.

2. I will support the constitution of the State of Washington and the constitution of the United States.

3. I will abide by the Rules of Professional Conduct approved by the Supreme Court of the State of Washington.

4. I will maintain the respect due to the courts of justice and judicial officers.

5. I will not counsel, or maintain any suit, or proceeding, which shall appear to me to be unjust, or any defense except as I believe to be honestly debatable under the law, unless it is in defense of a person charged with a public offense. I will employ for the purpose of maintaining the causes confided to me only those means consistent with truth and honor. I will never seek to mislead the judge or jury by any artifice or false statement.

6. I will maintain the confidence and preserve inviolate the secrets of my client, and will accept no compensation in connection with the business of my client unless this compensation is from or with the knowledge and approval of the client or with the approval of the court.

7. I will abstain from all offensive personalities, and advance no fact prejudicial to the honor or reputation of a party or witness unless required by the justice of the cause with which I am charged.

8. I will never reject, from any consideration personal to myself, the cause of the defenseless or oppressed, or delay unjustly the cause of any person.

Sean Davis is the General Counsel for the WSBA, a 2014 Washington Leadership Institute Fellow, and former WSBA Governor. He also serves as a Captain in the United States Air Force Reserve. He can be reached at seand@wsba.org
Local Counsel
In an Era of National Litigation

With many kinds of litigation becoming more national in scope, the role of local counsel has also evolved. Gone are the days when a long-lost college roommate may contact you simply because you are the only Washington lawyer he or she knows for what will likely be the only matter he or she ever has in Washington. In today’s more homogenized market, firms often have specialized expertise with a national reach and have long-standing relationships with local firms throughout the country. The national firm typically brings the substantive expertise and principal client contacts, and the local firm contributes its knowledge of local courthouse personalities and procedures.

In this column, we’ll look at three facets of being local counsel from the risk management perspective. First, we’ll examine the mundane but central task of knowing the pro hac vice requirements in both Washington state and federal civil trial courts. Second, we’ll address how local counsel can document their own role when they are being hired primarily for their local expertise. Finally, we’ll discuss the practical importance of documenting the compensation arrangement involved.
Washington’s pro hac vice rules vary depending on whether the litigation involved is in state or federal court.

Pro hac vice admission in state court is a two-step process—with both facets governed by Admission and Practice Rule (APR) 8(b). Local counsel must first file a motion to admit the out-of-state lawyer with the court concerned. The form is specified by the rule. The out-of-state lawyer must certify that the lawyer is a member in good standing of the lawyer’s “home” jurisdiction and that the lawyer has read the Washington Rules of Professional Conduct (RPCs). Local counsel must also certify that he or she is an active WSBA member, will be responsible for the conduct of the out-of-state lawyer, and will be present at all proceedings unless excused by the court. At the same time the motion is submitted to the court, local counsel must also forward a copy to the WSBA along with a specific cover sheet and the requisite fee. (Templates for the motion and cover sheet are available on the WSBA website at https://www.wsba.org/for-legal-professionals/join-the-legal-profession-in-wa/lawyers/pro-hac-vice.)

Pro hac vice admission is “one stop” in federal court—but with unusual geographic twists. Pro hac vice admission is regulated by Local Court Rule (LCR) 83.1(d) in the Western District and Local Rule (LR) 83.2(c) in the Eastern District. Both require that local counsel be a member of the bar of the court concerned and that the out-of-state lawyer involved is a member in good standing in the lawyer’s “home” jurisdiction and that no disciplinary proceedings are pending against that lawyer. In the Western District, local counsel “must have a physical office within the geographic boundaries of the Western District of Washington[.]” At least on its face, therefore, a lawyer officered in Spokane could not be local counsel for a federal court case in Seattle even if the lawyer is a member of the Western District bar. In the Eastern District, local counsel must have “an office in this state.” Again, at least on the face of the rule, a lawyer officered in Coeur d’Alene could not be local counsel for a federal court case in Spokane even if the lawyer is a member of the Eastern District bar. It is possible to ask for a waiver of the physical office requirement, but the decision is discretionary with the court concerned.

Like any other motion, pro hac vice applications must be served on opposing counsel under the applicable state and federal rules. Although it is a rare occurrence, opposing parties have standing to both oppose pro hac vice motions and to seek revocation of pro hac vice status as the functional equivalent to disqualification. The court in Hallman v. Sturm Ruger & Co., Inc., 31 Wn. App. 50, 639 P.2d 805 (1982), discusses state law on these points and the court in Cole v. U.S. District Court of the District of Idaho, 366 F.3d 813 (9th Cir. 2004), does the same for federal courts in the Ninth Circuit.

With any representation, it is important to document the scope of the lawyer’s role as a matter of risk management. With local counsel, two factors can often sharpen that need even further. First, local counsel today are often hired for their insights on the particular practices and personalities in the venue concerned rather than overall responsibility for the case. Second, national counsel most often have the direct contact with the client and are effectively the lawyers “calling the shots” in conjunction with the client.

Under Evans v. Steinberg, 40 Wn. App. 585, 699 P.2d 797 (1985), and Mazon v. Kraetchick, 158 Wn.2d 440, 144 P.3d 1168 (2006), co-counsel are generally precluded from suing each other for legal malpractice involving a jointly represented client. But if an error occurs in a facet of the case that is well beyond local counsel’s role—or even knowledge—an engagement agreement with the client clearly articulating the local counsel’s role can provide a practical defense to a claim by the client.

RPC 1.2(c) allows a lawyer to “limit the scope of the representation if the limitation is reasonable under the circum-
stances and the client gives informed consent.” The utility of this rule and an accompanying letter as a protective device may vary depending on whether the matter involved is in Washington state or federal court.

In state court, APR 8(b), in pertinent part, makes local counsel “the lawyer of record.” The rule also makes local counsel “responsible for the conduct thereof,” but the accompanying pro hac vice motion template defines this responsibility as applying to the “applicant”—in other words, the out-of-state lawyer—rather than the case as a whole. This approach is consistent with [Hahn v. Boeing Co., 95 Wn.2d 28, 34, 621 P.2d 1263 (1980)], in which the Supreme Court defined the role of local counsel in this context:

There are two legitimate judicial needs which are involved in considering a pro hac vice application: (1) reasonable assurance that the attorney is competent and will conduct himself in an ethical and respectful manner in the trial of the case, and (2) reasonable assurance that local rules of practice and procedure will be followed. The association of local counsel is designed to secure the second of these aims.

In federal court, Western District LCR 83.1(d)(2) and Eastern District LR 83.2(c)(1) each defines the role of local counsel more broadly than their state counterparts. The Western District rule requires that “local counsel attest . . . that he or she is authorized and will be prepared to handle the matter, including the trial thereof, in the event the applicant is unable to be present on any date scheduled by the court.” The Eastern District rule requires that local counsel “shall meaningfully participate in the case.” Although a letter defining the scope of local counsel’s role remains a prudent practice, it may not have the same protective effect in a federal case as in state litigation in light of these certifications.

Another important area to confirm at the outset is the fee arrangement. There are several common approaches, but with each, documenting them up front can help avoid problems later. With hourly fees, two approaches predominate.

First, the local counsel can simply bill the client directly. This is a typical approach in defense litigation when the local counsel already has a relationship with the client.

Second, the local counsel may submit its bill through the national counsel. In this approach, local counsel services are treated as the functional equivalent of a litigation expense for billing purposes. Billing legal fees as expenses is discussed generally in ABA Formal Opinion 00-420.

With contingent fees, two approaches also predominate.

In some instances, local counsel services are simply treated as a litigation expense by the out-of-state lawyer.

In others, the local counsel may split the overall fee (if successful) with the out-of-state lawyer. Washington RPC 1.5(e) allows lawyers from different firms to split fees as long as the client approves and the overall fee is reasonable. RPC 1.5(e) also requires that “the division is in proportion to the services provided by each lawyer or each lawyer assumes joint responsibility for the representation[,]” Contingent fees must be in writing under RPC 1.5(c)(1) and either that agreement or a written supplement should document any percentage split accorded to local counsel. Lacking a written agreement, in the event of a dispute later with the out-of-state lawyer over the fee, the local counsel may be limited to quantum meruit recovery.
“The endless questioning finally ended. My psychiatrist looked at me. There was no uncertainty in his voice. Manic-depressive illness. I admired his bluntness. I wished him locusts on his lands and a pox on his house. Silent, unbelievable rage. I smiled pleasantly. He smiled back. The war had just begun.”

The Therapist and
A psychiatrist and a lawyer analyze

The Family Died Anyway
by Jon Berner, M.D., Ph.D.

In Volk v. DeMeerleer, the Washington Supreme Court ruled that a psychiatrist could be liable for homicides committed by a patient, even though the patient never identified the victims as targets of violence. The core state interest articulated in the Volk decision is “society’s strong interest in preventing attacks by mentally ill patients.”

The patient (DeMeerleer), in treatment with the same psychiatrist for nine years, killed his former girlfriend and one of her children, and attacked another of her children with a knife. The patient last saw his psychiatrist three months before the killings. The patient at the time reported to his psychiatrist that he was taking his medications and tolerating intermittent suicidal thoughts. He produced no violent fantasies in the session. A majority of the Washington Supreme Court found persuasive the testimony of one expert witness that more extensive “assessment” by the psychiatrist during a brief session in April would have prevented the violent attacks in July.

Unfortunately, this decision is almost completely divorced from current clinical practice on multiple levels: primary among these are predictability of violence and clinician control over outpatients.

Continued on page 18
In late 2016, Washington’s highest court imposed an expansive tort duty on therapists practicing in the outpatient setting.

To promote public safety, therapists must "affirmatively protect" foreseeable third parties from the dangerous propensities of outpatients. The common law duty to protect arises from the therapeutic relationship, independently of any ability of therapists to control such outpatients in the community.

Washington’s lower courts have yet to develop the scope of the duty, which represents an “outlier” in a 50-state survey. In other jurisdictions, no outpatient duty exists, a narrow duty exists to warn identifiable targets of threats, or the duty is clearly defined by statute. In Washington, professional impacts have been forecasted for therapists (see also Dr. Berner’s companion article).

Individuals with mental illness may be deterred from outpatient services and treatment. The high standard for civil commitment and the limited capacity of related public resources present additional challenges to advancing public safety through the duty. Anticipating such issues and seeking clarity of the duty, many in the mental health community support

Continued on page 22
Jan DeMeerleer murdered Rebecca Schiering and her nine year old son Philip, and attempted to murder Schiering’s older son, Brian Winkler. After the attack, DeMeerleer committed suicide. DeMeerleer had been an outpatient of psychiatrist Dr. Howard Ashby for nine years leading up to the attack, during which time he expressed suicidal and homicidal ideations but never named Schiering or her children as potential victims. We must decide whether Ashby, as a mental health professional, owed DeMeerleer’s victims a duty of care based on his relationship with DeMeerleer. We hold that Ashby and DeMeerleer shared a special relationship and that special relationship required Ashby to act with reasonable care, consistent with the standards of the mental health profession, to protect the foreseeable victims of DeMeerleer. Ashby conceded the existence of a special relationship between him and DeMeerleer. The foreseeability of DeMeerleer’s victims is a question of fact appropriately resolved by the fact finder. Accordingly, we affirm the Court of Appeals in part and reverse the trial court’s summary judgment dismissal of the medical negligence claim.

suicide are observed in correctional settings despite court-mandated access to mental health treatment and the lower standards for involuntary commitment affirmed by the U.S. Supreme Court in Harper v. Washington.6

In the outpatient setting, compliance is even more problematic. Consistent with the facts in Volk and with the relapsing/remitting course of bipolar illness, patients routinely drop in and out of treatment. One review of 29 studies found a median nonadherence rate to prescribed oral antipsychotic medication of 46 percent, with a range between 5 and 85 percent. The median rate of nonadherence to medications in bipolar patients in another review is estimated to be 42 percent.7

There is no good data available to evaluate whether or not an individual practitioner could have improved a specific individual’s medication adherence rate above the baseline rate of 42 percent. Goodwin and Jamison note “of the thousands of articles written about lithium and other mood stabilizers, remarkably few deal in a substantive way with nonadherence. This lack of research is extraordinary given the extent of the clinical problem posed by patients who refuse to take their medication as prescribed….other issues, concerning practical matters—in particular, medication costs and treatment affordability and availability—are obviously important but have not been adequately studied.”

The remedies to improve compliance suggested by the Volk court in footnote 128 should be summarily dismissed as speculation. No psychiatric journal would publish them. There is no data provided that threatening involuntary hospitalization improves long-term outcomes substantially, although “logic” and “common sense” suggest substantial costs to the physician-patient therapeutic alliance if a patient is committed involuntarily. There is no data that “closer monitoring of medication compliance and the patient’s mental state” improves long-term outcomes substan-

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THE VOLK COURT DEFAULTED TO UNDEFINABLE PROFESSIONAL STANDARDS OF "REASONABLE" MENTAL HEALTH CARE.

CONSEQUENCES OF VOLK

Psychiatric treatment is an expensive and unreliable technology. Psychiatric resources are scarce, and patients’ ability to pay is limited: Despite spending 18 percent of Gross Domestic Product on general medical care, we have not yet invented psychiatric medical technology inexpensive enough for every American to afford complete access. The fatal conceit in Volk v. DeMeerleer is that a panel of judges, obviously without medical training, can improve the distribution of the scarce commodities of psychiatric time and patient resources. There is no evidence that they have any expertise or even useful intuition in this matter.

The Volk court identified “the public’s interest in safety from violent assault” as a policy concern at issue in the case before it.10 Arguably, the net effect of the court’s decision is to lower public safety. Put simply, when society adopts liability schemes such as set out in Volk, the costs are simply shifted to different parties. This opinion shifts costs of violent behavior from society in general to the one to two percent of the population with serious mental illness. It is a tax on mental illness, placed on a population already beset by downward economic drift.

Our clinic already must turn away hundreds of patients a year, largely because they cannot afford to purchase psychiatric time, a scarce medical commodity. We frequently hear complaints from potential patients that no one will see them because of their history of violent behavior. Volk will make their access problems worse in a state that has ranked last in the nation for access to mental health services.11 It will also increase patient costs because physicians will, by design, minimize liability by requiring more frequent visits and more expensive interventions, and by threatening referral to involuntary commitment more aggressively.

Revisions in tort law that restrict
mentally ill citizens’ access to care and enlist their physicians as facilitators should require more than “common sense” and “logic” when balancing competing claims. Such revisions require data: an objective consensus of clinical opinion—which is missing from the majority opinion in Volk.

Physicians might reasonably ask their legal colleagues to consider reversing the arrow of time when interpreting tort law. Instead of looking backward from a horrific event and attempting fruitlessly to identify its proximate, preventable cause, can the courts structure a tort system that encourages innovation in both scientific treatment and cost-effective access? The Volk decision creates additional barriers to these necessary innovations. The record in Volk v. DeMeerleer describes excellent psychiatric care in terms of maintaining a therapeutic relationship over nine years with a psychotic bipolar patient (no small feat!), appropriate prescription of dual mood stabilizer treatment (antipsychotic and anticonvulsant), and compassionate and thoughtful documented clinical reasoning in the last clinic visit before the murder-suicide. Yet the family died anyway. NWL

Jon Berner, M.D., Ph.D., has practiced in Woodinville for the last 20 years. He trained at Harvard, UCLA, and the University of Washington, and is Board Certified in Psychiatry. Some of his commentary also derives from six years of experience working in the state prison in Monroe, Washington. He currently has active research interests in brain metabolism and chronic pain.

NOTES
3. Id. at 271.
8. Volk, 187 Wn.2d at 265 n.12.
10. Volk, 187 Wn.2d at 266.
11. Mental Health America. Parity or Disparity: the State of Mental Health in America 2015.

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Introducing the newest member of our family
Samuels Yoelin Kantor is pleased to welcome Caitlin Wong, who has joined the firm as an Of Counsel attorney.
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What constitutes a continuing outpatient relationship?

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Protecting Third Parties from Dangerous Outpatients (continued from page 17)

...a legislative solution. But it is too soon to evaluate if there have been real changes in public safety, civil commitment and capacity, outpatient treatment availability, and malpractice insurance.

These and other significant findings are reported in a comprehensive study and qualitative analysis commissioned by the Washington legislature. The study was published in December 2017, one year after the Washington Supreme Court’s decision in *Volk v. DeMeerleer* imposed the expansive “duty to protect” in the outpatient setting.

*Volk* involved an outpatient’s violence against his former girlfriend and her sons. For several years, Jan DeMeerleer received intermittent treatment in his community for bipolar disorder and depression. When he last saw his psychiatrist, DeMeerleer discussed intrusive suicidal thoughts but lacked a plan to act. He made no threats to harm anyone. At the end of the appointment, the psychiatrist advised him to continue his medication treatment plan. DeMeerleer remained stable and light-hearted in the community. Three months later, his on-again, off-again girlfriend ended their relationship for good. DeMeerleer expressed sadness over the break-up to his sister but was “laughing and normal” after a dinner at her home. The next evening, DeMeerleer left a telephone message for his mother in which he also sounded “normal” in tone. In the middle of the night, however, he went to his former girlfriend’s home and attacked one of her sons with a knife. The son awakened his family during a struggle with DeMeerleer and fled to safety. DeMeerleer then shot and killed his former girlfriend and another of her sons. He returned to his home and committed suicide.

The victims’ family brought a wrongful death lawsuit against the psychiatrist and his clinic for medical negligence and related claims under theories involving a failure to warn the victims or mitigate DeMeerleer’s dangerousness. The trial court granted the motion for summary judgment brought by the defendant psychiatrist and clinic on the grounds that the plaintiffs failed to establish a genuine issue of material fact that DeMeerleer made actual threats directed at the victims prior to the attack, and that the psychiatrist was under no legal duty to warn the victims prior to the attack. The family then successfully appealed to the Court of Appeals and Washington Supreme Court.

The legislative “Volk Study” examined whether the Washington Supreme Court’s decision “substantially changed the law on the duty of care” for outpatient therapists, and whether it has impacted “mental health services in the state.” Data and surveys of diverse stakeholders, including plaintiff and defense personal injury counsel, licensed therapists and professional mental health associations, and public health analysts supported the study’s findings.
COMMON LAW PRECEDENT AND STATUTORY RESPONSES PRIOR TO VOLK

A staple of law school torts discussions, the groundbreaking Tarasoff decisions by the California Supreme Court in the mid-1970s imposed an expansive duty on therapists to protect foreseeable victims from outpatient violence. The Volk duty originates from Tarasoff and a reliance on the “special relationship” test set forth in Section 315 of the Restatement (Second) of Torts, which triggers liability for the negligent failure to protect endangered third parties. Despite Tarasoff’s influence as common law precedent, however, the California legislature responded to judicial concerns and criticisms by the mental health community to narrow the duty of “psychotherapists” to warn “reasonably identifiable victims” of patient danger.

Following a similar path, the Washington Supreme Court adopted Tarasoff and the Section 315 duty in a personal injury case involving gross negligence by Western State Hospital in discharging a dangerous patient. In the 1983 Petersen v. State of Washington decision, the Washington Supreme Court held that the hospital had an expansive duty to protect anyone foreseeably endangered by the patient. Petersen generated a four-year reform movement that resulted in the Washington legislature’s 1987 narrowing of the duty under current RCW 71.05.120(3).

As noted in the Volk Study, the pattern of an expansive common law duty being refined by state legislatures or in subsequent cases has repeated itself in many surveyed jurisdictions. The Volk majority upheld a “[Section] 315 Petersen duty,” but did not weigh RCW 71.05.120, which the Court of Appeals had held inapplicable to outpatient settings because the statute amended the Involuntary Treatment Act (ITA) regarding civil commitment. Instead, the Supreme Court’s Volk decision relied heavily on Petersen and the Ohio Supreme Court’s common law and public safety analyses in Estates of Morgan v. Fairfield Family Counseling Ctr., 77 Ohio St. 3d 284 (1997). As discussed below, however, the Volk majority failed to discuss the Ohio legislature’s subsequent enactment of a narrowed statutory duty to protect third parties.

THE VOLK DUTY FOR OUTPATIENT THERAPISTS

The Supreme Court in Volk held that outpatient treatment creates a “special relationship” giving rise to the therapist’s duty of reasonable care to act within the standards of the mental health profession to protect foreseeable third parties from harm. The therapist must employ variable means to protect “foreseeable victims”—victims a fact finder would determine in any subsequent lawsuit—from a patient’s “dangerous propensities.”

The patient who shares dangerous-sounding feelings or thoughts in the outpatient setting—whether a therapist has greater control. The therapist must employ variable means to protect “foreseeable victims” from a patient’s “dangerous propensities.”

The therapist must employ variable means to protect "foreseeable victims" from a patient’s "dangerous propensities"
legislature addressing this question after a comprehensive review of scientific data and statistics and after a thorough airing of the competing interests and policies involved.” Yet the Court of Appeals majority ultimately relied on Petersen to impose the expansive duty to protect. The dissent cited the

1987 ITA amendment as dispositive: “I would hold the trial court reasoned that respondents could not have reasonably identified [the victims] as Mr. DeMeerleer’s targets because he communicated no ‘actual threat of physical violence’ toward them.”10

ISSUES RAISED BY THE SUPREME COURT’S MAJORITY DECISION IN VOLK

The Volk Study identifies several issues in the Volk majority decision, many of which were discussed in the Washington Supreme Court’s dissenting opinion.

For example, the majority relied on Section 315 but also quoted a special relationship description from Section 41, Restatement (Third) of Torts, which has not been adopted by any court.11 The Volk Study also notes the lack of a discussion in Volk of the Ohio legislature’s response to the Morgan case (discussed above) “to respectfully disagree with and supersede the statutory construction of the Ohio Supreme Court.”12 Ohio’s 1999 statutory reform instead requires a patient’s explicit threat of imminent and serious physical harm or death against a clearly identifiable potential victim, and even then, a duty to protect arises only when a therapist believes the patient will carry out the threat.13

At the same time, some surveyed stakeholders hold the view that Volk did not change Washington law: “If there is a reasonably identifiable victim, then a provider has a duty to warn; if not, a provider has a duty to take reasonable precautions to protect.”14 However, the Volk Study’s analysis of the responses of a majority of stakeholders against the backdrop of a 50-state survey illuminated a lack of clarity regarding when the Volk duty arises, what constitutes a “definite, established, and continuing” outpatient relationship, the necessary means to discharge the duty, and when the duty ends so as to extinguish a therapist’s exposure to liability.

THERAPIST AND PATIENT CONCERNS RELATED TO THE VOLK DUTY

The Volk duty “requires a therapist to take steps to protect the public from their patient regardless of whether he presents an identifiable danger to others.”16 As noted by the Volk Study, however, “[p]redicting dangerousness and violence is not a science.”17 In addition to the practical challenges therapists face to fulfill this duty, the Volk dissent challenged the majority’s public safety rationale as dubious given the risk of potential unnecessary increases in involuntary commitment and use of law enforcement resources, breach of patient confidentiality protections, and discouragement of patients from seeking outpatient services and treatment.18

Likewise, the Volk Study reported widespread concerns among surveyed stakeholders that Volk risks the devaluation of patient care and clinical judgment in favor of a legally constructed duty that focuses on foreseeable victims. For example, potential impacts on patient-provider relationships “are more likely to be realized and magnified due to societal attitudes about mental illness and limitations on access to mental health treatment. Having a mental illness still carries with it significant stigma to many in our society. And many with a mental health diagnosis do not receive treatment to address their condition(s). For a considerable number of these individuals, fear of the stigma associated with mental illness and treatment prevents them from accessing the care they need.”19

Therapists may encounter individuals whose dangerousness exists outside the focus of many provider-patient relationships

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I help individuals and businesses find the best resolution to their disputes with the IRS.
Washington, behavioral health statistics show that nearly 60 percent of patients with mental illness do not receive mental health services.20

After Volk, the specter of criminal investigations of patients also may deter treatment. “When people with mental illnesses come in contact with police, they are twice as likely to be arrested as other individuals.”21 State v. Trey M., decided three months before Volk, illustrates the criminal consequences a patient may face from required disclosure of counseling statements.22 In Trey M., a “troubled and bullied young high school student was in counseling to address trauma stemming from his childhood of abuse and neglect. Following coaxing from his therapist to discuss his angry thoughts and plans, and in the context of the therapist-patient relationship, he disclosed his desire to violently harm three other students.”23 The therapist’s reporting of these “true threats” against three bullying classmates ultimately resulted in the patient’s felony harassment conviction that was upheld on appeal.

As a final complicating factor, therapists may encounter individuals whose dangerousness exists independently from the focus of many provider-patient relationships. Domestic violence, as emphasized in a judicial guide by the Washington State Administrative Office of the Courts, is not caused by anger or stress, or alcohol or drugs—or illness generally. “Illness-based violence (e.g., Alzheimer’s disease, Huntington’s chorea, psychosis) is uncommon, but it does happen, and such cases may end up in court as domestic violence.”24 Beyond addressing an outpatient’s risk of such uncommon harm to family, or to strangers in cases such as Petersen, the efficacy of the Volk duty to protect domestic violence victims may lack a sufficient nexus to root causes.25

THERAPIST RESPONSES AND POTENTIAL LEGISLATIVE REFORM NOTED IN THE VOLK STUDY

The majority of stakeholder therapists surveyed in the Volk Study expressed concerns over the scope and impact of

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Testifying expert for plaintiff’s counsel in connection with TRADEMARK and COPYRIGHT infringement claims made against defendants. Conducted forensic accounting analysis to discover amounts of infringed sales and calculated three components of damages allowed: 1) Defendant’s profit; 2) Actual damages of plaintiff; and 3) Costs of the action. Prepared mediation and trial schedule in anticipation of settlement or trial.

Question, Comment, Request?

The WSBA Service Center is open Monday through Friday, 8 a.m. to 5 p.m.

WSBA 800-945-WSBA (9722) • 206-443-WSBA (9722) • questions@wsba.org
Protecting Third Parties from Dangerous Outpatients (continued from page 25)

Volk. Such stakeholders are considering policy changes to address the expansive duty to protect all foreseeable persons potentially endangered by an outpatient, or they already have done so. For some therapists, concerns over Volk liability are prompting them to screen out potential patients with homicidal or suicidal ideation, terminate treatment of similar patients or those with a history of domestic violence, or consider early retirement. In many important aspects, however, the lasting impacts of the controlling Volk decision have yet to be seen.

Beyond administrative and clinical responses, the legislative check and balance envisioned by the Volk Court of Appeals majority decision has begun with the Volk Study and through bills introduced to refine the duty of outpatient therapists to protect third parties. While Washington’s highest court could revisit the duty, legislative parties. While Washington’s highest court could revisit the duty, legislative

Parties. While Washington’s highest court could revisit the duty, legislative


2. For purposes of this article, “therapists” includes mental health professionals defined by RCW 71.05.020(30), e.g., as psychiatrists, psychologists, and social workers, and other professionals who are subject to Washington’s mental health laws.


5. Volk Study, Appendix A (“Volk Study Appropriation”), Senate Bill 5883, Operating Budget, Section 606.

6. Tarasoff v. Regents of the University of California, 13 Cal.3d 177 (1974); Tarasoff v. Regents of University of California, 17 Cal.3d 425 (1976). As noted in the Volk Study, the “duty to protect” announced by the 1974 Tarasoff decision and seemingly narrower “duty to warn” in the 1976 Tarasoff decision have yet to be seen. In many important aspects, however, the lasting impacts of the controlling Volk decision have yet to be seen.

7. See Cal. Civ. Code, Section 43.92 (which in 2013 replaced California’s post-Tarasoff statutory “duty to warn” with a “duty to protect,” but emphasized this was not a substantive change in the duty); Volk Study at 7.


10. Id. at 441 (Brown, A.C.J., dissenting) (citing former RCW 71.05.120(2), currently codified at RCW 71.05.120(3)).

11. Volk Study at 22; see Volk, 187 Wn.2d at 273.

12. Volk Study at 21.

13. Id. (citing Ohio Rev. Code Ann. Section 2305.51 (2014)).

14. Volk Study at 45.


16. See id. at 16.

17. See Volk Study at 49.

18. See Volk Study at 49.


20. See U.S. Dept. of Health and Human Services, Substance Abuse and Mental Health Services Administration, Behavioral Health Barometer, Washington, Vol. 4, at 9 (reporting that in Washington from 2011 to 2015, an average of 58.3% of adults with any mental illness did not receive mental health services).


22. See State of Washington v. Troy M., 186 Wn.2d 884, 903 (2016) (whether a “defendant’s statements ‘were serious threats and that a reasonable speaker would so regard them, [or] . . . a cry for help from a mentally troubled [person], directed toward mental health professionals who could help him’ is an appropriate question for the fact finder”) (quoting State of Washington v. Schaler, 169 Wn.2d 274, 289-90 (2010)).

23. Id. at 908 (Gordon McCloud, J., dissenting).


25. By way of example, the Volk Study reported an Iowa Supreme Court decision declining to adopt the Tarasoff duty to protect in a case in which a husband with a history of domestic violence and psychiatric issues killed his wife after his release from a treatment facility. The court instead relied on a promise to notify the victim that triggered liability under Section 323, Restatement (Second) of Torts. See Volk Study at 64-65 (discussing Estate of Long ex rel. Smith v. Broadlawns Medical Center, 656 N.W.2d 71 (2002)).

Civics learning is essential for perpetuating our democracy, but it has been on the wane for years. For at least a generation, more Americans have been ignorant about our constitutional system than at any other time in history. Fewer Americans vote now and fewer young Americans believe deeply that our system is fair and just.

This is obviously a problem for the legal system. For example, it means not having a jury pool who will understand the important role they play in pursuing equal justice under the law. There is also a wider cultural problem of underrepresentation: Having fewer voters means that our elected officials are chosen by a minority of a minority. There’s a danger that minority viewpoints will be not only ignored but foreclosed.

The risks created by faltering public confidence in the legal system have been apparent for some time. It is up to the Washington state legal community to lead on the issue of citizen awareness. This is the only way the legal system will produce outcomes the public can rely on.

Lawyers are often seen as role models. A respected profession requires respectable representatives. If we see lawyers abusing common courtesy, abusing the legal system, or being dishonest, the consequences will play out in society.

Lawyers are obliged to explain the American justice system to other citizens, whether in our public schools, colleges and universities, or through other social networks. The Washington State Bar Association (WSBA) has attempted to foster such education through its civics and law-related websites, its lawyers’ assistance programs, and other pro bono activities. These are all important undertakings, but more is needed from the legal profession as a whole.
We need a larger public campaign emphasizing lessons in how America works, whether through explanation of its political and administrative process, its legal system, or other public authorities. The legal profession has a vested interest in fostering an informed public so that informed citizens will seek legal redress through the courts and feel encouraged to participate in administering justice as jurors or citizen advocates for human rights. This will only happen if they believe the system is reliable, fair, and affordable.

Several years ago, *Newsweek* gave 1,000 Americans the immigrant citizenship test. The results were awful, with some Americans being unable to circle Independence Day on a calendar. Likewise, a few years ago, the nonprofit Intercollegiate Studies Institute (ISI) gave 14,000 college freshmen and seniors from 50 prominent national universities a 60-question multiple-choice exam about American history, economics, and foreign policy. All flunked it, except students from Harvard University, who scored an average of D+. Later, ISI tested 3,500 adults, giving them essentially the same exam. All flunked, and those who had public service experience scored 5 points below the average adult.

Though Washington has passed laws that encourage civics learning, the laws fail to compel students to become proficient in American history, government, economics, and foreign policy. If more attention were paid to true civics learning, student scores in civics would be better and the student population would be less apathetic about such topics. The American Legislative Exchange Council gives Washington a grade of “C” for state-level education policies that provide high-quality options to all students, but without grading state schools on the topic of civics learning. These laws call for numerous evaluations and assessments, but hard data about whether our current approach to civics learning is effective is lacking and/or difficult to locate.

A recent study by Opportunity Nation and the Citi Foundation provides evidence of the value of civics education. These organizations found that Americans who are knowledgeable about civics vote more often, have greater opportunity for economic success, and are more thoughtfully and actively engaged in their communities.

In November 2015, I circulated an op-ed to former members of Congress, asking them to endorse a civics learning renewal. Democrats and Republicans enthusiastically signed on, urging a

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**Citizenship Quiz**

Some of the questions from the Civics and History section of the U.S. Citizenship test are listed below. See how many you can get right. Answers to the questions can be found at www.uscis.gov/citizenship/learners/study-test/study-materials-civics-test.

1. What is the supreme law of the land?
2. What does the Constitution do?
3. The idea of self-government is in the first three words of the Constitution. What are these words?
4. What is an amendment?
5. What do we call the first ten amendments to the Constitution?
6. What is one right or freedom from the First Amendment?
7. How many amendments does the Constitution have?
8. What did the Declaration of Independence do?
9. What are two rights in the Declaration of Independence?
10. What is freedom of religion?
11. What is the “rule of law”?
12. Name one branch or part of the government.
13. What stops one branch of government from becoming too powerful?
14. Who makes federal laws?
15. What are the two parts of the U.S. Congress?
16. What does the President’s Cabinet do?
17. What are two Cabinet-level positions?
18. What does the judicial branch do?
19. How many justices are on the Supreme Court?
20. Under our Constitution, some powers belong to the federal government. What is one power of the federal government?
21. Under our Constitution, some powers belong to the states. What is one power of the states?
22. What is one responsibility that is only for United States citizens?
23. Name one right only for United States citizens.
24. What are two rights of everyone living in the United States?
25. What is one promise you make when you become a United States citizen?
26. What are two ways that Americans can participate in their democracy?
27. What is one reason colonists came to America?
28. When was the Declaration of Independence adopted?
29. There were 13 original states. Name three.
30. What happened at the Constitutional Convention?
31. The Federalist Papers supported the passage of the U.S. Constitution. Name one of the writers.
32. What did the Emancipation Proclamation do?
33. What movement tried to end racial discrimination?
34. Name one American Indian tribe in the United States.
35. Name one U.S. territory.
return to literacy on the basics of our country and its governmental systems. Next, we plan to ask business leaders to endorse civics learning to help perpetuate the American democracy that has struggled for over 200 years to survive and provide opportunity to all. It’s important for all Americans, but particularly the next generation of leaders, to know how the United States came to be and why we treasure our institutions of freedom and legal equality.

Lawyers from across Washington should take it upon themselves to visit classrooms, service clubs, and other public venues as often as they can to inform and teach citizens about democratic principles.

The quest for civics learning has no political downside. It is not partisan. It is truly American and its most important constituents are students,
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- Spencer Nathan Thal, Attorney
  Poulsbo, Washington

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potentially America’s future leaders. If they know the story of America, they’ll be better prepared to defend the constitutional principles that have helped fuel American progress. That’s a legacy any lawyer can be proud of. NWL

George R. Nethercutt, Jr. is a former U.S. Congress-
man who represented the 5th Congressional District of Washington from 1995-2005. He practiced law in Spokane for 18 years before entering public service. In 1996, he formed the nonprofit, independent Nethercutt Civics Foundation, www.nethercuttcivicsfoundation.org, to foster an understanding of government and public policies in young adults. His foundation is working with Opportunity Nation and other groups to enhance civics literacy as a way to foster economic opportunity.

NOTES
2. See, e.g., Chapter 28A.150 RCW; RCW 28A.230.093; RCW 28A.230.095; and accompany-
ing WAC regulations.
Executive orders (EO) have been making headlines recently, and President’s Day offers an opportunity to examine presidential direct action.

10 Ten Significant Executive Orders and Proclamations

by Renee McFarland

Presidents have a wide array of tools at their disposal in addition to orders. These include presidential proclamations, presidential memoranda, national security directives, executive agreements, and presidential signing statements. At times, the media will refer to a presidential proclamation as an “executive order.” More complicated is the fact that, as presidential scholar Phillip J. Cooper writes in his book "By the Order of the President," some presidential proclamations “are substantive and carry the same force of law as an executive order.”

In general, executive orders, as Cooper writes, direct officers of the executive branch to “take an action, stop a certain type of activity, alter policy, change management practices, or accept a delegation of authority under which they will be responsible for the implementation of law.” A presidential proclamation “states a condition, declares the law and requires obedience to it, recognizes an event, or triggers the implementation of a law.” A basic distinction between the two is that an order is directed toward government officials and a proclamation is directed outside of the government. Modern executive orders must cite the authority used by the president to issue the order.

The earliest executive orders were often comments scribbled in the margins of a map or on a legal brief. Executive orders and presidential proclamations have been published in the Federal Register since 1935, pursuant to the Federal Register Act. President Kennedy, in signing Executive Order 11030 in 1962, set the basic policy governing the issuance of executive orders which is followed today.

Franklin D. Roosevelt issued 3,721 executive orders, the highest number of any president. John Adams, James Madison, and James Monroe each issued one. The following list contains historically significant executive orders and presidential proclamations, and offers a brief look at this complex and provocative subject.
The Proclamation of Neutrality, issued by President George Washington on April 22, 1793, against the backdrop of the war in Europe, established executive authority in the foreign policy arena, stating: “Whereas it appears that a state of war exists between Austria, Prussia, Sardinia, Great Britain and the United Netherlands, of the one part, and France on the other; and the duty and interest of the United States require that they [the United States], should with sincerity and good faith adopt and pursue a conduct friendly and impartial toward the belligerent Powers...” Congress ratified the proclamation after a long battle in both houses.

Arguably the most famous presidential proclamation, the Emancipation Proclamation, issued on January 1, 1863, ultimately led to the freedom of over three million slaves. Professor Cooper notes, “It is difficult to overestimate the importance of this declaration in American history.”

February 19, 2016 marked the 75th anniversary of Executive Order 9066, signed by President Franklin D. Roosevelt. Preceded by Presidential Proclamation 2537, which ordered residents of Italy, Germany, and Japan to register with the Department of Justice, EO 9066 set a dark chapter in American history into motion. Roughly 115,000 Japanese-Americans were interned at ten camps across the country. In 1988, the government issued a formal apology and paid $20,000 in compensation to more than 100,000 surviving victims of internment.

President Roosevelt signed Executive Order 8807 on June 28, 1941, which created the Office of Scientific Research and Development (OSRD). The OSRD conducted research and worked on a variety of war-related developments, paving the way for the creation of the world’s first atomic bomb.
On March 1, 1961, **President John F. Kennedy** signed Executive Order 10924, establishing the Peace Corps, followed by formal authorization by Congress on September 22 that year. Since then, more than 230,000 people have served in the Peace Corps in 141 host countries.5

**EXECUTIVE ORDER 9981**

President Harry Truman desegregated the military by signing Executive Order 9981 on July 26, 1948, which states: “There shall be equality of treatment and opportunity for all persons in the armed forces without regard to race, color, religion, or national origin.”4

**EXECUTIVE ORDER 10924**

**EXECUTIVE ORDER 12291**

President Ronald Reagan, shortly after taking office, signed Executive Order 12291 in February 1981. Historians see this executive order as important because it required that a cost/benefit analysis be applied to every regulatory action undertaken by the federal government, marking a move toward general deregulation.

**EXECUTIVE ORDER 12954**

President Bill Clinton signed Executive Order 12954, known as the “striker replacement” order, on March 8, 1995. Under the order, the Secretary of Labor was directed to examine the use of permanent striker replacements in firms with more than $100,000 in federal contracts. Businesses in violation would have their contracts terminated and would be ineligible to bid on other government contracts in the future. Ultimately, a unanimous three-judge panel of the United States Court of Appeals for the District of Columbia Circuit ruled that the order conflicted with the National Labor Relations Act.
President George W. Bush used executive orders to consolidate 22 federal agencies into a new Office of Homeland Security, whose primary mission is fighting terrorism. After the events of 9/11, President Bush and his administration actively worked to expand authority for unilateral executive action.

Through a series of presidential proclamations, President Barack Obama set aside more public land and water than any other president before him—over 265 million acres. Using the Antiquities Act, he expanded the Papahanaumokuakea Marine National Monument in August 2016, and established, among others, the Northeast Canyons and Seamounts Marine National Monument (September 2016), the Bears Ears National Monument and the Gold Butte National Monument (December 2016). 6

NOTES:
5. www.peacecorps.gov/about/.
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For decades, McKinley Irvin has helped clients navigate some of life’s most difficult challenges. Our family law attorneys, like David Starks, are known for their relentless pursuit of successful results, whether representing individuals in financially complex divorce or international family law matters. But perhaps our most noted distinction is our steadfast commitment to protect what our clients value most.

DAVID STARKS, PARTNER
- Fellow, American Academy of Matrimonial Lawyers (AAML)
- Fellow, International Academy of Family Lawyers (IAFL)
- Diplomate, American College of Family Trial Lawyers
- Named Top 100 Attorneys in Washington State by Super Lawyers
- Listed in The Best Lawyers in America
Of course there are people who weren’t invited to join a partnership with their local police, and have no interest in doing so because of their experience. Because of the stories that have been told over the dinner table, not just for a few years, but literally for generations that date back to the antebellum slave patrols and night riders.

I’ve talked to so many white cops who’ve said, “Please, don’t talk to me about slavery. My daddy was not a slave owner, his daddy was not a slave owner, his daddy’s daddy was not a slave owner. So please, let’s be relevant, let’s talk about today.” With zero appreciation of the truth, of the tradition, of the heritage as it is experienced in this country.

Outtakes from the Washington State Bar Association’s December panel on Race Relations, Policing and the Law: What is the legal system’s response in this time of racial tension?

**Moderator:** William D. (Bill) Pickett, President-Elect of the Washington State Bar Association

**Panelists:** Norm Stamper, Sue Rahr, Michele Storms

**NORM STAMPER** was the chief of the Seattle Police Department from 1994 to 2000 and has 34 years of policing expertise. He is the author of “Breaking Rank: A Top Cop’s Exposé of the Dark Side of American Policing” (Avalon 2006).

**BILL PICKETT:**
We’re here talking about the subject of race relations and policing. Norm, I’d like to know your thoughts on the intersection between community policing and race relations. Is there a role for community policing, or is it something that has come and gone?

**NORM STAMPER:**
There are 1,001 different definitions of community policing—here’s mine. Community policing is the community policing itself. ... A neighborhood has partners involved in the effort to achieve public safety and honor human rights and civil liberties. That partnership is critical. But the senior partner in that partnership is the citizenry...

There’s a large group of people who have no interest in joining with their local police department in this partnership. I refer to those who have developed over time deep mistrust of law enforcement. [This group is] disproportionately represented by young people, poor people, and people of color. If in fact in a pluralistic society, in a free and democratic society, those voices matter, it matters that those citizens participate in this partnership... We’ve got to find a way to drop some barriers. And one of them is to stop shooting so many of them.

**SUE RAHR** is a former King County Sheriff who is now the Executive Director of the Washington State Criminal Justice Training Commission. She has been quoted as describing police officers as “the guardians of our community” as opposed to the “warriors of our community.”

**BILL PICKETT:**
The question for you, Sue, is how are we training police officers today? I was down at the Academy last week and I saw a long corridor of officers lined up. I saw a lot of white faces and mostly male... I’m sure there are strides that you are making to somehow change some of that, but I want to drill down a little bit ... specifically to the training of officers and the selection of who gets to be trained in regards to the issue of race and policing.

**SUE RAHR:**
Well I can talk to you about the training. In our state, we have a single police Academy that does the training for all 300 city and county police departments and a few others.
We train everybody except the troopers. We do not do the hiring, so we basically take the recruits that are sent to us. I have basically selected a motto for the Academy — “Training the Guardians of Democracy.” Because I want to get the recruits focused on the Constitution, focused on freedom, focused on what their role is in maintaining our way of life. Unfortunately, popular culture portrays cops as the warriors. If you look at any police equipment publications, you would think you were looking at a military catalog.

We also have a political movement that started in the ’70s—the war on drugs, the war on crime, the war on freaking everything. And the cops were the ones on the front lines that were supposed to be fighting that war for us. So I don’t want to blame it on the politicians, we were certainly willing participants, but I think we have to be mindful that this is not something that emerged just in the vacuum of law enforcement We’re in this together.

How can we shift the mindset of our recruits early on so they start looking at themselves not as warriors, but as guardians? Every cop I know coming in the door said, you know, this is a calling. I want to do something good for the community. So my goal was to keep that intact. After five months of training them with warrior skills, I still wanted them to feel like they were serving a higher purpose, not out there to engage in battle.

When somebody sees themselves serving a higher purpose, they are more likely to manage their behavior and their decision-making. We can’t make enough rules to ensure that cops don’t make mistakes or don’t do the wrong thing because most of what they do is based on personal judgment and discretion. I would challenge recruits by saying, are you courageous enough to be compassionate?

I want them to be open to the concept of harm reduction rather than just taking bad guys to jail. When I came up—I joined in the late ’70s—it was all about arresting people. I believed with every fiber of my being that the more people I arrested, the safer the community was. I never thought beyond the booking desk. It’s like, hey, I got him out of the community, I dump him in a jail and something magic happens and they stop committing crimes.

Very wrongheaded thinking...

We try to get our recruits to look at the bigger picture. Is your action going to make the community safer? Is arresting that young man and giving him a felony conviction and taking him away from his children, his wife, his girlfriend, whatever, is that going to make the community safer?

MICHELE STORMS is Deputy Director of the ACLU-Washington. She is a former Dean of Students at the University of Washington School of Law and the recipient of the 2015 Distinguished Service Award from the WSBA’s Civil Rights Law Section.

"I've talked to so many white cops who've said, 'Please, don't talk to me about slavery.'"

Norm Stamper

BILL PICKETT: Michele, I’d like to know your thoughts on the intersection between community policing and race relations.

MICHELE STORMS: I want to step back and do a little context setting. I guess first I want to say at the ACLU, the things that we are really thinking about in the realm of policing relate to just a few specific topics: Excessive use of force, racially-biased policing, crisis intervention and what’s happening in that realm, more recently in particular, the ways in which law enforcement cooperates inappropriately with Immigration Services. And then also community oversight and the role of the sort of genuine, authentic community engagement with policing that Norm references a little bit...

In order to think about race relations in policing, you also have to think about race relations writ large... [In] the areas of the policing we look at, there are definitely places where there’s racial tension. But if we go back and look at our country, and [ask] what are the structures that are in place? We have a country that’s founded on racism. So we’ve had forced removal of Native Americans, slavery and Jim Crow,
immigration policies that absolutely disfavor black and brown people in that process and continue to be a source of difficulty in our country now in terms of our immigration laws. So these are some of the foundations.

And even where we have laws—where we had laws that were discriminatory, maybe those laws are gone, but we still have the history and the production of what was created by those laws. And so we have seen both explicit bias that has been present, and then we have implicit bias... we have unconscious factors in play when we encounter folks who are different from ourselves.

The work on implicit bias has been very deep and very scientific, so we know for a fact that people have certain reactions toward people they perceive as having disabilities or having mental health issues and absolutely [there are these reactions] along racial lines.

So we have our explicit biases and we have our implicit biases. So now lay that on top of law enforcement and what do you have? When I am someone with a gun in a tense situation, it could lead to death. And this is the very thing that we have seen happen that Norm referenced. We have a radical problem with loss of life in black and brown communities at the hands of police. And so how do I think we’re doing? We need to do a lot better than we’re doing.

Some of the things that make a difference are when the training for police is affirmatively taking on these questions of explicit and implicit biases—and I know Sue’s doing some great things bringing people in ... really talking with recruits about what their experiences are in these communities. That can make a difference.

Watch the entire one-hour webcast of this conversation at www.wsba.org/news-and-events/decoding-the-law.
A Two-Tiered Chess Game

The causation requirement in a legal malpractice action requires proving the merit of the underlying matter — the case within the case — which may be more complex than the professional negligence claim itself.

We have the knowledge and the experience to make the right moves and we would appreciate the opportunity to help you and your client.
The Washington statutory and case law governing the handling of dead bodies arise from the Judeo-Christian tradition in which the soul leaves the earthbound body, which returns to the dust from which it came. In that tradition the soul travels to another place. It ceases to inhabit the vessel we call the body. This belief, that the soul is gone from the dead body, is part of why Washington law struggles to address the issues of handling, burial, and desecration of human remains as a matter of property law rather than something sacred. The law of damages relating to human remains is limited in scope, and those with standing to claim damages are restricted to the next of kin. See RCW 68.50.160; Wright v. Beardsley, 46 Wash. 16, 89 P. 172 (1907). Under RCW 68.60.060, a civil action may be brought by the Cemetery Board (a state agency) for damage to abandoned and historic graves, but this relief is limited to “the repair and restoration of the property injured or destroyed and to the care fund if one is established.”

The legal rules are, of course, shaped by their cultural context, reflecting cultural beliefs and traditions. Case in point: the rules surrounding the remains of Native Americans. In contrast to the Judeo-Christian tradition, for the most part, the Native people, who lived and died here for thousands of years
before dissemination of the Torah and the Christian era, think about these things very differently.

Chief Sealth, after whom Seattle was named, gave a speech in the presence of Washington Governor Isaac Stevens in the mid-1850s that speaks eloquently to Native people’s beliefs about what happens after death.²

To us the ashes of our ancestors are sacred and their resting place is hallowed ground. You wander far from the graves of your ancestors and seemingly without regret.

Your dead cease to love you and the land of their nativity as soon as they pass the portals of the tomb and wander away beyond the stars. They are soon forgotten and never return. Our dead never forget this beautiful world that gave them being.

We will not be denied the privilege without molestation of visiting at any time the tombs of our ancestors, friends, and children. Every part of this soil is sacred in the estimation of my people.

And when the last Red Man shall have perished, and the memory of my tribe shall have become a myth among the White Men, these shores will swarm with the invisible dead of my tribe, and when your children’s children think themselves alone in the field, the store, the shop, upon the highway, or in the silence of the pathless woods, they will not be alone.

At night when the streets of your cities and villages are silent and you think them deserted, they will throng with the returning hosts that once filled them and still love this beautiful land. The White Man will never be alone.

I don’t know about you, but that sentiment comforts me.
Native Indian burial grounds and historic graves are acknowledged to be a finite, irreplaceable, and non-renewable cultural resource, and are an intrinsic part of the cultural heritage of the people of Washington. The legislature recognizes the value and importance of respecting all graves, and the spiritual significance of such sites to the people of this state;

There have been reports and incidents of deliberate interference with native Indian and historic graves for profit-making motives;

There has been careless indifference in cases of accidental disturbance of sites, graves, and burial grounds;

Indian burial sites, cairns, glyptic markings, and historic graves located on public and private land are to be protected and it is therefore the legislature’s intent to encourage voluntary reporting and respectful handling in cases of accidental disturbance and provide enhanced penalties for deliberate desecration.

RCW 27.44.030.
RCW 27.44.040 makes it a felony to knowingly disturb an Indian grave or to sell any Indian artifacts or human remains known to have been taken from an Indian cairn or grave. There is also a civil cause of action for violation of RCW 27.44.040 that provides for imputed damages of $500, or actual damages, whichever is greater, with actual damages to include damages for emotional distress. RCW 27.44.050(3)(c). Punitive damages are available for willful violations, RCW 27.44.050(3)(d), and the prevailing party may recover attorney fees. RCW 27.44.050(2)(a) & (5).

I litigated these issues in The Lummi Nation v. Golder Associates, 236 F. Supp. 2d 1183 (W.D. Wash. 2002). In this suit, the Lummi brought claims arising from the removal of human remains during construction of a sewage treatment facility on Semiahmoo Spit in Blaine, Washington. Under the current state of the law, any tribe or tribal member with “some familial, cultural, historic, or successor relationship with the remains” may sue for damages when a grave site is disturbed. While at treaty time in 1854 most of the Semiahmoo had moved north to Canada, some moved onto the Lummi Reservation. They became the successors to those who had lived and died at the site. (And it is no defense that the site is now outside Indian Country.)

On behalf of the defendant, we argued that RCW 27.44.050 violates both the privileges and immunities and the equal protection clauses of the Washington and United States Constitutions by impermissibly granting to one class of citizens rights not accorded to the citizenry generally, and solely on the basis of race or ethnic origin. Second, we argued that the statute impermissibly acts to establish religion in contravention of the First Amendment to the United States Constitution, and Article I, sec. 11, of the Washington Constitution. Third, we argued it impermissibly grants property rights of the state to private parties, in violation of both
Chief Seattle presciently warned us when he said his ancestors lived everywhere among us even after death.

Indian law has many unique features and our regional history provides ample reason to take it into account. Ethno-historians report that our climate was so temperate and the availability of food and shelter so abundant that this region we call the Salish Sea was home to one of the densest populations of inhabitants anywhere on the continent. They had time to develop rich art forms and elaborate social and political structures. They lived on all our shores and their remains may be encountered everywhere. Chief Seattle presciently warned us when he said his ancestors lived everywhere among us even after death. NWL

Notes
1. I tread lightly because, as in all things, it is dangerous to speak categorically as if all those who come from the same place share the same culture. I am still perplexed, for example, about how difficult it is to truly communicate when we speak the same language. Therefore, complain away if you are left out of this very brief analysis or if what follows doesn’t seem to tell your story.
2. Governor Stevens had imposed the Stevens Treaties on the tribes living in the territory we now know as Washington state before he returned to the East to fight and die in the Civil War. There is considerable controversy about whether Chief Seattle’s speech was, in fact, made. One of the earliest versions was reported in the Seattle Sunday Star on October 29, 1887.
3. The scope of imputed damages is undefined. For example, if 25 graves were disturbed, resulting in 25 violations, and 4,000 enrolled tribe members sued, would the recoverable damages be $50 million? What if 250 sets of remains were disturbed?
4. Carbon date testing from the Semiahmoo site indicates that this location had been occupied for over 4,500 years.
5. Whether the grant of jurisdiction to tribal court for a disturbance of an Indian grave site located outside of reservation lands would be sustained is a very interesting question touching, among other issues, sovereignty and unextinguished aboriginal rights, all of which is well beyond the scope of this article.
6. We had previously argued, also unsuccessfully, that the statute was an unauthorized exercise of power that was within Congress’s exclusive and plenary power to govern relations with the Native American tribes.
Thank you to our clients and peers for recognizing us as a leader in seven national practice areas and 27 regional practice areas as featured in the 2018 *U.S. News & World Report* and *Best Lawyers*®.

**National**
- Public Finance Law (Tier 2)
- Bankruptcy and Creditor Debtor Rights/Insolvency and Reorganization Law (Tier 3)
- Corporate Law (Tier 3)
- Financial Services Regulation Law (Tier 3)
- Insurance Law (Tier 3)
- Litigation – Environmental (Tier 3)
- Technology Law (Tier 3)

**Metropolitan Tier 1**
- **Seattle**
  - Bankruptcy and Creditor Debtor Rights/Insolvency and Reorganization Law
  - Commercial Litigation
  - Corporate Law
  - Criminal Defense: White-Collar
  - Health Care Law
  - Insurance Law
  - Litigation – Labor & Employment
  - Public Finance Law
  - Real Estate Law
- Trusts & Estates Law
- Spokane Municipal Law

**Metropolitan Tier 2**
- **Seattle**
  - Banking and Finance Law
  - Construction Law
  - Environmental Law
  - Financial Services Regulation Law
  - Litigation – Banking & Finance
  - Litigation – Bankruptcy
  - Litigation – Environmental
- Litigation – Intellectual Property
- Litigation – Securities
- Mergers & Acquisitions Law
- Spokane Commercial Litigation

**Metropolitan Tier 3**
- **Seattle**
  - Appellate Practice
  - Labor Law – Management
  - Natural Resources Law
  - Tax Law
  - Technology Law

You know someone that needs help with an L&I claim.

We’ll do the heavy lifting.

Thank you to our clients and peers for recognizing us as a leader in seven national practice areas and 27 regional practice areas as featured in the 2018 *U.S. News & World Report* and *Best Lawyers*®.
Many years ago as I was preparing for law school, a friend gave me a book about how to be more “fully human.” It worried me. She was a paralegal in a law firm and knew a lot more about law practice than I did. Could she think law school would rob me of my humanity?

Fast forward 35 years and my conclusion is people skills matter as much as, and sometimes more than, technical, knowledge-based legal skills. Mediating with hundreds of lawyers has confirmed for me that the most effective advocates demonstrate self-awareness. They have strong leadership skills. They understand their client’s needs and they practice respect. They listen attentively. These traits are among several skills, sometimes called “soft skills,” which can be learned. When practiced, soft skills help lawyers better serve their clients, the judicial system, and our communities.

In his book “Soft Skills for the Effective Lawyer,” Randall Kiser, an authority on attorney performance, explains that soft skills “are to hard skills as software is to hardware.” Kiser makes a compelling case. He argues that incompetence with soft skills can render the “hardware” of lawyering (i.e. knowledge of the law and advocacy skills) non-functioning or obsolete.

As a mediator I often encounter lawyers who are competent navigating the hardware of the law: knowledgeable in their area of legal expertise, and excellent advocates of their clients’ positions. It is the soft skills I see lawyers struggle with. The good news is these are skills that lawyers can learn. The start is recognizing their validity and effectiveness.

Soft skills are subjective abilities, traits and habits demonstrating understanding of human behavior and motivation. It makes sense that understanding human emotions and behavior would help anyone providing professional services. But the adversarial system can lead lawyers to emphasize strident advocacy. Soft skills can be seen as signs of weakness. Lawyers are in a complex people business, with duties to clients, courts, and the community. Lawyers’ ethical duties can obviously be complicated, including the tension between honoring client decisions and advising them as to the consequences of those decisions.

Randall Kiser decided to focus his research on the role of soft skills in lawyer performance after years of studying effective advocacy and durable attorney-client relationships. Kiser took a multidisciplinary, practice-based approach. In “Soft Skills for the Effective Lawyer,” Kiser describes and applies hundreds of studies regarding psychology, law, and soft skills and makes the compelling argument that lawyers who learn, develop, and use soft skills are more effective.

Kiser cites research results comparing intelligence, technical skills, and emotional intelligence which demonstrate: (1) at all job levels, emotional intelligence is twice as important as technical intelligence and (2) at leadership levels, soft skills are the key differentiator. In the study, nearly 90 percent of senior leaders demonstrated significant emotional intelligence. In a
summary of his research, Kiser makes his point about why soft skills matter:

Studies demonstrate that people who score high in assessment of their soft skills earn more income and generate more profits for their employers; exhibit superior leadership, decision-making, and prediction skills; experience fewer malpractice and disciplinary claims; and enjoy greater employment security. Conversely, emotionally ignorant leaders ranked among the bottom fifteen percent in decision-making skills. Those who fail to handle conflict effectively and remain unaware of their own fear, anger or excitement are dreadfully inept at making decisions.

High intelligence is not a substitute for soft skills. To the contrary, Kiser’s research shows exceptional intelligence brings with it an increased risk of performance deficiency. In other words, smart people are in particular need of strong soft skills. Kiser explains:

At least four prominent psychologists have observed and described specific deficiencies in problem solving that are correlated with high intelligence, suggesting that, unperturbed by soft skills, high intelligence may be hazardous to clients. ...[W]e tend to mistake verbal fluency for thinking, and as a result, fail to recognize that highly intelligent people are not necessarily effective thinkers.

Citing the work of Edward de Bono, a psychologist and physician, Kiser explains this intelligence trap: “They place a higher value on cleverness than wisdom, spend more time proving someone else wrong than constructively using their own intelligence, prefer reactive thinking, and tend to jump to conclusions.”

Attentive listening, the ability to recognize and differentiate emotions, understanding and responding with cultural competence, and behaving with civility are four particular skills that distinguish effective lawyering and increased client satisfaction.

Listening is tougher than one may think. When done well, listening demonstrates respect; when not done well, it is more than a communication failure. As Kiser aptly describes, “Not listening incites frustration, alienation, and anger, indicating that not being listened to violates our cultural norms and abases our sense of self-worth” and “superficial or impatient listening is offensive.”

Listening requires concentration, and, as communications professor Paul King states, “If you’re really concentrating, critical listening is a physically exhausting experience.” In contrast, when people talk about themselves, neuroscientists observe “heightened activity in brain regions belonging to the meso-limbic dopamine system, which is associated with the sense of reward and satisfaction from food, money or sex.”

Listening well requires an attitude of curiosity, a desire to learn. Brain science demonstrates that when we keep our minds engaged and learn new things, we improve our memories, and even extend our lives. Embracing and maintaining curiosity and continuing to learn are also keys to effectively representing clients. Kiser points to curiosity as an important soft skill and quotes David Maister, a law firm management consultant, who explains:

The key is to focus not on what we know, but on what we don’t know. And that is curiosity: the constant asking of questions. “What’s behind that?” “Why is this the case?” “How does this fit in?” As curiosity does its work, problem definitions evolve. Patterns emerge, connections are made, and positions soften and reform. Perspectives migrate, and richness of insight is gained. The “right answer” is never as right at the outset as it is after it has evolved, informed by inquiry.
Maya Angelou stated, “I’ve learned that people will forget what you said, people will forget what you did, but people will never forget how you made them feel.” The ability to precisely identify and distinguish emotions, known as “emotional differentiation” or “emotional granularity,” is particularly important for lawyers.

People who can identify emotions with precision and specificity are healthier, more resilient, less likely to suffer depression and alcohol dependence, and better at evaluating complex information and options. Kiser points out: “Like legal research software, our brains process inputs more efficiently and effectively when the critical issues are precisely identified.”

Kiser points to U.S. Supreme Court Justice Sonia Sotomayor’s recollection of her experience as an assistant district attorney:

Granting myself permission to use my innate skills of the heart, accepting that emotion was perfectly valid in the art of persuasion, amounted to nothing less than a breakthrough. [It was the] single most powerful lesson I would learn... It changed my entire approach to jurors, from the voir dire to the structure of my summations, and the results spoke for themselves: I never lost a case again.

Understanding and demonstrating awareness of cultural norms and differences we encounter with clients and colleagues is an absolute necessity to building rapport, establishing trust, and truly communicating. Cultural competence demonstrates respect and dignity, core values of our judicial

“THOSE WHO FAIL TO HANDLE CONFLICT EFFECTIVELY AND REMAIN UNAWARE OF THEIR OWN FEAR... ARE DREADFULLY INEPT AT MAKING DECISIONS.”

RANDALL KISER
system. In describing the importance of cultural competence, Kiser notes that to be culturally competent is to “extend to someone else the respect, kindness, deference, attention, tolerance, and gratitude that characterize our most effective interactions and modify our behavior to respect different values and mirror different ways of relating to people.”

Kevin John Fong, a cultural translator and facilitator, explains:

Just as we each have distinct ideas about how to get things done, organizations, communities, and groups also have distinct and habitual ways of perceiving and interacting with others. But when people come together from diverse traditions and cultures, relating and working together can prove to be complex. Uncertainty, suspicion, frustration, and inability to reach consensus can result. To achieve productive and sustainable outcomes, all members need to establish sufficient relational trust to sustain communities that can draw from the strengths of their respective cultures. Each individual must draw upon basic communication skills while learning to facilitate processes that work trans-culturally.

Fundamentally, soft skills require civility. When we keep civility central to our individual practices, we support fundamental societal values and we enhance our effectiveness for our clients. Lawyering with civility enhances one’s reputation and trustworthiness with colleagues, opposing counsel, and judges. Effective advocates understand that far from appearing weak, the lawyer who practices civility enhances her effectiveness.

Civility in the legal profession was described by Washington Supreme Court Justice Steven Gonzalez as “a way of connecting and interacting with people; of engaging and thinking about what our relationships are with one another, and of discerning what we care about it.” The quality of these connections with other lawyers and our clients depends on soft skills: how we communicate, argue and disagree, how we regulate our own emotions and understand our client’s emotional needs, how we show respect and understanding, and how we respond to incivility.

Dr. Rhea Settles, who offers civility training through The Civility Zone, emphasizes that civility can be taught. The first step is understanding what civility is. Dr. Settles offers this definition:

Civility is being mindful of what is done, said and written and decisions that are made in an effort not to harm.

As lawyers we have an enormous responsibility and opportunity with every word we write or say, and every action we take or resist taking, to willfully and mindfully practice civility. Everyone benefits when we come from a place of emotional intelligence. It matters.

NOTES:

Kathleen Wareham is a full-time mediator with Washington Arbitration and Mediation Service and a frequent speaker and writer on mediation advocacy skills, conflict resolution skills, and mediation ethics. She can be reached at kathleen@kathleenwareham.com.

APPEALS

OVER 500 CASES ARGUED ON THE MERITS

JASON W. ANDERSON | LINDA B. CLAPHAM*
MICHAEL B. KING* | JAMES E. LOBSENZ*
GREGORY M. MILLER*

°Fellow, American Academy of Appellate Lawyers
*Founding Members, Washington Appellate Lawyers Association

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The Board of Governors met Jan. 18-19 in Bellingham. The agenda, materials, and minutes from that meeting—as well as past meetings—are available at www.wsba.org (search “Board of Governors”). A recap of each meeting is also emailed to members the week following. The next meeting is March 8 at the Red Lion in Olympia.

Feedback Needed: Referendum Process Review Work Group Proposal
With a caveat that the work is far from done, the Board of Governors’ Referendum Process Review Work Group recently released initial recommendations that would change the scope and timeline for member referendums.

The Board of Governors intentionally set aside the referendum process during its comprehensive bylaw review from 2016-17 and instead chartered a specific work group in May 2017 to study this area. One of the work group’s main responsibilities has been to solicit member feedback.

The complete report—with both majority and minority opinions—is online at wsba.org (search “referendum work group”). Please review and send comments to sherryl@wsba.org.

Please note: The board has not yet set a timeline for continuing discussion or action on the initial recommendations.

Lawyer/Legal Advertising Rules: Simplified, Updated
Current legal ethics rules include comprehensive restrictions on the ways lawyers may provide information to the public about legal services. The scope of those restrictions may be narrowed in the future as the board considers updating Washington’s lawyer advertising rules in line with emerging national best practices and developments in other states.

The WSBA Committee on Professional Ethics recently recommended simplifying Title 7 of the Washington Rules of Professional Conduct (Information about Lawyer Services) while maintaining the core concept that all communication regarding a lawyer’s services must not be false or misleading. The proposal retains current Rule 7.1 (Communications Concerning a Lawyer’s Services); deletes current Rule 7.2 (Advertising), 7.4 (Communication of Fields of Practice and Specialization), and 7.5 (Firm Names and Letterheads) while preserving a number of the core concepts as comments to Rule 7.1; migrates referral-fee restrictions from Rule 7.2 to Rule 7.3 (Solicitation of Clients); authorizes real-time solicitation under Rule 7.3 except where that solicitation would lead to identifiable public harm; and relocates the authorization of law firms with offices in multiple jurisdictions to Rule 5.5 (Unauthorized Practice of Law).

The Board of Governors convened a work group in 2016 to review and evaluate the groundbreaking lawyer advertising report of the Association of Professional Responsibility Lawyers, and—based on the recommendation of the work group—referred the issue to the Committee on Professional Ethics to draft a proposal.

The advertising-rules recommendation went to the Board of Governors for first reading in January and will be on the agenda for action in March. The complete report is online at wsba.org (search “advertising rules”).

Eastern-Washington President-Elect Rotation in Bylaws
The current WSBA Bylaws (Article VI.D.2) require that the President-Elect come from the eastern side of the state every fourth year. Several governors have put forth proposals to modify that requirement. One eliminates the geographic requirement entirely; another requires installment of an eastern-Washington President-Elect if four years pass with no president otherwise elected from that region. The proposals—available to read in their entirety at wsba.org—were introduced for first reading at the January board meeting and will be on the March agenda for possible action. What do you think?
Send feedback to margarets@wsba.org.
Annual Clean Audit Shows Strong Financial Management

At the end of each year, the WSBA engages an independent certified public accounting firm to audit our financial statements. In addition to verifying financial statement accuracy, the auditors review, analyze, and test internal controls over reporting, management oversight, and various systems related to the WSBA’s finances and overall operations of the organization.

The Budget and Audit Committee reviewed the Fiscal Year 2017 year-end financial results at its January 2018 meeting. As in prior years, the WSBA received an “unmodified opinion” for the fiscal year ended Sept. 30, 2017. No adjustments were made, no material weaknesses were noted, and no management letter was issued. The results of this very positive audit indicate that the WSBA’s finances are accurate in all material aspects. For more information, the audit report and audited financial statements can be viewed at www.wsba.org/about-wsba/finances.

WSBA Executive Director Serves as VP of International Law Association

WSBA Executive Director Paula Littlewood began her term as Vice President of the International Institute of Law Association Chief Executives (IILACE) on Feb. 1, 2018, serving alongside law leaders from Namibia, Hong Kong, New Zealand, and Denmark, among other countries. IILACE is a unique forum for Law Society and Bar Association CEOs to exchange views and information of common interest to the legal profession, locally, regionally, and internationally. It supports the role of Law Societies and Bar Associations and promotes the rule of law.

(No WSBA funds are used for Littlewood’s travel expenses to participate in IILACE activities.) NWL

SGB WELCOMES

Liz McLafferty

ATTORNEY PROFILE

Product Liability
Serious Injury
Medical Malpractice
Mesothelioma-Asbestos
The Washington Supreme Court in January passed an order to codify the Board of Governors’ decision to add three new positions to its ranks—two community at-large seats and one Limited License Technician/Limited Practice Officer at-large seat. The board will hold a special meeting in February to determine how to bring on these new positions. Nomination information, timelines, and eligibility requirements will be posted afterward at www.wsba.org/elections; interested people can also contact Pam Inglesby at pami@wsba.org, 206-727-8226.

Eligibility:
District positions: Any active lawyer member of the Bar may run for the office of governor from the congressional district in which the member is entitled to vote. Any active lawyer member of the Bar who qualifies as a young lawyer as of Oct. 1, 2018, may run for the At-large: New & Young Lawyer position. For all positions, any Bar member who has previously served on the Board of Governors for less than 18 months is eligible to run for a second term.

Becoming a candidate:
To run for the Board of Governors, you must complete the appropriate nomination form posted on the WSBA website at www.wsba.org/elections. The WSBA must receive the forms for district races by 5 p.m. PST on Feb. 15, 2018. The deadline to run for the At-large position is 5 p.m. PST on April 20, 2018. Candidates for the At-large New & Young Lawyer position will be evaluated by the Washington Young Lawyer Committee (WYLC). The WYLC will nominate at least two candidates to be interviewed for election by the Board of Governors. For all positions, a WSBA member may nominate another member by completing the nomination form. For more information, contact Pam Inglesby at pami@wsba.org.

Voting:
The four district-based positions are elected by members in their districts. 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 13 or, if they request it, 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 2. The At-large governor will be elected by the Board of Governors at its May 17-18 meeting, which will be webcast.

Volunteer and Learn More About the Lawyer Discipline System
Interested in learning more about and volunteering for the lawyer discipline system? Apply now to be an adjunct disciplinary counsel (ADC). ADCs assist in carrying out the functions of the lawyer discipline system as needed pursuant to Rule 2.9 of the Rules for Enforcement of Lawyer Conduct (ELC). ADCs may be asked to assist staff disciplinary counsel with the investigation of a grievance; serve as special disciplinary counsel in the investigation of a grievance or prosecution of a disciplinary case; provide staff disciplinary counsel with an outside opinion on an area of law; serve as a practice monitor following imposition of a disciplinary sanction or suspension; or consult with a lawyer under the terms of a diversion contract. Prerequisite: ADCs must have been an active or judicial member of the WSBA for at least seven years at the time of appointment. Appointment is for a five-year term. Apply now through myWSBA. Applications accepted through February 28, 2017. Questions: email theaj@wsba.org.

Volunteer Custodians Needed
The WSBA is seeking interested lawyers as potential volunteer custodians under Rule
for Enforcement of Lawyer Conduct (ELC) 7.7. 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, or disbarred, or dies or disappears, and no person appears to be protecting the client’s interests. The custodian takes possession of the necessary files and records and takes action to protect the client’s 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 his or her 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.

**WSBA News**

**WSBA Board of Governors Meetings**

March 8, 2018, in 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 206-727-8284, 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.

**WSBA Budget**

At its September meeting, the Board of Governors approved the WSBA FY18 budget. To learn more about the budget, and the programs and services that it supports, visit www.wsba.org/About-WSBA/Financial-Info.

**MentorLink Mixer: Transitioning into Solo Practice**

February 16, 12 - 1:30 p.m.

WSBA Conference Center

Meet the mentors! WSBA MentorLink is hosting a luncheon with members who have gone solo. This free event is a casual setting for members to network with experienced practitioners and learn more about succeeding in the legal profession through solo and small practice. RSVP at www.wsba.org/connect-serve/mentorship/mentorlink-mixers.

**Legal Directory Launched**

The online lawyer directory has been renamed the Legal Directory and now includes all member types (limited license legal technicians, limited practice officers, and lawyers). There are also additional search fields to help you and the public locate licensed legal professionals. Check out the Legal Directory at mywsba.org/legaldirectory.

**WSBA 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 with the opportunity to engage with other attorneys across the state, give back to your profession, and advance 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 those who plan to teach – both current CLE faculty and those interested in future opportunities. Please log on and register in the CLE faculty database today at 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.

**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 Rules of Professional Conduct (RPC). 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/for-legal-professionals/ethics/about-advisory-opinions. 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 Member Wellness Program**

**WSBA Connects**

WSBA Connects provides free counsel-
Need to Know

ing in your community. All WSBA members are eligible for three free sessions on topics including work stress, career challenges, addiction, and anxiety. Upon calling 1-800-765-0770, a telephone representative will arrange a referral using KEPRO’s network of clinicians throughout the state of Washington. There is no need to let problems build up unnecessarily. We hope you make the most of this valuable resource.

Judicial Assistance Services Program
The purpose of the Judicial Assistance Services Program (JASP) is to prevent or alleviate problems before they jeopardize a judicial officer’s career. JASP provides confidential support and treatment for judges struggling with medical or mental health challenges, addiction, grieving, stress, or isolation. If you are a judge or are concerned about a judge, you are encouraged to contact the Judicial Assistance Services Program at 415-572-3803 or contact clinical consultant Susanna Kanther, Psy.D., at susanna@drkanther.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 Avenue, 7th Floor. Also, if you are seeking a Peer Advisor to connect with and perhaps walk you to this meeting, the Member Wellness Program can arrange this and can be reached at 206-727-8268.

Virtual Job Group Begins Feb. 19
Looking for a new job? This group uses the Zoom Videoconferencing platform to offer strategy and support to job seekers. We will meet online for six consecutive Mondays from Feb. 19 through March 26 between 9:30 and 11 a.m. The cost is $30 and you can sign up at tinyurl.com/ycmno5mr.

WSBA Practice Management Assistance
The WSBA offers free resources and education on law practice management issues, including financial management, marketing and client retention, and technology. For more information, visit wsba.org/pma.

Lending Library
The WSBA Lending Library is a free service to WSBA members offering the short-term loan of books on health and well-being as well as the business management aspects of your law office. You can view available titles at www.wsba.org/library. Books may be borrowed by any WSBA member for up to two weeks. If you live outside of 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, visit www.wsba.org/library.

Get Discounts on New Software and Services
Looking to build up your practice? Visit the Practice Management Discount Network for discounts on tools to help you improve your legal service delivery—featuring practice management software, credit card processing, and more. Visit www.wsba.org/discounts to get started.

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 wsba.org/casemaker. As a WSBA member, you already receive free access to Casemaker. We have now enhanced this member benefit by upgrading to add Casemaker+ with CaseCheck+ for you. Just like Shepard’s® Citations 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 discuss these features with you. For help using Casemaker, call the WSBA Service Center at 800-945-WSBA or 206-443-WSBA.

Quick Reference

Usury Rate
The maximum allowable usury rate can be found on the Washington State Treasurer’s website at https://tre.wa.gov/partners/for-state-agencies/investments/historical-usury-rates/.

General aviation accidents to major airline disasters

Robert F. Hushbuck, James T. Anderson
1420 Fifth Avenue, Suite 3000
Seattle, WA 98101
info@aviationlawgroup.com
206.464.1166 | aviationlawgroup.com
CLE seminars are subject to change. Please check with providers to verify information. To announce a seminar, send information to clealendar@wsba.org. Information must be received by the first day of the month for placement in the following issue’s calendar.

### CIVIL RIGHTS

**Civil Rights Spring CLE**
Mar. 23, Seattle & webcast. CLE credits pending. Presented in partnership with the WSBA Civil Rights Law Section; 800-945-WSBA or 206-443-WSBA. www.wsbacle.org

### GENERAL

**Crisis Communication**
Mar. 13, Seattle & webcast. CLE credits pending. Presented by the WSBA; 800-945-WSBA or 206-443-WSBA. www.wsbacle.org

### CONSTRUCTION

**Construction Project Scheduling & Delay Claims**
Mar. 2, Seattle & webcast. 6 CLE credits. Presented by The Seminar Group; 800-574-4852 or 206-463-4400; http://www.tsgregistration.net/5704WSB

### INTELLECTUAL PROPERTY

**From Panel to Publisher — Representing Comic Book Creator Clients in 2018**
Mar. 2, Seattle. 3 CLE credits (2 Law & Legal Procedure + 1 Other). Presented in partnership by the WSBA and Emerald City Comic Con; 800-945-WSBA or 206-443-WSBA. www.wsbacle.org

**Comic Book Contract Negotiation and Drafting Practicum**
Mar. 3, Seattle. 2.5 CLE credits (1 Law & Legal Procedure + 1.5 Other). Presented in partnership by the WSBA and Emerald City Comic Con; 800-945-WSBA or 206-443-WSBA. www.wsbacle.org

### LEGAL LUNCHBOX

**February Legal Lunchbox**
Feb. 27, webcast. 1.5 CLE credits. Presented by the WSBA; 800-945-WSBA or 206-443-WSBA. www.wsbacle.org

**March Legal Lunchbox**
Mar. 27, webcast. 1.5 CLE credits. Presented by the WSBA; 800-945-WSBA or 206-443-WSBA. www.wsbacle.org
These notices of imposition of disciplinary sanctions and actions are published pursuant to Rule 3.5(c) of the Washington Supreme Court Rules for Enforcement of Lawyer Conduct. Active links to directory listings, RPC definitions, and documents related to the disciplinary matter can be found by viewing the online version of NWLawyer at http://nwlawyer.wsba.org or by looking up the respondent in the legal directory on the WSBA website (www.wsba.org) and then scrolling down to “Discipline History.” As some WSBA members share the same or similar names, please read all disciplinary notices carefully for names, cities, and bar numbers.

Disbarred

John David Ferrell (WSBA No. 28922, admitted 1999) of Burley, was disbarred, effective 11/21/2017, by order of the Washington Supreme Court. The lawyer’s conduct violated the following Rules of Professional Conduct: 1.15A (Safeguarding Property), 1.15B (Required Trust Account Records), 8.4 (Misconduct). Scott G. Busby acted as disciplinary counsel. John David Ferrell represented himself. James E. Horne was the hearing officer. The online version of NWLawyer contains links to the following documents: Hearing Officer’s Decision; Disciplinary Board Order Declining Sua Sponte Review; and Washington Supreme Court Order.

Resigned in Lieu of Discipline

John Paul Brody Jr (WSBA No. 9503, admitted 1979) of Port Orchard, resigned in lieu of discipline, effective 11/08/2017. The lawyer agrees that he is aware of the alleged misconduct in disciplinary counsel’s Statement of Alleged Misconduct and rather than defend against the allegations, he wishes to permanently resign from membership in the Association. The Statement of Alleged Misconduct reflects the following violations of the Rules of Professional Conduct: 1.4 (Communication), 1.5 (Fees), 1.7 (Conflict of Interest: Current Clients), 1.8 (Conflict of Interest: Current Clients: Specific Rules), 1.15A (Safeguarding Property), 8.4 (Misconduct). Jonathan Burke acted as disciplinary counsel. John Stephan Moceri represented Respondent. The online version of NWLawyer contains a link to the following document: Resignation Form of John Paul Brody Jr (ELC 9.3(b)).

Betsy Ross Hollingsworth (WSBA No. 6181, admitted 1975) of Phoenix, resigned in lieu of discipline, effective 12/1/2017. 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: 1.3 (Diligence), 1.4 (Communication), 1.5 (Fees), 1.15A (Safeguarding Property), 1.16 (Declining or Terminating Representation), 3.2 (Expediting Litigation), 3.4 (Fairness to Opposing Party and Counsel), 4.1 (Truthfulness in Statements to Others), 8.1 (Bar Admission and Disciplinary Matters), 8.4 (Misconduct). Scott Etherton represented herself. The online version of NWLawyer contains a link to the following document: Resignation Form of Betsy Ross Hollingsworth (ELC 9.3(b)).

Gary C. Hugill (WSBA No. 4713, admitted 1972) of Richland, resigned in lieu of discipline, effective 12/11/2017. The lawyer agrees that he is aware of the alleged misconduct in disciplinary counsel’s Statement of Alleged Misconduct and rather than defend against the allegations, he wishes to permanently resign from membership in the Association. The Statement of Alleged Misconduct reflects the following violations of the Rules of Professional Conduct: 4.2 (Communication With Person Represented by Counsel), 5.5 (Unauthorized Practice of Law; Multijurisdictional Practice of Law), 8.4 (Misconduct). Benjamin J. Attanasio and Scott G. Busby acted as disciplinary counsel. Leland G. Ripley represented Respondent. The online version of NWLawyer contains a link to the following document: Resignation Form of Gary C. Hugill (ELC 9.3(b)).

Janet A. Irons (WSBA No. 12687, admitted 1982) of Issaquah, resigned in lieu of discipline, effective 12/1/2017. 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: 1.15A (Safeguarding Property), 1.16 (Declining or Terminating Representation), 3.2 (Expediting Litigation), 3.4 (Fairness to Opposing Party and Counsel), 4.1 (Truthfulness in Statements to Others), 8.1 (Bar Admission and Disciplinary Matters), 8.4 (Misconduct). Craig Bray acted as disciplinary counsel. Janet A. Irons represented herself. The online version of NWLawyer contains a link to the following document: Resignation Form of Janet A. Irons (ELC 9.3(b)).

Suspended

April Boutillette Brinkman (WSBA No. 36760, admitted 2005) of Portland, was suspended for six months, effective 12/22/2017, by order of the Washington Supreme Court. The lawyer’s conduct violated the following Rules of Professional Conduct: 3.5 (Impartiality and Decorum of the Tribunal), 8.4 (Misconduct). Colin Folawn acted as special disciplinary counsel and Joanne S. Abelson acted as disciplinary counsel. Timothy K. Ford represented the respondent. John A. Bender, Jr. was the hearing officer. David A. Thorner was the settlement hearing officer. The online version of NWLawyer contains links to the following documents: Hearing Officer’s Amended Decision; Disciplinary Board Order Declining Sua Sponte Review; and Washington Supreme Court Order.

Scott Etherton (WSBA No. 29904, admitted 2000) of Lacey, was suspended for 90 days, effective 11/28/2017, by order of the
Washington Supreme Court. The lawyer’s conduct violated the following Rules of Professional Conduct: 1.15A (Safeguarding Property), 1.15B (Required Trust Account Records). Benjamin J. Attanasio acted as disciplinary counsel. Scott Etherton represented himself. Anthony A. Russo was the hearing officer and the settlement hearing officer. The online version of NWLawyer contains links to the following documents: Order Approving Stipulation to 90-Day Suspension; Stipulation to 90-Day Suspension; and Washington Supreme Court Order.

Candace Pousson Howay (WSBA No. 41493, admitted 2009) of Lake Charles, LA, was suspended for one year, effective 11/21/2017, by order of the Washington Supreme Court imposing reciprocal discipline in accordance with an order of the Supreme Court of the State of Louisiana. Joanne S. Abelson acted as disciplinary counsel. Candace Pousson Howay represented herself. The online version of NWLawyer contains a link to the following document: The Washington Supreme Court Order.

Wesley K. McLaughlin (WSBA No. 35374, admitted 2004) of Keauhou, HI, was suspended for three years, effective 11/16/2017, by order of the Washington Supreme Court. The lawyer’s conduct violated the following Rules of Professional Conduct: 5.4 (Professional Independence of a Lawyer), 7.2 (Advertising), 7.3 (Direct Contact with Prospective Clients). Erica Temple acted as disciplinary counsel. Gregory Paul Turner represented Respondent. The online version of NWLawyer contains links to the following documents: Order Approving Three-Year Suspension; Stipulation to Three-Year Suspension; and Washington Supreme Court Order.

Stephen Ray Rasmussen (WSBA No. 18757, admitted 1989) of Portland, OR, was suspended for six months, effective 10/27/2017, by order of the Washington Supreme Court imposing reciprocal discipline in accordance with an order of the Supreme Court of the State of Oregon. Joanne S. Abelson acted as disciplinary counsel. Stephen Ray Rasmussen represented himself. The online version of NWLawyer contains a link to the following document: The Washington Supreme Court Order.

Interim Suspension

Francis Grey (WSBA No. 36428, admitted 2005) of Vancouver, is suspended from the practice of law in the State of Washington pending the outcome of disciplinary proceedings, effective 11/21/2017, by order of the Washington Supreme Court. This is not a disciplinary sanction.
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Nicholas focuses his practice on estate planning, probate, trust administration, taxation, business planning and succession, and copyright. Nicholas attended Arizona State University where he earned a Bachelor’s of Science in Biochemistry, Arizona Summit Law School for his law degree, University of Washington School of Law to obtain a LL.M. in Taxation and a LL.M. in Intellectual Property.  

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**Alexandra Ormsby**’s practice focuses on personal injury litigation with an emphasis on defending businesses in premises liability and vehicle accidents.  
**William Locke** practices in our Tacoma office where he defends clients in general civil litigation matters, including premises and personal injury litigation.  

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Mac has been a trial lawyer in Seattle for over 40 years. He has tried a wide range of cases including maritime, personal injury, construction, products liability, consumer protection, insurance coverage, and antitrust law. Mac has over 20 years of experience mediating cases in Washington, Oregon, and Alaska. He has mediated over 1,500 cases in the areas of maritime, personal injury, construction, wrongful death, employment, and commercial litigation. Mac has a reputation as not only being highly prepared for every mediation, but also for providing as much follow-up as is necessary to settle a case.

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State v. Letourneau,
100 Wn. App. 424 (2000)
Fordyce v. Seattle,
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LIMIT v. Maleng,
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My name is Sanjay Walvekar and I am the Outreach and Legislative Affairs Manager at the Washington State Bar Association. I work with a great team to develop and implement WSBA’s outreach strategy and to coordinate, develop, and advocate for WSBA’s annual legislative agenda. I can be reached at sanjayw@wsba.org.

Before law school, I taught English in Seoul, South Korea (home of the best subway system in the world)!

My career has surprised me by its twists and turns. I’ve been a teacher, campaign manager, contract attorney, and political consultant. I now work in legislative affairs and outreach.

The best advice I have for new lawyers is: don’t pigeonhole yourself. Find work that matches your skillset and interests. There are many non-traditional opportunities out there for law school graduates.

I wish that more lawyers would commit to working on access to justice issues.

If I could have tried one famous case, it would be Loving v. Virginia.

During my free time, I love to travel, try new cuisines, and spend time with family and friends.

The most memorable trip I ever took was a six-week homestay with a farming family in rural northeastern Thailand as part of a college study abroad program. I learned so much about hospitality, generosity, and the value of strong work ethic.

I look up to my parents. They immigrated to the U.S. from India in their 20s and worked exceptionally hard to give our family a good life.

I absolutely can’t live without coffee. The addiction is real.

If I took one day off in the middle of the week, I would ask my wife if she could take the day off too. We’d go on a morning jog, enjoy a cup of coffee without a rush, visit the neighborhood taco truck, and spend the rest of the day hanging out within reach of the couch.

My favorite place in the Pacific Northwest is usually Seattle, but some days anywhere with sunshine.

I am happiest when I’m lying in the sun near the water.

I grew up in Orange County, CA; eastern Tennessee; Denver, CO; and the Tri-Cities, WA. My family moved around quite a bit for my Dad’s job as an engineer for large-scale construction projects.

Nobody would ever suspect that I am a huge train/transit nerd. If I’m visiting a new city with any sort of train or subway system, I’m trying it out!

This is on my bucket list: I’d love to hike the Inca Trail to Machu Picchu. I’d also love to get my dive certification and go on a shipwreck dive in the South Pacific.

This makes me roll my eyes: speakerphones on buses.

This makes me smile: unexpectedly hearing a song that takes you back, friendly dogs, and kids being kids.

My first car was my 1992 Ford Explorer, which I still drive regularly today (195k miles and counting!).

If $100,000 fell into my lap, I would pay off my law school debt. Or take an epic trip around the world. It depends on what day the money hits my lap.

If I could get free tickets to any event, I would go to a college football national championship game featuring my UW Huskies.

If I have learned one thing in life, it is (to paraphrase Maya Angelou) we’re all more alike than we are different.
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