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Where Choices in Life Take Us

If you hadn’t chosen your particular career path, practice area, or law firm, what would you be doing instead? If you could trade places with another lawyer for a day, whom would you choose?

I always imagined that if I hadn’t pursued an editorial career, I’d be pretty content as a postal worker in Southern California, delivering mail on foot while savoring the sunshine and scribbling down poems along the way.

In this issue’s cover story, “The Grass is Always Greener,” WSBA members from across the state share what they love about the geographical areas in which they practice—and reveal what they’d pick if they could try out a different law job for a day.

“I would be a special deputy prosecutor somewhere along the coast. I would go clamming on my lunch break,” says Adams County Chief Deputy Prosecuting Attorney Peter Palubicki. “I would go to Paris and argue a politically charged free speech case,” says Chelan County lawyer Dale Foreman. Alan Tindell of Benton County would trade places with Vincent Bugliosi during the closing argument of the Charles Manson murder trial. “I read his book, Helter Skelter, when I was in junior high school and it influenced my decision to become a lawyer more than anything else,” Tindell says.

And then there are those who wouldn’t change a thing, like Wendy Hernandez of Walla Walla County. “This is the only place I would practice and I would not want to trade places with anyone else, not even for a day,” Hernandez says.

This issue also includes book recommendations from WSBA members and staff, and I’d like to offer up one of my own: Ilya Kaminsky’s Deaf Republic. Set in a war-torn Eastern European country, the book is a series of poems following the citizens of a fictional town called Vasenka. One morning, after soldiers shoot and kill a young deaf boy in the town square, Vasenka’s citizens decide, from then on, to refuse to hear the soldiers as a form of resistance. For the rest of the book, they speak in a kind of sign language to one another. “Our hearing doesn’t weaken, but something silent in us strengthens,” Kaminsky writes.

The poems in Deaf Republic are tragic; insightful; lovely; and sometimes, darkly funny:

“On earth a man cannot flip a finger at the sky: each man is already a finger flipped at the sky.”

Whether you’re a longtime lover of poetry or a newcomer to the genre, I encourage you to give this devastating little book a try.

Also in this issue: Molly Barker discusses the new steps Washington is taking toward zero carbon emissions, Stacia Lay explains the difficulties cannabis businesses face with cross-border intellectual property licensing, and Megan Card meets her hero—U.S. Supreme Court Justice Ruth Bader Ginsburg.

Kirsten Abel is the NWLawyer editor and can be reached at kirstena@wsba.org.
JURY BIAS: THEN AND NOW
Excellent article by Mr. Luvera, “Inescapable Bias.” [May 2019, NWLawyer]

Much has been made of the defense by John Adams, one of our founders (who also orchestrated the noxious Alien and Sedition Acts in 1798), of British troops involved in the so-called “Boston Massacre” in 1770. According to David McCullough’s book, John Adams (Touchstone, 2001, pages 65-68), in the first trial involving British Capt. Thomas Preston, “Adams’ argument for the defense, though unrecorded, was considered a virtuoso performance. Captain Preston was found not guilty.” In the second trial involving eight soldiers, McCullough notes, “The effect [Adams had] on the crowded courtroom was described as ‘electrical.’” Six soldiers were acquitted. Two were found guilty of manslaughter.

That is the story we are told, but it has always struck me as strange that Adams would have had such success with a typical Boston jury. What McCullough does not disclose is that Adams knew that there would be no impartial jurors in Boston. He convinced the judge to seat a jury from outside of Boston.

As recounted in John F. Tobin’s online New York State Bar Association article The Boston Massacre Trials, in the first trial the defense (Adams) successfully challenged most of the prospective jurors (then called the “venire”), while the crown was not allowed any challenges.

In accordance with the practice of that day, still followed in New York and in many other states, the sheriff simply conscripted the needed number of jurors, called then and now “talesmen,” from among the bystanders in the courtroom and in the vicinity of the courthouse at the time. When additional defense challenges had been dealt with, the resulting jury consisted mostly of avowed loyalists, who for that reason alone, coupled with remarks they had made to others in advance of the trial, could be counted on to give Preston the benefit of any doubt. Indeed, it is not a stretch to say that the outcome of the trial was decided at that moment.

And during the second soldiers’ trial, again, none of the jurors were from Boston. www.nysba.org/Journal/2013/The_Boston_Massacre_Trials/. So while Adams is given credit for representing the British troops and may have given a stirring defense, the real story is in Adams’ use of voir dire to seat British loyalists on the jury. Was this an impartial jury? Would this have passed an appearance of fairness test?

David E. Ortman, Seattle

I commend Paul Luvera for making the case that many citizens do not receive fair trials because of biased jurors. The four examples of juror bias that Mr. Luvera gave were all cases in which the citizen was in contest against the government. And in each case the court had refused the citizen’s challenge for cause or failed to remove an obviously biased juror. The Luvera article points to a deeper problem than just biased jurors; it points to a biased judicial system that allows biased jurors onto the jury in the first place.

Unlimited for cause challenges can be used to stack a jury in favor of the prosecution by eliminating jurors who oppose the law at issue. The paramount example is the “death-qualified” jury in capital cases. Jurors opposed to the death penalty are routinely struck off, leaving the jury filled with nothing but death penalty supporters.

This violates the citizen’s right to an impartial jury, which is a fair cross-section of the community. The “death-qualified” jury means that in a community where 90 percent of the citizens oppose the death penalty, the state would be allowed to sift and sift the jury pool with challenges for cause until the jury is exclusively drawn from the 10 percent of the community who support the death penalty. The United States Supreme Court has sanctioned this jury stacking in favor of the state in capital cases. In Uttech v. Brown, 127 S. Ct. 2218, 2224-2225 (2007), the Court ruled that “the State has a strong interest in having jurors who are able to apply capital punishment within the framework state law prescribes” and that a juror who is “substantially impaired in his or her ability to impose the
death penalty under the state law framework can be excused for cause ...” The impartial jury of the 6th Amendment has thus been overthrown in order to give the state a jury more likely to render a death verdict.

And the death-qualified jury is not just biased about sentencing. The death-qualified jury is also conviction prone. People who believe in the death penalty are more likely to believe government witnesses and also to believe that the government does not make mistakes in criminal cases. See Professor John D. Bessler, Cruel and Unusual: the American Death Penalty and the Founders’ Eighth Amendment (Northeastern University Press 2012) at 231.

The pro-government bias as illustrated by the death-qualified jury does not stop there. A trial concerning any controversial law—gun laws, drug laws, sex laws, tax laws, etc.—will have the same problem. Jurors who are opposed to the law at issue will be struck off by unlimited challenges for cause and the jury consequently will be filled largely with government partisans who support the law at issue. The jury’s time-honored role as a check and balance against government excess—namely jurors judging the law and rendering the verdict according to conscience—has been defeated by the biased application of the challenge for cause.

Thomas Stahl, Ellensburg

RESPONSE FROM THE AUTHOR:
I thank David Ortman for sharing the historical background of the jury selection in the famous trial defended by John Adams. I was not aware of that information and agree with him about its significance to the subject of dealing with bias in voir dire.

Thomas Stahl raises issues that merit discussion. His concerns are directly connected to the basic flaw of the statutory language. The defect is that the statute prohibits dismissal of a juror with actual bias unless the judge is “satisfied from all the circumstances the juror cannot disregard such opinion and try the case impartially.” This language was enacted in 1877 when Washington was a territory and has not been eliminated or revised since. However, science has firmly established it is an impossible demand of human nature for...
In box

both juror and judge. We know it is an unattainable precondition irrespective of the sincerity of the juror and the wisdom of the judge in evaluating juror assurances regarding the influence of bias. Furthermore, whatever the state of wisdom and experience of the trial judge in the exercise of judicial discretion, the statute creates a very significant risk a juror will be allowed to serve who should not be on the jury. The specific language of the statute should therefore be revised. Until that is done, trial judges can avoid allowing biased jurors serving on the jury by exercising their discretion, under standards discussed in the article, by excluding jurors with actual bias when challenged.

Paul Luvera, Gig Harbor

MORE ON THE DEATH OF THE DEATH PENALTY IN WASHINGTON

In State v. Gregory, reviewed in the May NWLawyer [“The Case That Invalidated the State’s Death Penalty,” by Ken Masters], the Supreme Court ruled that the death penalty in Washington is unconstitutional because it has been imposed in an arbitrary and racial manner which violates the “no cruel punishment” clause of the Washington Constitution.

The process of a death penalty prosecution is complex. Prosecutors must consider the views of the public; their risk of an acquittal, either of the offense or on penalty; the number of victims; the skill of defense counsel; the cost of prosecution; the attitude of trial and appellate judges; aggravating and mitigating circumstances; and deterrence. Another factor is the likelihood that the defendant may kill again, as by killing an inmate or prison guard. One reason for the death penalty is that it gives the victims and society assurance that the perpetrator will never kill again. These factors change as counsel wrestle and discover information and monitor public views. Prosecutors are elected and should consider public opinion. The process is unique to each case and not arbitrary or capricious or freakish, nor is it benefited by statistical analysis because it is a long process of human decision by many, many minds: prosecutors, defenders, newspaper people, judges, and juries. No one in the course of Gregory, to my knowledge, offered evidence of prejudice or caprice by anyone, jury or prosecutor.

In Gregory, 24 jurors voted unanimously for the death penalty. I doubt there is any evidence that the prosecution in some sly way elicited racial bias on the part of the jury. Essentially, the court is saying that juries cannot be trusted with the power to decide death cases. There may or may not be a constitutional duty to provide a jury trial in sentencing, but it is surely insulting to accuse indirectly the juries of Washington of biased verdicts.

As to the small number of death cases, one reason comes from the appellate courts, which tend to elongate consideration of death penalty cases.

Reliance by the court on a statistical study by a sociology professor and an “expert in quantitative analysis” is more than troubling. In order to mean anything, this study would have to demonstrate robustly, with many examples, that black defendants like situated with white defendants were four times as likely to be death penalty defendants. Examples are mob hits, multiple-victim murder, husband-wife murder, and so forth. It would be necessary to examine many like situations in order to learn anything. I see no indication that this occurred. Washington probably doesn’t have enough death penalty cases even to enable comparison of doctor-murders-spouse cases or other like situations by race. Perhaps this is explained in the studies or in the opinion.

It’s also disturbing that no one cross examined either side’s experts. Cross is the best method ever devised to find truth. There was no hearing or “trial” of the defense theory and therefore no jury or trier of fact decision. This may violate the right to due process and is a march toward the Napoleonic system where the court controls both the evidence and the verdict. After all, the experts were supposed to discover facts—evidence—and their reports theoretically could have gone against Mr. Gregory. The deputy prosecuting attorney’s report certainly did. At that point, Mr. Gregory would have appreciated a jury trial.

Last, “cruel” and “cruel and unusual” punishment refer to a punishment, such as hanging a person without killing, and then cutting the victim down for mayhem, dismemberment, and death—a good historical example of cruel. Fundamental fairness and disparity in sentencing are not “cruel punishment.”

This is a harsh and hard topic. But we, as lawyers, should do our best to listen to the opposition; try to find and express our deeper views, such as we all have; and ultimately cooperate as lawyers, citizens, and people for the betterment of our society.

Roger B. Ley, Portland

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LESSONS FROM THE LISTENING TOUR:
Wherever We’re Headed, Let’s Go Together

Af ter several months and hundreds of miles spanning all corners of Washington state, we can declare that the 2019 WSBA Listening Tour is the most rewarding and soul-fulfilling endeavor we have undertaken recently in our professional capacities. To be sure, it is not always easy; we’ve joked, in fact, that Clint Eastwood has already provided us a template for organizing feedback: “The Good, the Bad, and the Ugly.” But that’s okay—it’s great, actually. We are on the road specifically to hear the unvarnished realities from members and answer questions, face to face and heart to heart. We believe there is no greater way to invest in our three touchstones for the year: trust, relationship, and service.

The WSBA Board of Governors and executive director began the Listening Tour in 2012 to connect directly with members in local communities to answer questions, share ideas, hear feedback, and offer comments. In the past, each tour focused on a particular area of the state. This year, we decided to be more comprehensive and cover as much of Washington as possible; given the WSBA’s change in top leadership and the potential for a new bar structure on the horizon, we felt it important to hear from as many of you as possible. So far, we have been to Kennewick, Yakima, Kent, Bellevue, Tacoma, Chehalis, Longview, Vancouver, Spokane, Newport, Davenport, Ellensburg, and Wenatchee … and we are not through yet. In September, we will visit the San Juan Islands, and we are continuing to add more dates. (Have a suggestion for a tour stop? Email barleaders@wsba.org.)

Although each gathering has some local flavor, several themes are ubiquitous:

**ESHB 1788.** Members have asked questions about the process behind and potential impacts of the bill that would have repealed the majority of the State Bar Act and recognized the authority of the Supreme Court to regulate the practice of law. Specifically, we have tried to clarify the timeline of the WSBA’s Board Legislative Committee, which closely tracked the bill from inception but took time to meet with the Court and gather information before officially taking a stand of opposition. Despite passing the House and Senate with wide support, the bill ultimately did not receive a concurrence vote in the House, and therefore failed to pass.

**The Washington Supreme Court’s Bar Structure Work Group.** What’s the future of the bar? Remaining unified, splitting into two organizations focused separately on regulatory and professional-association-like functions, or some hybrid? Opinions run the gamut here. We have heard from many who have concerns about paying mandatory fees for some of the work that the WSBA does, including legislative functions. We have also heard from many who appreciate the full range of professional support and strength offered by a unified bar.

**The WSBA’s relevancy and visibility east of the Cascades.** The further we get from Seattle and the King County region, the more members express concerns about the lack of support and resources they perceive from the WSBA. It has been powerful for us to travel to these members’ home communities, and—no matter how we have tried to incorporate remote/online access into all our program models—we understand we need to do better to be present for and representative of all members. And speaking of Seattle …

**Why is the WSBA’s office in Seattle and not a more central location?** We have done studies and costed out options to move to a more central location. With such a concentration of members (40 percent) in the Seattle/King County area, the economics and access have always made Seattle the location that makes the most fiscal and operational sense. We also currently have a very favorable lease. We have done our best to invest in technology and processes that allow remote access and participation in the majority of our functions. This is not a substitute, however, for ensuring we are connected, accessible, and relevant to members in all parts of the state.
We have good, honest discussions about topics that just cannot happen via email or some other electronic means. We have unfailingly enjoyed breaking bread with you, our colleagues, who are smart, passionate, engaged, and productive in dialogue. Because, in the end, we all have taken an oath to uphold the rule of law and expand access to justice. We are on the same journey, and it sure helps to go together. As a former bar President remarked in Yakima, all things come back around again, and if we can just keep our wits and do what’s right, we will all end up fine.

The Listening Tour has also reminded us that we live in one of the most beautiful places in the world. It has been our pleasure to meet you where you live and work, from sea to farmland, from Canada to Oregon. We sincerely thank you for hosting us and taking the time to chat with us. Your input has made a difference and it will continue to make a difference.

See you on the road!
Peace.

**Political leanings.** Many members feel strongly that the WSBA and its leaders should not stray far afield from its core regulatory mission, especially when it comes to social and political statements and activities.

**Sections.** Sections remain one of the most valuable WSBA benefits for some members, providing a forum for practice-area experts to collaborate, troubleshoot, and plan/present truly germane CLEs. These members have deep concerns about what might happen to their section’s viability if the bar were to bifurcate.

**Reputation.** The reputation of the bar has undeniably been harmed by recent events, including several high-profile articles in the Seattle Times. We have received questions, in general, about “What the heck is going on?” at the bar. While there is no simple answer here, our Board of Governors and leaders are in a process of restoring trust and working together for the good of the organization.

**Transparency.** A number of people have expressed concern that we have not been completely transparent with membership. This is a valid concern. We remain hopeful that the Board will listen and take action to ensure this concern is addressed in all future actions. We aim to be as forthright and timely with information as possible, but we can always do better. We appreciate hearing specifically how we can improve, whether through more robust online posting of documents or more inclusive decision-making processes.

**Discipline notices.** We hear you: bring back the expanded discipline notices in NWLawyer! We shortened these to just the most basic facts several years ago because of the tremendous amount of staff time it took to synthesize the complex findings into a narrative that was sufficiently neutral and factual from all parties’ perspectives. We are exploring how to put more context and information back into the notices.

**Kudos!** We are glad to hear that we are meeting and exceeding your expectations in some areas, particularly in our Legal Lunchbox offerings, our CLEs, including the Practice Primer series, how we have developed reciprocity rules, NWLawyer magazine, the Law Clerk Program, and our discipline standards and procedures, by and large.

We ended the above list on a high note because, well, that’s how we always feel leaving each tour stop.
A perverse side effect of the increased availability of reciprocal admission is that reciprocal discipline has also become more common. When we are admitted in another state, we are also submitting to the regulatory jurisdiction of that state’s licensing authority, regardless of where alleged misconduct may have occurred, under state variants of ABA Model Rule of Professional Conduct 8.5(a). In theory—and occasionally in practice—two states may simultaneously prosecute a dual-licensed attorney for the same misconduct. The far more typical scenario, however, is for one state to prosecute a lawyer and, if discipline results, for other states where the lawyer is licensed to impose reciprocal discipline.

For a Washington lawyer who has been disciplined in Washington and who is also licensed in other jurisdictions, the recurring questions that follow, with respect to the other licensing jurisdictions, typically are, “Do I have to report, and how do I do that?” In this column, we’ll focus on how answers to those questions can vary with respect to three other jurisdictions in the Northwest: Alaska, Idaho, and Oregon. We’ll begin from the perspective of a Washington-licensed lawyer who has been disciplined in Alaska, Idaho, or Oregon, and address the mechanics of reporting such discipline in Washington.

We’ll then examine the scenarios of a lawyer disciplined in Washington who is also admitted in those other Northwest states and the reporting requirements of each. In each scenario, we’ll discuss what disciplinary sanctions must be reported and when the report must be made, and we’ll address reporting to both state licensing authorities and federal trial courts in those states.

Before we do, three preliminary points are in order. First, although ABA Model Rule for Disciplinary Enforcement 22 sets out a suggested approach to reciprocal discipline, state procedures vary widely and can be relatively arcane. Lawyers should carefully review the specific procedures used in the state involved and should get competent help in those jurisdictions if they have questions or anticipate unusual wrinkles in their cases.

Second, lawyers should not expect to litigate their original case anew in another state. Courts in other jurisdictions typically look at two questions in the reciprocal discipline context: (1) Was the lawyer afforded adequate due process in the state in which regulatory discipline was imposed? (2) Should the lawyer be disciplined in the reciprocal jurisdiction and, if so, what sanction is appropriate? The un-
Underlying facts leading to a finding of misconduct in the original state, however, are not typically relitigated. The Oregon Supreme Court put it this way in a recent case involving a Washington lawyer who was also licensed in Oregon:

The reciprocal discipline rule, in effect, codifies a basic principle of issue preclusion: an attorney who has had a full and fair opportunity to litigate the charges leading to discipline meted out in another jurisdiction may not relitigate the fact issues already decided. 6

Third, although the most likely outcome by far is that the reciprocal jurisdiction will impose the same sanction, that result is not necessarily preordained. In Idaho State Bar v. Everard, 124 P.3d 985 (Idaho 2005), for example, the Idaho Supreme Court imposed a lesser sanction than the Washington Supreme Court. By contrast, in In re Page, 955 P.2d 239 (Or. 1998), the Oregon Supreme Court imposed a more severe sanction than the Washington Supreme Court. When variations result, they are usually the product of some combination of peculiar facts or a difference in disciplinary sanction jurisprudence in that particular state.

Lawyers should carefully review the specific procedures used in the state involved in reciprocal discipline and should get competent help in those jurisdictions if they have questions or anticipate unusual wrinkles in their cases.

REPORTING DISCIPLINE BY ANOTHER JURISDICTION IN WASHINGTON

To State Licensing Authority
For a Washington lawyer who has been disciplined in another jurisdiction, Washington Rule for the Enforcement of Lawyer Conduct 9.2(a) is straightforward: “Within 30 days of being publicly disciplined, or being transferred to disability inactive status in another jurisdiction, a lawyer admitted to practice in this state must inform disciplinary counsel of the discipline or transfer.” ELC 9.4(a) requires similar reporting for a resignation in lieu of discipline in another jurisdiction. The focus of ELC 9.2(a) is on public discipline. Alaska, Idaho, and Oregon all have variants of “private admonitions” that, by definition, are not public and in Oregon are not considered “discipline.” 7

To Federal Trial Courts
In federal court, Western District Local Rule 83.3(c)(6) and Eastern District Local Civil Rule 83.3(c) govern reciprocal discipline. Both federal rules require reporting to the respective clerks of the court suspension, disbarment, or resignation in lieu of discipline in another jurisdiction. Although neither specifies a deadline, prudence suggests reporting within a reasonable period of the imposition of discipline in another jurisdiction.

REPORTING DISCIPLINE BY ANOTHER JURISDICTION IN ALASKA

To State Licensing Authority
Reciprocal discipline in Alaska is principally controlled by Alaska Bar Rule 27. Alaska BR 27(a) is worded somewhat ambiguously in that reciprocal proceedings are triggered “upon receipt” of a copy of the order imposing discipline on an Alaska-licensed lawyer in another jurisdiction. The rule implies, but does not explicitly state, that the Alaska lawyer disciplined elsewhere has an obligation to inform the Alaska Bar. Prudence suggests, however, that it would be wiser to be the reporter rather than wait for the jurisdiction imposing the discipline to inform the Alaska Bar. This often has three strategic advantages. First, it avoids appearing “sneaky” in an era where most jurisdictions maintain records of other states where their lawyers are licensed and commonly share disciplinary information with those states. 8 Second, it eliminates the risk of compounding the original discipline with an accusation that a lawyer who did not promptly report may have violated Alaska RPC 8.1 that generally imposes a duty to cooperate with regulators on disciplinary matters. Third, on a practical level, it allows the lawyer to “control the narrative,” at least at the outset, in making the report. The Alaska rule is also silent on when a report must be made. Again, prudence suggests reporting within a reasonable period following imposition of discipline. Finally, the Alaska rule does not specify to whom the report should be made. Alaska’s bar counsel fills the role of both disciplinary and general counsel, so reporting to bar counsel should suffice.
Ethics and the Law

Alaska BR 27(a) requires reporting of any “discipline.” Washington ELC 13.1 defines discipline to include proceedings resulting in admonition, reprimand, suspension, or disbarment. By contrast, ELC 5.8(c) classifies an advisory letter issued by a review committee of the Disciplinary Board as “not a sanction, and is not disciplinary action.”

To Federal Trial Courts

Like its state counterpart, the duty to report to the Alaska federal district court is somewhat ambiguous—describing reciprocal discipline proceedings as beginning under Local Civil Rule 83.1(f)(1) “whenever it appears to the court” that a triggering disciplinary event has occurred in another jurisdiction. Again, prudence suggests self-reporting for the reasons noted earlier. Unlike its state counterpart, however, the Alaska federal court rule only requires reporting if the lawyer has been suspended or disbarred. But the Alaska federal court rule is silent on the timing for reporting and to whom the report should be directed. As discussed earlier, caution counsels reporting within a reasonable period following the imposition of the original discipline. Reporting to the clerk of the court should be sufficient.

REPORTING DISCIPLINE BY ANOTHER JURISDICTION IN IDAHO

To State Licensing Authority

Idaho Bar Commission Rule (IBCR) 513 addresses reciprocal discipline at the state level. IBCR 513(a) requires an Idaho-licensed lawyer to report a disciplinary “sanction” imposed elsewhere. “Sanction,” in turn, is defined by ICBR 501(o) and 506 as ranging from an “informal admonition” through disbarment. Resignations in lieu of discipline are specifically included within Idaho’s definition of sanction. Even though an “informal admonition” is included as “discipline” by ICBR 506(h), this should not oblige a Washington lawyer to report an advisory letter because those are not defined as “discipline” under Washington ELC 5.8(c). The lawyer disciplined is required to report to the Idaho State Bar’s bar counsel within 14 days of the sanction being “imposed.”

To Federal Trial Courts

In Idaho federal court, Local Civil Rule 83.5(b)(3) governs reciprocal discipline. It contains a degree of ambiguity—being framed as beginning “upon the receipt by this Court” but not specifically stating who is to forward the report. Similarly, the Idaho federal rule does not include a specific reporting deadline or indicate to whom the report should be directed. As discussed earlier, prudence suggests self-reporting within a reasonable time of the entry of discipline elsewhere, and reporting to the court of the clerk should be sufficient. LCR 83.5(b)(3) extends to any “discipline” imposed by another court and includes resignations in lieu of discipline.

REPORTING DISCIPLINE BY ANOTHER JURISDICTION IN OREGON

To State Licensing Authority

Although Oregon’s reciprocal discipline procedure is found in Oregon Bar Rule 3.5, the reporting duty is actually included in Oregon RPC 8.1(b) and has an important twist on timing. Oregon RPC 8.1(b) requires an Oregon-licensed lawyer to “report in writing to the disciplinary counsel of the Oregon State Bar the commencement against the lawyer of any disciplinary proceeding in any other jurisdiction.” The Disciplinary Counsel’s Office in Oregon has generally interpreted “commencement” to mean filing of formal disciplinary proceedings by a state regulatory agency rather than simply submission of a grievance. Reciprocal discipline proceedings under Oregon BR 3.5 then begin either on a “determination of discipline in the other jurisdiction” or a resignation in lieu of discipline.

To Federal Trial Courts

Oregon’s federal district court rule, Local Rule 83-6(a), is very specific on reporting: The lawyer involved must submit a report to the clerk of the court, the chief judge, and any assigned judge in a matter the lawyer is handling within 14 days of the lawyer’s suspension, disbarment, or resignation in lieu of discipline elsewhere.

... Although the most likely outcome by far is that the reciprocal jurisdiction will impose the same sanction, that result is not necessarily preordained.
A New Standard for Overtime?
Washington Looks to Expand Eligibility

The Washington Department of Labor & Industries (L&I) recently filed a proposed rule that would dramatically increase the minimum salary required for employees to qualify for the “white collar” (executive, administrative, and professional) overtime exemptions. […]

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Being the Voice for New and Young Lawyers in Labor and Employment Law

You could label Sarah Burke a new and young lawyer, though she’s anything but new to labor and employment law. Burke grew up in a “union household,” as she describes it. Her father was a union organizer and Burke developed the same passion for labor organizing and advocacy. In 2011, Burke followed in her […]

NWSidebar.wsba.org

How to Win Your Case Using the Latest Discovery Technology

Discovery is a challenging and rewarding process. The rewards are frequently based on the speed and efficiency of data acquisition and its interpretation; the pitfalls are related to the lack thereof. Therefore, success in the discovery process is only as effective as the technology used to uncover and apply it. The most important aspect of […]

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ADR Solutions

• All panelists are former Washington State Superior Court judges
• Mediation, arbitration, hearing officer, special master and litigation consultation
• Talented and responsive staff
• Comfortable mediation conference rooms
• Arbitration courtroom with audio/visual technology and party breakout rooms
You’re a lawyer. You therefore understand that courts are supposed to follow precedent. So before you start drafting a motion, you no doubt fire up your legal research database and look for case law to support your motion—case law demonstrating that precedent compels the court to grant the relief you are requesting.

But here’s the problem: If you’re filing a motion, then the other side doesn’t agree that you’re entitled to the relief. How could they possibly have reached such a wrong-headed conclusion? Well, chances are that they too have access to a legal research database, which they’ve used to find case law showing (at least in their view) that the court should not grant the relief you’re requesting. You’ve probably found those same cases. And you need to deal with them.

Lawyers tend to make two mistakes when dealing with these so-called “bad” cases—cases in which the party that corresponds to your client did not prevail. First, lawyers sometimes minimize or bury “bad” cases. The other side, however, then focuses on those “bad” cases in their response. As a result, the two briefs talk past each other, each focusing on their “good cases.” This mismatch leaves the judge to reconcile seemingly contradictory precedents without much help from the parties.

Second, lawyers sometimes address the “bad” case, but only as an afterthought. This technique is certainly better than ignoring the case, but it’s still not ideal. Here’s what happens: You set out the relevant law by focusing on “good” cases—cases where the prevailing party was in your client’s position. The case that explains the general standard? Your party won. Further explanation of the rule? Your party won. Examples of how the law was applied in specific instances? Yup, your party won.

Having explained all that good law, you then explain how the good law applies to your client’s facts. Not surprisingly, the result is good for the client!
Then and only then, after showing how the law requires a win for your client, do you finally address the “bad” case. Usually that pivot involves a phrase like “This court should not follow Smith” or “This case is different from Nguyen.” The “bad” case is first discussed as an afterthought.

Consider the judge’s perspective when reading a brief like this. The judge must decide your motion on the law—not just the good cases, but all the cases. As the judge reads the good cases, she is digesting the lawyer’s explanation and constructing her own understanding of how the law works. She then applies that understanding to the facts of the case—both as she reads the law (because you’ve already explained the facts) and then again as she follows along with the lawyer’s application of law to fact.

What a jolt, then, to come upon the “bad” case after already understanding and applying the law. This new case has precedential force, so the judge must incorporate it into her understanding of the law. But that understanding has already been formed. Saving the “bad” case for the end—separating it from the lawyer’s initial explanation and application of the law—unsets the judge’s understanding. The surprise appearance of the “bad” case is like an unused screw rolling out of the box after you’ve finished assembling a chair. You know that screw was supposed to go somewhere. And you don’t want to sit on the chair until you figure out where. You can’t trust it.

So what should you do with these “bad” cases? You certainly can’t ignore them. First of all, the Rules of Professional Conduct may require you to acknowledge adverse legal authorities. But second of all, addressing the other side’s arguments is good practice. As Bryan Garner recommends, using quite vivid language: “Answer your opponent’s arguments—and flay them if possible.” Again resorting to metaphorical violence, Garner exhorts lawyers to “do harm to all serious counterarguments” and to “knock each one down quickly.”

This combative approach is echoed by other legal writing experts. For example, in The Art of Advocacy, Noah Messing treats adverse authorities as obstacles to avoid. In response to the question “How much time should I spend distinguishing an adverse opinion?” Messing responds: “As little as possible—usually. For all but the most influential cases, the more quickly and decisively you can discard the other side’s strong cases, the better.” Under this approach, the authorities themselves become the lawyer’s adversary. We are advised to convince the court that bad cases “should not apply to your dispute.”

I suggest a different approach for dealing with “bad” cases: Don’t think of them as “bad” at all. There’s no such thing as a bad case. OK, strictly speaking, that’s not always true. You might occasionally run into a truly bad case: binding precedent that forecloses an argument you otherwise wanted to make. For example, Katz v. United States is a bad case if you want to argue that the Fourth Amendment does not protect telephone conversations in public phone booths. Katz is bad because it controls the lower courts and it directly rejects the argument you’re advancing.

But when lawyers talk about “bad” cases, those Katz-like cases usually aren’t what we’re talking about. Run-of-the-mill “bad” cases don’t foreclose your claim. So what makes them bad? Most often, these cases simply resolved the motion differently than what you’re requesting in your motion. So if you’re the defendant moving for summary judgment, a “bad” case permitted the plaintiff to proceed to trial. If you’re a plaintiff seeking a deposition of the defendant’s chief financial officer, a “bad” case refused to allow a similar deposition. Your opponent will likely stress these cases in their response. And you might be inclined to minimize them.

Why though? Surely, if you are a defendant seeking summary judgment, you’re not arguing that all defendants are always entitled to summary judgment. Of course some cases have come out the other way. That doesn’t mean they are bad.

To the contrary, you should think of these distinguishable cases as good cases, which you can deploy to your benefit. By highlighting the differences between the “bad” case and the motion you’ve filed, you can create a helpful contrast for the court. You can explain to the judge: “Sure, some motions get denied, but only if they are like this other case. My motion is different!”

Again, consider the judge. The parties’ concerns about bad cases don’t mean anything to the judge. Authority is authority. Messing’s advice—to explain how the authority “should not apply to your dispute”—doesn’t mean anything to a judge. For a judge in the Eastern District of Washington, all 9th Circuit cases apply. And a judge in Yakima County Superior Court needs to apply cases from Division III of the Court of Appeals. None of those cases is bad.

But all of those problems go away if you recast a “bad” case as a good one. Don’t minimize it or address it after you’ve already presented your argument. Embrace it! Help
the judge create a complete and coherent understanding of the law—with “good” and “bad” cases alike.

A simple change in wording and paragraph placement can make a big difference. For example, don’t end your argument with something like this:

The Supreme Court’s decision in Spiller v. Ware does not apply to the present case. Spiller involved a private plaintiff that needed to prove damages to establish his CPA claim. But here, the plaintiff is the Attorney General, so a presumption of damages applies, and therefore the court should not admit evidence of plaintiff’s harm that might prejudice the defendant.

When the judge reads this paragraph she learns, for the first time, about the Spiller case, about the different rules for private and governmental plaintiffs, and about how those different rules might apply to evidentiary decisions. The judge then has to adjust her previous thinking to incorporate these new ideas.

Instead, include earlier analysis in your brief like this:

Evidence of individual harm might be admissible in cases with a private plaintiff. In such cases, the plaintiff must establish damages as an element of the CPA claim, so harm-related evidence would be relevant. For example, in Spiller v. Ware, the Supreme Court approved of the trial court’s admission of vivid evidence of the plaintiff’s harm. The Court reasoned that as a private entity, the plaintiff needed to offer evidence of damages.

This kind of analysis is more helpful for the judge. She can obtain a complete understanding of the law from one brief—yours. You’ve created that understanding, which will surely benefit your client. And there’s nothing bad about that.

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David J.S. Ziff is a senior lecturer and the director of legal writing at the University of Washington School of Law. You can follow him on Twitter at @djzsff.

NOTES:
1. See Washington RPC 3.3.
3. Id. at 56-57.
5. Id. at 80.
Literary Lawyer

TALKING ‘TOUGH’

Like many memorable projects, this book began as a casual conversation—just a few judges reflecting on the toughest decisions of their careers in between bites of Italian fare at a popular Washington, D.C., restaurant.

As District of Columbia Superior Court Senior Judge Russell F. Canan continued to chat with his two colleagues, they began to realize that they might have the makings of a great book. The idea gelled over more conversations, and soon they had 13 judges in total—from different parts of the country, with different experience and backgrounds, who had presided over litigation ranging from high-profile media circuses to little-known cases with great consequences for those involved—who agreed to share a look back at the decisions that stuck with them.

The 13 judicial reflections contained in Tough Cases provide a glimpse into the mindset of judges as they wrestle with the weight and potential consequences of their decisions. Washington State Superior Court Judge Robert H. Alsdorf (Ret.), who writes about his experience ruling on a controversial state tax initiative at the same time his seat on the court was up for reelection, explained recently that all judges eventually find themselves conflicted over certain decisions in which they felt: “I really didn’t want to rule that way, but it’s what the law required.”

Tough Cases touches on infamous cases from the perspectives of the judges who oversaw them, like Judge George W. Greer, who presided over the Terri Schiavo right-to-die case that consumed the nation; Judge Reggie B. Walton in the Scooter Libby trial; and Judge Jennifer D. Bailey in the case of Elián González.

Alsdorf writes of his own deliberative process when faced with the tax initiative case, mentioned above, that could easily have ended his judicial career. Canan, in the book’s second chapter, describes the time he struggled against a strict interpretation of the law in order to prevent an unjust outcome, leaving him wondering to this day whether the ends justified the means.
**Q:** Was there any discussion about how to approach publishing these stories?

**CANAN:** Well we have ethical constrictions, so we can’t talk about a case that’s ongoing—or in the legal jargon, that’s impending. And we can’t talk about cases that are barred from the public, for instance some different types of family court cases. So if you read the “Brave Jenny” chapter, that does talk about a child abuse neglect case, which is barred from the public, but [the judge who wrote the chapter] got permission by the main actors to publish. … As a result of this, [Jenny] has attended a number of book talks in Washington, D.C., and has become a bit of an activist for survivors of child abuse and neglect. So it’s really been a wonderful development.

**Q:** What do you think distinguishes a judge from the public at large, other lawyers, and would you say that there [are] any special abilities that a judge has coming into the role, or that they develop through the role?

**ALSDORF:** One thing I think distinguishes judges is something which I was focusing on in my piece, and that is that a judge knows not to try to be right, but to try to be fair. Because when you focus on underlying principles and balance them against each other and come to a decision, that’s much more reliable than a case coming in and you act on your gut reaction … If you start with the “right” result, I think you’re more likely to get the wrong result. If you focus on fairness, focus on hearing all the arguments, I think, frankly, you’re more likely in the end to get it right because you actually listened to people and you’ve really heard what they have to say. If you already have the right result in your own mind, confirmation bias or other defaults could cause there to be a lack of justice.

**Q:** How would you define fairness in that context?

**ALSDORF:** Attention to procedure. Give every person an opportunity to be heard. Weigh that evidence from all sides. There are all sorts of techniques you have to apply to make sure you are not swayed by inappropriate factors. For example, everybody knows this and studies have shown that good-looking witnesses are generally deemed more credible. Judges need to kind of check themselves and say, “Why was I taken by this witness?” You learn to do things like identifying your own implicit biases by flipping the emotional factor in a case. For example, in a family law case you listen to both the husband and the wife and try to evaluate what you’re going to do in terms of child custody. At the end, when you’ve made your decision but before you’ve announced it, what you should do is flip the gender, so everything that applies to the husband now applies to the wife, and vice versa, and see whether or not you come to a parallel decision, but in favor of the other party. Because if you flip the gender and don’t flip the result, something’s wrong with your thinking. So you learn various techniques like that to try to catch your own biases and set them aside.

**Q:** Sort of serendipitously, in *NWLawyer* [“Inescapable Bias,” May 2019] we have an article that was submitted, and the core thesis of the article is based on studies of human behavior: that people are essentially incapable of honestly recognizing their own biases or even overcoming their biases when they do recognize them. … Are there any other tools that you see that judges or other legal professionals have to recognize their bias and eliminate or reduce it?

**ALSDORF:** Honestly, I think judges do that all the time: recognizing their own bias. Every judge I know—absolutely every judge I know—has said at one point or another, “I really didn’t want to rule that way, but it’s what the law required.” So you’re accustomed to setting aside that personal bias or personal leaning. …

**CANAN:** Well my chapter actually deals with that conundrum of dealing with a situation where strictly following in the law is going to result in what I thought would be a manifest injustice. And so the issue is whether or not there are situations where a judge might consider applying what’s called “rough justice” to try to get what’s just. Do the ends justify the means if the ends are just? … I think, as Bob was saying, many judges really struggle with it, and I know I have with mandatory sentencing cases where you feel you are doing something you would not personally impose.

**Q:** That was a really hard chapter to read, because you could see where there were these unspoken words communicated between all the people in the room who had a legal education, but you’re [Canan] sort of paralyzed by what’s coming, guessing at what the jury’s talking about. Do you see room for any reforms to the jury system that might help avoid situations like that?

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I would like to think that the book celebrates the independence of the judiciary and the rule of law.

— RUSSELL F. CANAN, DISTRICT OF COLUMBIA SUPERIOR COURT SENIOR JUDGE
I am a real fan of juries. ... Juries are not perfect, but there is a way in which the community’s voice is best expressed through a jury.

— HON. ROBERT H. ALSDORF (RET.)
Q: While adhering to governing law and procedure, how much discretion does a trial judge have to respond with empathy and/or to help the parties before them?

ALSDORF: I think there’s always room for empathy. There are times where a party has been unduly litigious or has disrupted court, who may need reprimand. But at the same time that’s not saying anything against empathy. The more you hear, the more the parties can see you hear. So I think there’s always room for empathy—no matter what the result is—because you make decisions more acceptable to the losing party when you are able to demonstrate that you understand where the people are coming from.

Q: What do you hope people will get from the book?

CANAN: I hope they would get a newfound respect for judges and the independence of judges and respect for the rule of law. I think, as we say in the introduction, part of the general public thinks that judges just do what they want to accomplish our personal goals. And I think this book highlights that that’s not the case. I mean, there are bad judges out there, no question about it, we all know that. There are some corrupt judges out there, sadly. But I think the vast majority of judges, both state and federal, are honest individuals who represent the highest levels of integrity. And I think, as judges, we always want all our brother and sister judges to live up to that ideal.

NOTES:
1. In chapter 2, “Rough Justice,” Judge Canan recalls a case in which a jury question seemed to indicate that the jury was leaning toward a verdict that might effectively require imposition of a mandatory five-year sentence in a case that did not warrant such harsh punishment. The prosecutor and defense counsel, responding perhaps to some subtle indications from the court, reached a last-minute plea agreement to avoid that harsh result. What happened next causes Canan to look back at the unforeseeable consequences of his actions and wonder whether the outcome in the case justified the means by which it was reached.

Colin Rigley is a communications specialist for the Washington State Bar Association. Prior to joining the Bar, his previous experience included journalism and content strategy in California and Washington. He can be reached at colinr@wsba.org.
BUY THE BOOK

Must-add titles for your summer reading list

**Bad Blood: Secrets and Lies in a Silicon Valley Startup**
*By John Carreyrou*

This is a fascinating account of the massive fraud that the Silicon Valley blood-testing company Theranos and its two leaders were able to perpetuate on large corporations, retired high-level government figures, and the public. The author and a few brave whistleblowers exposed it. For lawyers, it is particularly interesting to read Carreyrou’s account of the role prominent attorney David Boies and his firm played in Theranos’ troubled legal affairs.

— Amy J. Stephson, Bar No. 13056

**Home Game: An Accidental Guide to Fatherhood**
*By Michael Lewis*

Are you a new father in need of help? Try out Michael Lewis’s *Home Game: An Accidental Guide to Fatherhood*. This is a refreshingly blunt take on all of the stress and bizarre situations that come with raising children. Several stories stand out: The time Lewis’ daughter told her whole daycare that he has a small penis, and the violence he demonstrated toward staff in defending the door to his son’s hospital room. There are so many moments when you blush thinking, “He just said what about his kids?” But when he contends that his kids will probably just think he’s funny when they grow up, one is reminded how parents really need to lighten up.

— Dan Crystal, Program Manager, WSBA Member Wellness Program

**Mastermind: How to Think Like Sherlock Holmes**
*By Maria Konnikova*

One of the most engaging science authors ever delves deep into the neuroscience and psychology of fiction’s greatest detective. In doing so, she trains readers to upgrade their own minds. I’ve read a lot of pop-science books, but none as fun and easy to read as this. Konnikova writes in such a way that it feels like you are just sitting down to coffee with her. Yet somehow you leave the experience a little more mindful and a whole lot smarter.

— Jordan L. Couch, Bar No. 49684

**Fire Logic**
*By Laurie J. Marks*

Shaftal has been conquered by the militaristic Sainnites, its government scattered and its ruler dead before he could vest an heir with the ancestral magic of the land. Zanja, the only surviving member of a murdered tribe, seeks revenge against the Sainnites for her people’s destruction. But when she joins forces with others whose existences are shaped by the decades-long conflict, she learns how her supernatural intuition, and the elemental magic of the people of Shaftal, can break the land out of a violent cycle and end a stagnant war.

*Fire Logic* rejects the good-versus-evil conflicts of traditional fantasy. It grapples with ambitious questions about the nature of the divisions between people, and the painful, complex work that forges lasting peace. It’s surprising, it’s beautiful, it’s challenging, it’s mind-opening. Also, it’s the only fantasy book I’ve ever read where a certain magical affinity predisposes people to become lawyers.

— Sarah R. Nagy, Bar No. 52806

**Code Girls: The Untold Story of the American Women Code Breakers of World War II**
*By Liza Mundy*

If you liked the movies *The Imitation Game* and *Hidden Figures*, you’ll love this book! This book is written as both a narrative of the lives of a few specific “code girls” and a historical recounting of how code-breaking developed in America. Truly fascinating story, very well researched, and easy to read. Highly recommend!

— Tiesha Fields, Bar No. 49323
By Tom Wright and Bradley Hope

This is an incredible tale of how a young and obscure Malaysian, Jho Low, managed to steal $3 billion from the Malaysian government in the 1Malaysia Development Berhad (1MDB) scandal that ultimately brought down the country’s prime minister. The story includes entertaining anecdotes of incredible parties that Low hosted, which were attended by major Hollywood celebrities. While a fun and interesting read, it also provides a case study in the making of a fraud through the use of sleight-of-hand, outright theft, and leveraging connections among the wealthy and well connected.
— Ralph W. Flick, Bar No. 41427

Crazy Rich Asians
By Kevin Kwan

If you’re seeking a light-hearted, summer-flying read, then I highly suggest Crazy Rich Asians. Transport yourself to the glamorous world of the fictional socialite scene of Singapore. Asian-American Rachel Chu, from New York City by way of California, suddenly finds her relationship with her boyfriend, Nicholas Young, turned upside down during a summer trip to meet his family in Singapore. Before embarking on their summer adventure, Nick forgets to mention one teeny-tiny detail ... he happens to be from one of the richest families in all of Asia. Their relationship will face new challenges with family and friends, and a few surprising twists and turns. This novel is the first of a three-part series—and now a major motion picture (with some key differences, of course)—that will definitely leave you wanting to know what happens next.
— Connor Smith, WSBA Communications Coordinator

Justice for Wards Cove
By Douglas M. Fryer

I recommend a book by one of our own: Douglas M. Fryer’s Justice for Wards Cove. Few lawyers will experience a single case with a duration of almost 28 years. Antonio v. Wards Cove Packing Company was such a case, and Douglas Fryer was the lawyer who represented Wards Cove from start to finish. The journey started with a bench trial, then repeated visits to the Court of Appeals, to the U.S. Supreme Court, and the halls of Congress. The case could be compared to the construction of the transcontinental railroad, except that project took only six years. Wards Cove, one of three related suits based on Title VII of the Civil Rights Act of 1964, was the only one in which plaintiffs failed to establish liability. Ignoring the 172 Findings of Fact by the district court, politicians, academics, and various public figures rallied and railed in a failed effort to change the result. The book is well crafted by a lawyer who, like the railroad, built his case one tie at a time, and tells the story in a way that will hold your interest even on a vacation beach or the deck of an ocean liner.
— Dexter Washburn, Bar No. 2335

Long Walk to Freedom
By Nelson Mandela

Autobiographies are admittedly not my literary preference; as a general rule, the amateur historian in me gravitates toward the medieval sagas: collected stories wherein more contemporary writers have artfully woven tales of heroic figures—centered on themes of companionship, tragedy, and triumph. If these are the themes I seek out for my reading, I have no idea how it has taken me this long to read Nelson Mandela’s enthralling tale. In truth, Long Walk to Freedom has every element of the heroic epic: a national hero rises from incredible adversity to both victory and redemption. Throughout this tale, Mandela details his life as a lawyer in Johannesburg—opening the first black law firm in South Africa. Always an advocate for justice and equality, Mandela utilizes his finely tuned talents as a lawyer in his political activism, becoming an important harbinger of the ultimate demise of apartheid. This book is an absolute page-turner; it is an incredible account laced with both humor and inspiration that everyone should read.
— Michael Tonkin, WSBA MCLE Analyst

Catch-22
By Joseph Heller

When I was about 12 years old, my dad insisted that I read his all-time favorite book, Catch-22, because my dad didn’t understand 12-year-olds. Needless to say, I did not finish Catch-22 on first reading. It would take another two decades, plus a few years, for me to slay the absurdist WWII story excoriated by The New Yorker as a novel that “gives the impression of having been shouted onto paper.” Catch-22 doesn’t so much tell a story as inflict a mental state. It is a complexly constructed wireframe of completely bananas irrationality wrapped around a war-time setting filled with characters so idiosyncratic that the only way to grapple with them is to let their abnormal reasoning sink into your own subconscious. Catch-22 requires patience and no small degree of Stockholm syndrome. To grasp Heller’s world, you first must accept it. Once you do that, the things that don’t make sense start to make sense and you can find meaning in the words shouted on the page.
— Colin Rigley, WSBA Communications Specialist
We were seated by 9:25 a.m. No cameras, no cell phones, no purses, no bags; just you and the suit you had on. We had to go through security twice. Each admittee was allowed only one guest. Luckily, another admittee didn’t have a guest so I wasn’t forced to choose which one of my parents got to go into the courtroom with me. We waited for what felt like forever. There were a few faint whispers, but I think everyone was too scared to talk, with all the U.S. Marshals spread throughout the courtroom. A woman sitting next to my mom was told to remove the glasses from the top of her head by a marshal whose tie actually matched the maroon curtains and gold ordainments—I wondered if that was intentional, or if he was just a Hogwarts fan. Finally, the clock struck 10. I felt a wave of nervousness and then … absolutely nothing happened. They were late.

At long last (three minutes later) all of the curtains drew back in a dramatic fashion and the justices walked in a straight line to their respective seats. The clerk called court to order and the curtains drew closed.

Justice Stephen Breyer read the opinion that morning. It was a case about burglary. That’s all I remember. I was too busy studying each of their faces, fascinated by the fact that I was breathing the same air as they were. I was seated in the front row, about eight feet away, awkwardly staring at each justice, desperate to make eye contact. Justice Samuel Alito was the only one not there that day. Chief Justice

RBG AND ME

An extraordinary encounter with an extraordinary jurist and how I asked an 85-year-old woman about her workout routine

BY MEGAN D. CARD

Supreme Court Justice Ruth Bader Ginsburg sat for a group photo with Gonzaga Law School alumni in December 2018. The author is seated to her right.
John Roberts had a charming Richard Gere quality about him. Justice Ruth Bader Ginsburg was so small you could barely see her head over the bench. Justice Brett Kavanaugh just looked thrilled to be there, as did Justice Neil Gorsuch. I actually appreciated their smiles and enthusiasm. Justice Breyer reminded me of the Monopoly man. Justice Elena Kagan looked just like she did on TV. I felt a sense of pride to see Justice Sonia Sotomayor on the bench.

Next, Chief Justice Roberts announced they would hear the motions. The movant from Liberty Law School went first and 13 admittees were sworn in. Gonzaga School of Law was next. (Gonzaga offers its law school graduates the opportunity to be admitted to practice, and sworn in, before the U.S. Supreme Court as an alumni event.) Our movant approached the podium, stated that he believed all 27 of us to be of sound character and fitness (phew), and announced our names and places of residence one by one. I remembered to raise the right hand (literally) and smiled proudly when he announced “Megan D. Card, Olympia, Washington.” After all the names were announced, Chief Justice Roberts said, “Motion granted. Court is adjourned.” And just like that, the curtains drew back again and they all disappeared as quickly as they had entered. I watched Justice Clarence Thomas walk down the steps and politely wait for Justice Ginsburg as he held out his hand. “What a gentleman,” I thought to myself. Politics did not matter in that moment; he was a colleague who cared. I and the other Gonzaga alumni went back to our meeting room in hopes that one of the justices might stop by.

We were in luck. Chief Justice Roberts walked into the room, with the presence and confidence you would expect from the chief justice. He told us about the eight portraits that were hanging in the room. One was of “the guy that looks like Mark Twain,” Justice Melville W. Fuller, who started the tradition of the justices shaking hands prior to entering the courtroom and before meeting for conferences. “It encourages collegiality,” Chief Justice Roberts said. Another portrait depicted Chief Justice Roger Taney, who wrote the majority decision in Dred Scott v. Sandford. I lost track after that point because I just couldn’t believe this was real life.

Chief Justice Roberts told us that only about five percent of law students are admitted to the Supreme Court of the United States. We were the first Gonzaga law school graduates admitted. He informed us of the tradition of “planking,” a modern exercise regimen and particularly popular in law school. “Have you been planking lately?”

Justice Ginsburg is much smaller and more fragile than I had imagined. Her style was impeccable and topped off with white-lace gloves. There was an awkward silence, and I’m sure it was because no one knew what to say to one of the most important figures in legal history—or simply history, period. The night before, I had lain awake for hours thinking about the questions I would ask her if I had the chance. And so, when the chance presented itself, the first question I asked was, “How do you feel about your newfound fame?”

She replied, “Maybe next week.” I told her that I had just bought a shirt the day before that said “Plank like RBG.” Justice Ginsburg gave us a brief history lesson on how her “Notorious RBG” moniker was born. “Of course you know where that’s from [the rapper, Notorious B.I.G.]. It started with a gal who was upset about a dissent I wrote. The
Notorious B.I.G. is from Brooklyn, and I’m from Brooklyn.” (One of our group members was smart enough to bring his “I dissent” RBG action figure and asked her to sign it, which she happily obliged.)

I asked Justice Ginsburg if she was excited about her new biopic, “On the Basis of Sex.” She said her nephew was the screenwriter and “that part of it is true, and part of it is not,” noting that in the movie she was portrayed as stumbling through her opening argument and coming back with an amazing rebuttal—but it did not actually happen that way. She told us that she “never stumbled,” and didn’t give a rebuttal. When she asked her nephew why he chose to write about that 1971 case, which was “just” a 10th Circuit Court of Appeals case, when she had taken many other cases about sex discrimination to the Supreme Court, he responded that he wanted the movie to be just as much a love story about her and her husband, Martin Ginsburg, as it was about her work. Her eyes seemed to sparkle when she talked about her husband.

The next questions came more easily:
“*How do you feel about your newfound fame?*”
“It’s quite odd. I’m 85 years old and everyone wants my picture.”

Others asked how she was feeling and if she had any more acting roles coming up. She said she did have a part in an opera, but it was just a speaking piece and she didn’t have any plans for more at the moment.

We then gathered for a picture, and I made sure I got to sit right next to my idol. Even during our brief encounter with Justice Ginsburg—or RBG—she demonstrated her quick wit, humor, and eloquence. She congratulated us again and just like that, she was gone. None of us could believe that had actually happened—fortunately Gonzaga had photographers there to prove it!

I’ve always been proud to be a Zag, and now I’m proud to be a Zag and bar number 307880 of the SCOTUS. I will likely never need to use my admission, but I can’t wait to go back to D.C. and sit in the reserved section of the courtroom … even if I have to wait in line. 😊

**NOTES:**
1. When Justice Anthony Kennedy announced his retirement, a photo of Justice Ginsburg holding the plank position went viral as a contrasting image of someone not about to hang up her robes.

**MEGAN D. CARD** is a proud Gonzaga Law School alumna. She is a shareholder at Rodgers Kee Card & Strophy, P.S. in Olympia, where she was born and raised. Her focus is in family law. When she is not working, she enjoys running, traveling with her husband, and camping with their dogs. She can be reached at megan@buddbaylaw.com.

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THE GRASS IS ALWAYS GREENER

A saying from the mid-1500s attributed to Erasmus of Rotterdam, paraphrased, states, “The corn in another man’s ground seems ever more fertile and plentiful than does our own.” Tracing back even further to the first century B.C., the poet Ovid wrote in his book, *Art of Love*, “The harvest is always richer in another man’s field.”

For at least a couple thousand years it seems, humans have had an interest in what others have and in what they could have, too. Imagining what else could be on the other side of the fence, so to speak, has long been a part of human nature.

And although sometimes comparing ourselves to others in that way can lead us astray—we all know from experience that the corn isn’t always more plentiful in another farmer’s field—other times, it can lead to positive change. A new career. A move to a new city. Greater financial stability. But even if we don’t actually intend to quit our jobs to become privacy lawyers in Ireland or estate planning attorneys in the Netherlands, it’s still fun to dream a little.

We asked WSBA members what they love (and don’t love) about the geographical places in which they work, and what they would do if they could trade places with another lawyer in a different practice area or part of the world.

The answers we received from members around the state were as varied as Washington’s disparate landscapes—from the mountains to the coast to the “scabland scenery” in between.
Natasha Hill
Bar No. 54137

Law Practice: civil litigation, employment litigation, entertainment and business law

What do you like best about the part of the state in which you practice or work? No traffic! The commute to work and around town is super easy. After 12 years in Los Angeles and two years in Seattle, this is an underappreciated perk for sure.

What do you like least? The winters are cold and the snow slows things down quite a bit, making my quick commute a bit longer.

What has surprised you about the place you practice or work? Spokane really doesn’t suck. I grew up here, so it took leaving and coming back to really appreciate what this town has to offer. And I think Gonzaga basketball says it all!

If you could trade places with a lawyer for a day (geographically or by type of law practiced), what would your trade be? I would head to Canada to practice environmental law. I studied environmental law at the University of British Columbia during a summer abroad in law school. Given the importance of environmental issues in our current climate (pun intended, of course), I’d love to experience what an attorney’s practice in this area looks like, specifically from an international perspective.

STEVENSON, SKAMANIA COUNTY

Neal Sacon
Bar No. 39800
Law Practice: housing and community development law

What has surprised you about the place you practice or work? Just how annoying spotty cell coverage is.

If you could trade places with a lawyer for a day, what would your trade be? U.S. Attorney for the Southern District of New York.

CLARKSTON, ASOTIN COUNTY

Todd Richardson
Bar No. 30237
Law Practice: general, litigation focused

What has surprised you about the place you practice or work? Really the answer is more how surprised I am when I leave the area. We have a rather collegial bar, and generally we work together and help each other. When I go outside the area, I find that many locales don’t have the collegial attorneys I get to work with.

If you could trade places with a lawyer for a day, what would your trade be? Hawaii ... can I move my office to the beach?

“I would be a special deputy prosecutor somewhere along the coast. I would go clamming on my lunch break.”

PETER PALUBICKI (Bar No. 41685), criminal prosecutor from Ritzville in Adams County, on trading places with a lawyer for a day.
**THE GRASS IS ALWAYS GREENER**

**BELLINGHAM, WHATCOM COUNTY**

**Talitha Ebrite**
Bar No. 47260  
**Law Practice:** oil and gas title and litigation, and general business litigation. I work remotely—I am a shareholder of a 100-lawyer, full-service firm headquartered in Oklahoma.

What do you like best about the part of the state in which you practice or work? I appreciate the collegiality of the local bar, and the slower pace of life here in Whatcom County. I'm fortunate to have the support and resources of a mid-size firm along with the flexibility and freedom of my remote working arrangement. I love being able to spend a gloriously sunny afternoon working near the water at the Woods Coffee on Boulevard Park.

What do you like least? It's never fun to see the same faces over and over again; you do become familiar with repeat offenders and it is heartbreaking to see people continue to sabotage themselves and make choices that hurt themselves and their families. I also work the new ferry from Kingston that takes me downtown. This is a new, terrific convenience—much better than dealing with traffic trying to get to the Bainbridge ferry. The new ferry makes it easier to indulge myself in living away from the mess that is now unfortunately Seattle, but also allows me to keep my practice in Seattle and still take on work in Kitsap County (and throughout the state).

If you could trade places with a lawyer for a day (geographically or by type of law practiced), what would your trade be? Eastern Washington. Practicing in the wide-open spaces there, in a small town, would be really interesting.

**THE GRASS IS ALWAYS GREENER**

**REPUBLIC, FERRY COUNTY**

**Kathryn Burke**
Bar No. 44426  
**Law Practice:** government—county prosecutor

What do you like best about the part of the state in which you practice or work? Working and living in a small jurisdiction allows me to observe firsthand when we make a positive impact on the community. When the system works as it should, I have the unique experience of watching people I've prosecuted get clean and sober, reunite with their families and children, and become productive members of society. Being able to interact with a former defendant outside of the court system (whether at a local business, community event, or school function) and see the positive changes in his/her life is extremely gratifying and reminds me why I became a prosecutor.

What do you like least? Living in a small jurisdiction and seeing the same faces over and over again is never fun; you do become familiar with repeat offenders and it is heartbreaking to see people continue to sabotage themselves and make choices that hurt themselves and their families. On another note, I am also the county coroner and that part of the job is always more difficult when I know the subject (which happens often).

What has surprised you about the place you practice or work? The diversity of cases that we see. Although we are a small jurisdiction, there is never a day that I don't see something novel or unusual, or a day that I don't learn something new.

If you could trade places with a lawyer for a day (geographically or by type of law practiced), what would your trade be? I would probably trade places with a civil attorney and work on something a little less fast-paced. Maybe draw up some wills or trusts or something.

**THE GRASS IS ALWAYS GREENER**

**KINGSTON, KITSAP COUNTY**

**Kany Levine**
Bar No. 18969  
**Law Practice:** criminal defense, civil rights, personal injury, employment discrimination

What do you like best about the part of the state in which you practice or work? I live in Kitsap County and have an office in downtown Seattle in Pioneer Square. I work at home a lot, but I also walk on the new foot ferry from Kingston that takes me downtown. This is a new, terrific convenience—much better than dealing with traffic trying to get to the Bainbridge ferry. The new ferry makes it easier to indulge myself in living away from the mess that is now unfortunately Seattle, but also allows me to keep my practice in Seattle and still take on work in Kitsap County (and throughout the state).

If you could trade places with a lawyer for a day (geographically or by type of law practiced), what would your trade be? Eastern Washington. Practicing in the wide-open spaces there, in a small town, would be really interesting.

**THE GRASS IS ALWAYS GREENER**

**PULLMAN, WHITMAN COUNTY**

**Christine Dow**
Bar No. 41624  
**Law Practice:** family law

If you could trade places with a lawyer for a day (geographically or by type of law practiced), what would your trade be? To be in a practice with other family law attorneys, with a collaborative law component.
Deborah Nelson
Bar No. 23087

**Law Practice:** plaintiffs’ personal injury, legal malpractice, long-term disability insurance, and insurance bad faith

I lived in Port Angeles and had an office there for 13 years before moving to Seattle in 2007 when I was president of the Washington State Trial Lawyers Association (now WSAJ) because I thought the grass was greener in Seattle. However, I realized fairly soon that the grass is pretty green in both places, so I purchased a home in Sequim and still actively practice law in both places: at my office in Seattle and at my office in Sequim, where I routinely represent clients in Jefferson and Clallam counties.

What do you like best about the part of the state in which you practice or work?

I appreciate the variety of representing people in a large city and also representing people in rural parts of the state. I find that I'm closer to my clients in smaller towns since we're living at much closer proximity to each other and often know many of the same people. I've also enjoyed creating long-term friendships with my clients in Clallam County.

What do you like least?

Because I practice in both a large city and a small town, I've been able to avoid having a least favorite part of my practice. When the city gets too fast, I head for Sequim. When Sequim gets too slow, I head for Seattle.

Did you plan to practice or work there?

I had always hoped to start my law practice in Seattle, but when I got out of school, the only job I could find was in Port Angeles. However, I quickly grew to love it and it was the perfect place to launch my career and learn how to be a lawyer.

What has surprised you about the place you practice or work?

I've been surprised that there really isn't that much crossover between my practice in Clallam and Jefferson counties and my practice in Seattle. People don't go back and forth between the two places as often as I would have expected (certainly not as often as I do!) and I think my clients in Clallam and Jefferson Counties appreciate that they don't have to go to Seattle to get a “Seattle lawyer,” since I come to them. One thing that I appreciate is that, in the early years of my practice in Port Angeles, many of the insurance defense attorneys that I practiced opposite are still people that I know and practice opposite in Seattle.

If you could trade places with a lawyer for a day (geographically or by type of law practiced), what would your trade be?

I would like to know what it is like to practice law in Sweden. My spouse and I went to Sweden this summer for our honeymoon and visited family there and expect to return, but I do wonder what life is like for lawyers in Sweden, both in Stockholm and in smaller towns.

LESI REARDANZ (Bar No. 27074), municipal/government attorney from Everett in Snohomish County, answering what is the best part of the place where you work.

The natural beauty and energy of the Snohomish County community. Northern and eastern Snohomish are emerging areas of diverse industry, people, natural assets, and community spirit and togetherness.

Erik M. Kupka
Bar No. 28835

**Law Practice:** criminal and civil litigation

What do you like best about the part of the state in which you practice or work? The people. The pace. The great outdoors. The added bonus rests somewhere in the eight-minute commute to the office and the ability to make every one of my children’s school and extracurricular events.
THE GRASS IS ALWAYS GREENER

WALLA WALLA, WALLA WALLA COUNTY

Wendy Hernandez
Bar No. 35054

Law Practice: immigration law

What do you like best about the part of the state in which you practice or work? I love Walla Walla. I love the recreational and academic opportunities that this out-of-the-way community affords. I love immigration law. I love that Walla Walla is a diverse community that is supportive (mostly) of its immigrant population. Since Walla Walla has been my home for much of 37 years, I love that I know my clients personally.

What do you like least? Walla Walla is also a tough place to practice immigration law because the immigrant community is predominantly impoverished and everything we do requires travel. It is very hard to charge clients what it costs to represent them, including travel costs and time out of the office. Immigration court is in Seattle, about 250 miles away; U.S. Citizenship and Immigration Services (USCIS) is in Spokane, 150 miles. Flights are often canceled, which can leave me driving over the pass at the last minute in winter weather.

What has surprised you about the place you practice or work? When I first opened my practice in Walla Walla, numerous local attorneys asked me how long I intended to practice immigration law here. I wondered what they were trying to tell me! I guess the surprise is that I am still here 10 years later and still enjoying my work in spite of the challenges.

If you could trade places with a lawyer for a day (geographically or by type of law practiced), what would your trade be? This is the only place I would practice and I would not want to trade places with anyone else, not even for a day!

ZILLAH, YAKIMA COUNTY

Michelle Bos
Bar No. 37083

Law Practice: intellectual property

If you could trade places with a lawyer for a day (geographically or by type of law practiced), what would your trade be? I would trade with a mediator or a child advocate.

EAST WENATCHEE, DOUGLAS COUNTY

Paul Kube
Bar No. 24336

Law Practice: litigation, employment, personal injury

What do you like best about the part of the state in which you practice or work? Beautiful location with close access to mountain biking, skiing, and hiking.

DALE M. FOREMAN (Bar No. 6507), general litigation attorney from Wenatchee in Chelan County, on trading places with a lawyer for a day.

“...I would go to Paris and argue a politically charged free speech case.

SEATTLE, KING COUNTY

Tyler L. Merrill
Bar No. 50696

Law Practice: family law

Did you plan to practice or work there? Yes! Every time I leave Seattle, I always can’t wait to get back.

If you could trade places with a lawyer for a day (geographically or by type of law practiced), what would your trade be? I would love to handle a medical malpractice case.

BLAINE, WHATCOM COUNTY

Rajeev D. Majumdar
Bar No. 39753

Law Practice: small town general practice—criminal, civil, transactional

What do you like best about the part of the state in which you practice or work? It’s so beautiful—instant access to ocean, forests, and mountains, combined with access to city life and the diversity that an international border brings. There is always something to do in public with people, while maintaining lots of opportunity for solitude and contemplation. We have an amazing nonprofit cinema dedicated to showing independent and international films, and that alone might be worth living here for—but that may say more about me and my addiction to movie popcorn than the area as a whole.

If you could trade places with a lawyer for a day (geographically or by type of law practiced), what would your trade be? I would like to practice and advocate on behalf of native people’s rights and sovereignty. I think it is a very deep and misunderstood subject area, and one that would be a significant and meaningful endeavor on behalf of others. If I had to do that in Hawaii, so be it.
Megan D. Card
Bar No. 42904
Law Practice: family law

What do you like least? The divide between attorneys in private practice and the government lawyers. There are so many assistant AGs here, but there is not much crossover between the Government Lawyers Bar Association and the Thurston County Bar Association.

If you could trade places with a lawyer for a day (geographically or by type of law practiced), what would your trade be? In law school I wanted to be an entertainment lawyer working in the music industry, and I still think that would be pretty cool. I would also trade places with Amal Clooney for a day because, duh.

The access to the outdoors, the Olympics, the national forest.

DIANNA TIMM DRYDEN (Bar No. 10574), a wills and probate attorney from Union in Mason County, answering what is the best part of the place where you work.

Lindsey Schromen-Wawrin
Bar No. 46352
Law Practice: civil litigation, mostly on issues of government authority

What do you like best about the part of the state in which you practice or work? Port Angeles is my hometown, so I appreciate being familiar with a place and how that familiarity still allows me to discover all the things I’ve failed to notice, or that have changed over time.

What do you like least? A lot of people who come to the Olympic Peninsula seem to think they are the first people here, and then act from that assumption. This way of thinking has a long history on the Olympic Peninsula. When I interviewed Klallam language teacher Jamie Valadez a dozen years ago about the community in Port Angeles, she started her reply with “Port Angeles is not a very old community; it’s only 150 years old.” That’s perspective. When people tell me that since I was born here, I’m a native, I try to politely counter that I’m local, not native. Native means something else here. So what I like least is when people come here and act like it isn’t a place with millennia of human history. Do come and visit (or move here and take the Strait Shot bus to work); just remember this place is not Seattle’s backyard.

Did you plan to practice or work there? Yes. I’ve long been influenced by the idea that if you want to make the world a better place, start in the place you call home. My last summer of law school, I sent a letter to the Clallam County Superior Court judges asking if they would accept an intern for the summer. The court had no research clerks or any similar support for the judges, so they were happy to have a clerk, and they would joke about how I was the only applicant. It was a great way to learn who is who in a small legal community before getting a law license.

What has surprised you about the place you practice or work? There is a lot of collegiality within the legal community. At the same time, people get to know each other really well, which brings its own challenges. Bridge-burning doesn’t work in a small town—after all, there are only three bridges off the peninsula.

If you could trade places with a lawyer for a day (geographically or by type of law practiced), what would your trade be? My legal work mostly deals with government power, often in ways that are way upstream and don’t feel directly immediate in people’s lives. Perhaps in response to that, I love volunteering with Clallam-Jefferson County Pro Bono Lawyers, and I recently helped an immigration attorney on a detainee habeas petition. So for a day, I’d want to do the fast-paced interactive legal work that ends the day with me saying, “this person is more secure because I helped them.”
Kimberley Lane

Bar No. 30492

Law Practice: wills and probate and small business

What do you like best about the part of the state in which you practice or work? The clients! The clients in the Cle Elum area are such warm, wonderful people. They make it easy to come in and do good work every day for them. Prior to retiring in Cle Elum, I worked in the Bellevue/Redmond area doing intellectual property transactional work. The clients in that practice are sophisticated business people who conduct themselves very professionally. Here in Cle Elum, the clients are so friendly and warm that having a client meeting is closer to sitting down over coffee with old friends or family.

What do you like least? 1) Forest fires. At one point in recent years a forest fire was dangerously close and the air was orange. 2) When a client passes, it hits home. Emotionally, that is hard. You feel how the loss of one person ripples through the community.

Did you plan to practice or work there? Not originally. I planned to retire in Cle Elum, but there are not sufficient legal services for this community without having to travel at least 20 miles. Consequently, I wanted to give back to my community, which is why Lane Law is currently structured as all pro bono (in that I receive no payment for services, but all fees go to keep the lights on and pay staff). Further, I have a paralegal who is in the WSBA Law Clerk Program, so she will be prepared to take the bar in 3 1/2 years and continue the practice for the benefit of the community.

What has surprised you about the place you practice or work? How interconnected everyone is in this small town. For the majority of my practice, I was in the Bellevue/Redmond area, which is populated by people from all over the world. The people there rarely knew each other. Here, everyone knows everyone else going back multiple generations. There is history, and feuds and sides. You have to be very careful and respectful of those connections.

If you could trade places with a lawyer for a day (geographically or by type of law practiced), what would your trade be? In-house for a sports team or sports team management (baseball, football, or NASCAR).
**LONGVIEW, COWLITZ COUNTY**

Meredith Long  
Bar No. 48961  
*Law Practice:* civil litigation

What do you like best about the part of the state in which you practice or work? A lot of Cowlitz County is rural and life runs at a slower pace here. People are friendly and unpretentious.

What do you like least? The constant rain! But I love to garden, and all those soggy winter days give us the most beautiful blooms in spring and summer.

Did you plan to practice or work there? As a teenager, I swore I would never be a lawyer or end up living in my hometown—I was wrong on both counts.

What has surprised you about the place you practice or work? I am surprised how popular the legend of the Sasquatch is here. I have met people that claim to be descendants of Sasquatch, and we have a “sQuatch Fest” every January.

If you could trade places with a lawyer for a day (geographically or by type of law practiced), what would your trade be? I would trade places with a lawyer from the San Juan Islands and telecommute from the beach.

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**MOSES LAKE, GRANT COUNTY**

Brian Dano  
Bar No. 4793  
*Law Practice:* nonlitigation office practice: primarily estate planning, probate, real and commercial property transactions, and LLC creation and management.

What do you like best about the part of the state in which you practice or work? I truly enjoy the wide-open spaces and surrounding mountain and scabland scenery, as well as the lack of people and automotive congestion. I love watching the many varied crops—both irrigated and dry land—spring from the soil and mature, as well as the harvest.

What do you like least? There isn’t too much not to like, but in my case, in a relatively small town area, I miss not having many nice dining options.

Did you plan to practice or work there? I grew up in Ellensburg and went back there to practice, as planned. I am now practicing 70 miles east in Moses Lake (since 1984), which I had not planned on, but am not disappointed in having relocated here.

What has surprised you about the place you practice or work? There has been tremendous economic growth in both the agricultural and industrial sectors, the most surprising facet of which is the relatively recent location of the vast server farms (Microsoft, Yahoo, etc.) in Quincy, where I have a part-time office. And lately, the market value of agricultural land, particularly acreage suitable for vineyards and orchards, has exploded.

If you could trade places with a lawyer for a day (geographically or by type of law practiced), what would your trade be? This is an interesting one. If you mean in Washington, it is a toss-up between trading places with a Walla Walla lawyer and one near the coast, maybe Port Angeles or Forks. If you mean anywhere, then Ivans, Utah (near St. George), or Southern Arizona.

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**LOPEZ ISLAND, SAN JUAN COUNTY**

Kathryn L. Tucker  
Bar No. 15881  
*Law Practice:* public interest advocacy in the domain of patient rights, as executive director of a small national nonprofit

What do you like best about the part of the state in which you practice or work? I live on Lopez Island, one of the most spectacular places on the planet! I love to travel for work, which offers a nice balance of rural life with more stimulation of larger communities. I spend the cold, wet, dark winter months living in Bend, Oregon, where it is nearly always sunny, and the skiing is outstanding.
Lindsey Weidenbach
Bar No. 43523
Law Practice: corporate/commercial, estate and succession planning, tax and ag law (including row crops, orchards, and cannabis)

Did you plan to practice or work there? I grew up in Cashmere, Washington, and so this area is home to me. Coming home was always a possibility but I thought I would end up in Seattle, which I tried for a year while getting my LL.M in tax at UW. It turns out that the Seattle lifestyle just isn’t for me.

If you could trade places with a lawyer for a day (geographically or by type of law practiced), what would your trade be? If it were only for a day, I would trade places with a lawyer like Kathleen Zellner who assists the wrongfully convicted. Our criminal justice system doesn’t always work and to be a part of helping someone find justice would be greatly rewarding. I can’t imagine the sort of pressure and stress that work would bring though, which is why I would like to spend just a day in her shoes.

Teunis J. Wyers
Bar No. 23771
Law Practice: estate planning and administration, and some real estate transactions

If you could trade places with a lawyer for a day, what would your trade be? An estate planning lawyer in The Netherlands.

Gabriel Foster
Bar No. 52627
Law Practice: family law

What do you like least? The unpredictable weather (you can leave your office for court with sunny weather and return in a rainstorm).

Did you plan to practice or work there? I never had the Tri-Cities in mind when I went to law school or when I was looking for work after graduation. But an opportunity arose here and I took it, knowing nothing about the Tri-Cities region. But sometimes the river of life washes you ashore where you’re supposed to be.

What has surprised you about the place you practice or work? The Tri-Cities turned out to be an excellent place to have a solo law practice. The area is not overrun with too many lawyers so there is lots of work to go around. It only takes a few minutes to get from my home to the office to the court—to get anywhere, really. The local bar is very friendly and in the family law area in which I practice, very cooperative in ultimately getting cases settled without having to go to trial.

If you could trade places with a lawyer for a day (geographically or by type of law practiced), what would your trade be? If I could trade places for a single day with another lawyer, it would be taking Vincent Bugliosi’s place giving the closing argument in the Charles Manson case. I read his book, *Helter Skelter*, when I was in junior high school and it influenced my decision to become a lawyer more than anything else.

Natalie N. Kuehler
Bar No. 50322
Law Practice: environmental law and complex litigation

Did you plan to practice or work there? No, it never possibly occurred to me that I would hang my own shingle, much less that I would end up in a rural area in the far west of the country.

If you could trade places with a lawyer for a day (geographically or by type of law practiced), what would your trade be? The Solicitor General’s Office—though I would be in way over my head.
For decades, McKinley Irvin has helped clients navigate through some of life’s most difficult challenges. Our attorneys are known for their relentless pursuit of successful results, whether representing individuals in financially complex divorce or high conflict parenting disputes. But perhaps our most noted distinction is our steadfast commitment to protecting what our clients value most.
Cannabis Conundrum

Cross-border intellectual property licensing for cannabis businesses

More than six years after Washington state voters approved I-502, the initiative that legalized the production and sale of marijuana, the state’s legal and regulatory framework for cannabis continues to experience growing pains and uncertainty. Take, for example, the licensing of intellectual property rights in connection with the production and branding of cannabis products. This issue has recently received attention in Washington courts and the Washington Legislature. While some clarity may be on the horizon with respect to this issue, unanswered questions will likely remain, including the impact that cross-border license agreements might have on the tenuous federal-state détente regarding the legality of marijuana.

**The Headspace Trademark Case**

In January 2017, California entity Headspace International LLC sued, among others, Podworks Corp., a Washington cannabis business, in Washington state court alleging trademark claims under Washington law. Headspace, as an out-of-state entity, was not and could not be a marijuana business licensee under Washington’s cannabis licensing framework. As a result, Headspace did not use its trademark on any cannabis products of its own in Washington. Instead, Headspace based its trademark claims in Washington on its agreement with a cannabis business that is licensed to operate in Washington, X-Tracted Laboratories 502, Inc. Under that agreement, Headspace licensed to X-Tracted its trademark and its “proprietary chemical process to create highly refined essential plant oils.” X-Tracted, in turn, used the process and trademark in the production and branding of cannabis products in Washington.

In the trial court, Podworks successfully moved to dismiss Headspace’s claims. Podworks argued in part that because Headspace could not, as an out-of-state entity, be lawfully involved in the production and sale of marijuana in Washington, it couldn’t demonstrate the lawful use of its mark in commerce in Washington, which is necessary to establish trademark claims. The trial court agreed that Headspace had not alleged any trademark claim based on its mark having been lawfully placed in commerce in Washington. On that basis, the
In an August 2013 memorandum to U.S. Attorneys known as the “Cole Memorandum,” Deputy Attorney General James Cole outlined federal enforcement priorities with respect to marijuana. In the view of the Cole Memorandum, cannabis businesses that are subject to strong and effective state regulatory and enforcement systems are less likely to implicate federal enforcement priorities. Therefore, the memorandum, despite having no impact on the illegal status of marijuana under federal law, provided some assurance to cannabis businesses complying with state law that wide-scale federal enforcement actions were not in the offing.

That assurance was questioned in January 2018, however, when then-Attorney General Jeff Sessions rescinded all previous marijuana-specific nationwide enforcement guidance, including the Cole Memorandum. But Sessions’ 2018 memorandum didn’t explicitly repudiate any of the previous guidance on marijuana enforcement. Rather, it concluded that such additional guidance was unnecessary, as prosecutors should “follow the well-established principles that govern all federal prosecutions,” which require prosecutors to “weigh all relevant considerations” when making prosecution decisions. Thus, while the rescinding of the Cole Memorandum understandably raised concerns in the legal cannabis industry, it appears to have had little practical impact on the federal government’s generally hands-off approach to cannabis businesses that are complying with state laws that are consistent with federal enforcement priorities.

Court dismissed all of Headspace’s claims.

The Washington Court of Appeals disagreed, concluding that Headspace’s allegation that it had, in fact, made use of its trademark in commerce in Washington via its licensee’s (X-Tracted) use of the trademark on cannabis products was sufficient, at least at this early stage of the case. Headspace Int’l LLC v. Podworks Corp., 5 Wn. App. 2d 883 (2018). As to whether that use was lawful given Headspace’s status as an out-of-state entity, the court concluded that the licensing arrangement as alleged was lawful, rejecting various arguments to the contrary by Podworks.

Among other things, Podworks argued that to be a valid trademark license, Headspace’s agreement with X-Tracted would require Headspace to exercise such control over the quality of X-Tracted’s cannabis products that Headspace would be a “true party of interest” of the Washington cannabis business. Washington’s cannabis licensing framework requires all “true parties of interest” to be vetted by the Washington State Liquor and Cannabis Board (LCB) and listed on a marijuana business’s license. “True parties of interest” include, among others, those receiving or having the right to receive a percentage of the profits from the marijuana business. But the appellate court rejected the argument that a trademark licensor’s control over the quality of the goods on which the licensed trademark was used necessarily made the licensor a “true party of interest” in its licensee’s cannabis business. Notably, the court commented that if the license agreement (which was not provided in connection with the motion to dismiss) specified that Headspace would receive a percentage of X-Tracted’s profits, Headspace would be a “true party of interest” in cannabis licensee X-Tracted. But the court found the allegations of Headspace’s complaint to be consistent with the theory that the license agreement did not provide for such profit-sharing.

Podworks sought review by the Washington Supreme Court, arguing that to permit a cross-border agreement such as California entity Headspace’s license agreement with a Washington cannabis business conflicted with Washington’s cannabis regulatory framework, which was carefully drawn to avoid conflict with federal law by, for example, precluding legal marijuana activities from crossing state borders. In early March 2019, the Washington Supreme Court decided to hear the case.

**Federal stance on marijuana enforcement**

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Cannabis Conundrum

CANNABIS IP LICENSING AND THE LEGISLATURE
In 2017, the Washington Legislature weighed in on the issue of intellectual property license agreements for cannabis businesses with a new provision codified at RCW 69.50.395. This provision explicitly permits licensed marijuana businesses to enter into such agreements in particular circumstances—for example, for the license of trademarks registered under federal or Washington state law. The new provision also required that the agreements be disclosed to the LCB. This new provision was cited in the Headspace case, with the appellate court rejecting the argument that adoption of the provision meant, by implication, that intellectual property license agreements were prohibited before it was adopted.

Although the LCB was tasked with adopting regulations to flesh out RCW 69.50.395, no such regulations have yet been adopted, and draft regulations have raised concerns in the cannabis industry. However, new legislation passed by the Washington Legislature and signed by Gov. Jay Inslee on May 13, 2019, answers at least some of the questions left open by the 2017 amendment. Among other things, the amendment:

- Permits a license agreement for a trademark registered under federal or Washington law, or under any other state or international trademark law;
- Permits intellectual property license agreements to provide for a royalty fee based on sales of the product using the intellectual property, provided that the royalty fee doesn’t exceed 10 percent of the licensee’s gross sales from the product;
- Permits the contracting parties to grant exclusive rights to the intellectual property;
- Permits the licensor to impose quality-control standards to preserve the integrity of the intellectual property; and
- Permits assignment of the licensor’s improvements of the intellectual property.

And perhaps most notably, the amendment provides that if the parties to the agreement comply with all the requirements set forth in the amendment, the intellectual property licensor is not required to qualify as a marijuana business licensee (e.g., a “true party of interest”) for purposes of the agreements authorized in the amendment.

THE FUTURE OF CANNABIS IP LICENSE AGREEMENTS
The amendment to RCW 69.50.395 provides some certainty as to a number of the open questions mentioned above. It allows more flexibility in the payment arrangements specified in intellectual property license agreements for cannabis businesses by permitting a limited royalty rate based on sales, a more typical payment mechanism for such agreements. It also permits the rights owner to impose quality controls over use of its intellectual property to protect those rights, a vital component of, for example, trademark license agreements. The amendment’s authorization of license agreements for international trademarks also opens up possibilities for Canadian businesses, which have enjoyed robust growth due to that country’s recent legalization of cannabis on a nationwide scale. And perhaps most importantly, the amendment permits agreements containing such terms without requiring the intellectual property rights owner
to qualify as a marijuana business licensee under Washington’s strict cannabis licensing framework.

But new questions will undoubtedly arise even with passage of the amendment. In particular, it remains unclear what effect, if any, the specter of cross-border licensing of intellectual property among cannabis businesses will have on the lurking legal conflict between federal law and state law on the treatment of marijuana. Previous guidance from the U.S. Department of Justice relating to that conflict stated that federal law enforcement priorities were focused on issues such as preventing revenue from marijuana sales from going to criminal enterprises, gangs, and cartels; preventing the diversion of marijuana from states where it’s legal to states where it’s not; and preventing state-authorized marijuana activity from being used as a pretext or cover for other illegal activity or other illegal drug trafficking. As long as states that have legalized marijuana implement strict regulatory and enforcement mechanisms, the Justice Department indicated that activity in compliance with those mechanisms is less likely to threaten these federal enforcement priorities and, therefore, require federal action. Although that guidance was rescinded by former Attorney General Jeff Sessions in January 2018, the principle it espoused has not appeared to change. It remains to be seen, however, whether the possibility of cross-border license agreements between cannabis businesses will have any impact on the current stay of the federal enforcement hand.

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STACIA LAY is an attorney with Focal PLLC in Seattle and advises clients with respect to a wide variety of intellectual property issues and disputes. She can be reached at stacia@focallaw.com.

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NWLawyer Would Love to Hear From You!
In 2017 in Washington, there were enough people awaiting trial from behind bars to rival the population of Ferry County—and that’s just based on the national average, which might be a comparatively low estimate. If you instead rely on data from a few of the state’s most populous counties—King, Pierce, and Spokane—the number of people in jail who had not been convicted of a crime would be at least 75 percent of those counties’ total prison population, which is 10 percent higher than the national average. That’s...
only one piece of information drawn from the Pretrial Reform Task Force Final Recommendations Report published earlier this year.

The report was the culmination of 18 months of research and analysis, incorporating stakeholders from across Washington to look at the state’s pretrial practices and identify areas to make improvements. The task force’s executive committee included Washington Supreme Court Justice Mary I. Yu representing the Minority and Justice Commission, King County Superior Court Judge Sean P. O’Donnell representing the Superior Court Judges’ Association, and Spokane Municipal Court Judge Mary Logan representing the District and Municipal Court Judges’ Association.

The report’s findings and recommendations have the potential for broad reforms of Washington jails, where many lower-income citizens are often forced to wait for their day in court. However, the Pretrial Reform Task Force also outlines a need for much more research and reporting to develop a clear picture of how defendants move through pretrial processes and who these processes impact most.

Presiding in Spokane Municipal Community Court, an innovative alternative rehabilitation-focused program to alleviate nonviolent crimes in downtown Spokane, Judge Logan has had significant experience with processes aimed at keeping people out of jail and preventing the cycle that traps many people in a revolving-door relationship with county jails and, perhaps, state prisons.

_NWLawyer_ reached out to Judge Logan, who conferred with her fellow executive committee members Justice Yu and Judge O’Donnell, to respond to our written questions about the potential impacts of the Pretrial Reform Task Force’s analysis.

**Q:** What was the impetus behind the Pretrial Reform Task Force and the recommendations in its report?

**A:** In 2016, the Washington Supreme Court hosted a symposium presented by the Minority and Justice Commission in Olympia titled “Pretrial Justice: Reducing the Rate of Incarceration,” which featured national experts discussing growing trends involving pretrial incarceration. The Washington Pretrial Reform Task Force was then launched in June 2017… The [Task Force Executive Committee], convened by the Superior Court Judges’ Association, the District and Municipal Court Judges’ Association, and the Minority and Justice Commission, undertook a review to examine factors driving pretrial decisions that lead to high detention rates, and to develop recommendations for improving pretrial justice in Washington.
**Q:** One of the standout recommendations from the Task Force’s report is the need for regular and broad data gathering on pretrial processes throughout the state. What resources would need to be made available for Washington courts to undertake more intensive data gathering of this nature?

**A:** Consistent statewide data collection has become exceptionally challenging due to a number of variables: the aging out of current systems, the implementation of separate electronic systems by various jurisdictions and levels of courts, even the basic definition of terms such as “FTA” (failure to appear) versus “FTC” (failure to comply) has raised issues in attempts at calculating the number of warrants issued. Access to the stored information can pose obstacles as well; thereto, the question of where and how that information would be kept if there are numerous systems gathering the information. There is not an easy answer to data gathering and storage—and it all will come with a hefty price tag.

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**Q:** The Task Force report highlights the sometimes startling success of court date reminders at boosting appearance rates. What immediate steps can courts take to implement reminder systems to help ensure more people arrive for court?

**A:** There are some very inexpensive notification systems on the market that exist independent of a case management system—some such systems are a component of electronic case management systems, as well. ... [These systems provide] a reminder to people who have court dates, providing them adequate notice to plan for travel, child care, and time off from work.

**Q:** The report also highlights the potential for Pretrial Risk Assessment Tools (PRATs) to assist in data collection and better identify defendants less at risk for skipping court. What considerations should courts and legal professionals make when assessing these tools, specifically in ensuring that the tool isn’t subject to biases of the software creators?

**A:** Any tool should always be viewed as one component of information a judge considers in making decisions—an additional arrow in a quiver of arrows. Pretrial service departments can offer insight into a person’s living circumstances, which is also quite helpful in making decisions. Important

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**Availability of Pretrial Services**

According to a 2018 study, there were 32 active or former pretrial service programs in Washington. Though pretrial services are available across a wide swath of the state, large gaps were indicated in Eastern Washington and along the coast.

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**Source:** Superior Court Judges’ Association Pretrial Services Survey (Sept. 2018)

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*There is not an easy answer to data gathering and storage—and it all will come with a hefty price tag.*

— SPOKANE MUNICIPAL COURT JUDGE MARY LOGAN ON THE DIFFICULTY OF GATHERING PRETRIAL PROCESS DATA ACROSS THE STATE
Whenever any innovation is being considered is the “why” of that endeavor. In other words, the entity should collaboratively and cooperatively consider just what problem is being addressed by the use of such a tool. Is the goal to reduce failures to appear? Is the goal to be good managers of limited resources? Is the goal to reduce reliance on jail as a means to assure appearance? As to the biases that can exist, it is important to recognize that without any specialty tool, a judge has very little information upon which to rely other than criminal history, which can also continue the same biases.

**Q:** The Task Force recommends that governments bear the cost of pretrial services, but how would doing so affect court budgets? Would cuts have to be made elsewhere? What would you say to those who might be averse to budget impacts?

**A:** Some of the most compelling information that can be shared with a funding source is the comparison between heavy reliance on jail and alternatives to pretrial incarceration; for example, if the cost to incarcerate someone can be determined, the data can be collected to provide a cost/benefit analysis for the governmental entity that ultimately bears that cost. The benefit of a pretrial service department is to provide information to the court to make educated decisions regarding release and conditions that allow the accused to maintain employment or schooling, or place reasonable restrictions to help ensure public safety, or a combination of both. Providing data to drive the decisions eases that discussion and may result in cost savings, which still protect the public without having to negatively impact any budgets.

**Q:** How do the Task Force’s findings and recommendations fit into broader criminal reforms, given other efforts such as the elimination of cash bail in California … and even the Spokane Community Court?

**A:** The findings fit in quite nicely with the broader reform efforts as they raise awareness to taking a harder look at a system upon which great expectations are placed and from which we are seeing mixed results. Introspection and review with careful implementation has shown to have positive results.

**Q:** Efforts that reduce or eliminate jail time, even those efforts meant to prevent incarcerating people who’ve not been convicted of a crime, are often criticized as being “soft on crime.” What is your response to such criticism, and what findings from the pretrial reform assessment do you think support that?

**A:** One of the most important takeaways from the analysis is that being smart on crime is more productive then being “hard” on crime. The 3DaysCount™ [campaign] demonstrates how just three days in jail is a significant disruptor resulting in loss of employment, belongings, and housing. The examination of the results of mass incarceration, particularly on non-violent misdemeanor offenses, has shown that effective use of alternatives to incarceration, such as a robust pretrial services department, results in fewer people coming back into the system. Using tools to separate populations of offenders into categories of risk helps the judiciary appropriately apply conditions such as text messaging notices of court appearances that result in greater appearance to hearings, which results in higher rates of accountability and respect for victims.

**Q:** What can other legal professionals do to get involved if they’d like to help with pretrial reform?

**A:** First steps would include education on the current system. Nationwide, there has been a close examination of the criminal justice system and it is worthwhile to start from that base of examination as it segues into the use of alternative approaches—building a better mouse trap starts by understanding the workings of the current “trap” and tuning it up to create the possibility of better results, meaning prompt access to counsel, handling of charges, application of services where needed to address needs including addiction and the devastating effects of drug/alcohol abuse, generally addressing the underlying reasons someone does not appear. Volunteer lawyers are also necessary to aide in the [work]. Involvement may require stepping up and getting uncomfortable in [order] to amend pretrial efforts, but the effort is supported by the data from the state.

**Colin Rigley** is a communications specialist for the Washington State Bar Association. Prior to joining the Bar, his previous experience included journalism and content strategy in California and Washington. He can be reached at colinr@wsba.org.
ask a lawyer to discuss “mediation” and you will likely hear about a process in which the parties and their counsel are separated, with the mediator shuttling between conference rooms. The mediator will bond with, inform, opine, and cajole each side until she has secured an agreement and cemented it by a Civil Rule 2A stipulation. This process, however, differs markedly from the facilitative mediation model described by Christopher W. Moore in his classic work, *The Mediation Process: Practical Strategies for Resolving Conflict*; that model is also taught in the University of Washington School of Law’s intensive training program, and at Dispute Resolution Centers (DRCs) throughout the state.

The foundation of this second mediation process is the refusal to separate the disputing parties—thus its description as “facilitative”—as the mediator assists each participant in crystalizing and articulating his interests and the necessary elements of an acceptable settlement, as well as listening to and understanding those of the other party. Although the litigation community still appears skeptical of the efficacy of a model that puts disputants in the same room, many trained mediators—from William Ury, who with Roger Fisher wrote *Getting to Yes: Negotiating Agreement Without Giving In*, to DRC small-claims volunteers—rely on a tried and true set of tools to manage conflict and drive toward resolution.

Among the most effective and reliable of these tools are the following:

1. A clear set of rules of engagement or communication that keeps the proceedings both safe and productive;
2. Skillfully facilitated discussion, allowing each party to clarify and articulate his or her needs and interests;
3. A facilitator with sufficient cachet (either by personal reputation and/or training) to get the parties’ buy-in to the process;
4. A clearly thought-out structure that will “hold” the parties in the negotiation process when the heat of conflict spikes;

A mediator’s lens on a historic moment and what it highlights about effective mediation

BY JOSEPH SHAUB
5. Establishment of a “safe container” in which participants know that they are free to speak their truth without the threat that they will be harmed later by their candor;
6. Facilitation of creative brainstorming in which ideas for resolution, previously not imagined, may lead to accord;
7. Discipline in keeping the important issues in the forefront, with tangential and diverting questions put aside; and
8. Effective driving to resolution at the conclusion of the process.

To appreciate how effective—and timeless—these conflict-resolution tools are, I invite you to travel to the 1787 Constitutional Convention in Philadelphia, where 55 delegates met to construct a government satisfactory to the wide constellation of economic, regional, and moral interests represented.

**TENOR OF THE TIMES**

It would be understandable—though grossly mistaken—to assume that our current era of polarization is a rarity in the history of our republic. While ideological and economic clashes over abortion, gun control, and immigration feel particularly heated to our current sensibilities, the U.S. has periodically, over 230 years, been buffered by intense conflict. This is nowhere more evident than in May of 1787, when the Federal Convention (as it was then known, but now referred to as the Constitutional Convention) commenced.

For well over 100 years, colonists had organized themselves into colonies with differing inception stories and fiercely held identities.

While fervent nationalists like James Madison and Alexander Hamilton were committed to a process that would forge a nation from these disparate subcultures, representatives like Gunning Bedford Jr. of Delaware and William Paterson of New Jersey were adamantly opposed to melting their sectional identities into a broader national identity.
As Richard Beeman notes in his excellent *Plain, Honest Men*:

When Washington’s contemporaries called him the “Father of his Country,” there was no doubt in their minds that the country being referred to was America. Patrick Henry—far more than Jefferson, Madison, Mason, or Randolph—was the acknowledged political leader of his country. And his country was the independent, sovereign state of Virginia.

There were yet more layers of conflict that threatened to blow the convention apart, such as slavery in the south, deadlock over the size of government and the role of states, clashes between Northeastern mercantile interests and Southern agrarian interests, and the lack of a Bill of Rights in the document the states were to ratify.

How then did these 55 brilliant, willful men—many of whom were leaders of their communities and accustomed to guiding the civic discourse in the direction they preferred—manage to push through their conflicts and arrive at a mutually acceptable outcome? The tools of conflict resolution described earlier guided them through every step during those four steamy summer months in 1787.

While space does not permit a complete explication of each tool’s use and significance, perhaps the most interesting and illustrative story involves the creation of a “safe container” for debate and deliberation.

**CONFIDENTIALITY AND THE CONSTITUTIONAL CONVENTION**

Confidentiality and privilege are statutory protections for basic ADR approaches in this state. Both mediation and collaborative practice (each intended to bypass adversarial dispute resolution founded upon litigation and related conflict resolution-based processes) support the creation of a “safe container” in pertinent sections in RCW Title 7:

- **RCW 7.07.030** creates a privilege which permits a “mediation party” to “refuse to disclose, and may prevent any other person from disclosing, a mediation communication.”
- **RCW 7.07.070** provides a cloak of confidentiality to disclosures made during mediation proceedings.
- **RCW 7.77.150** protects communications made during the collaborative process from compulsory disclosure.

While Washington courts have not addressed the mediation privilege, its purpose has been clearly described by the California Supreme Court as follows:

The Legislature designed the mediation confidentiality statutes to “promote a candid and informal exchange regarding events in the past. ... This frank exchange is achieved only if the participants know that what is said in the mediation will not be used to their detriment through later court proceedings and other adjudicatory processes.”

The delegates to the Federal Convention well understood the importance of secrecy in their own deliberations. At the outset of the proceedings, South Carolina delegate Pierce Butler proposed that an absolute rule of secrecy be enacted, with “nothing spoken in the house [to] be printed, or otherwise published or communicated without leave.” Perhaps nothing contributed more to the productivity of the deliberations and debates than this secrecy rule. What is truly remarkable—even stunning—in our current world of leaks and bloviating talking heads, is that during the four months of the convention, the delegates strictly honored that pledge. There was the very occasional lapse in correspondence between a delegate and a close confidant back home, but the disclosures were never particularly detailed and never made for the purposes of stirring up supporters for a particular position.

The convention strove mightily, with unpleasant consequences to the delegates, to enforce this ban on public knowledge of the proceedings. The meetings were generally held in the Pennsylvania assembly.
hall on the second floor of the building. Windows and doors were closed, with guards posted outside, and the drapes drawn over the windows so as to prevent bystanders from overhearing deliberations. This made for a muggy, very uncomfortable environment during the hot, humid summer days in Philadelphia. The delegates often retired after adjournment of sessions to the local taverns and rooming houses to further discuss the proceedings, but care was taken that these conclaves were protected from public disclosure. Indeed, when the final product of the convention was presented to the country in September, many people one would expect to be “in the know” were jolted by its content. Thomas Jefferson, a close confidant of James Madison, first reviewed the product of the convention from his diplomatic assignment in Paris and was appalled by certain passages. The oath of secrecy was clearly intended to survive the close of the convention. In the ratification convention in New York, when Robert Yates (a delegate along with Alexander Hamilton) argued that Hamilton’s latest position was counter to what he had said at the convention, Hamilton exploded with outrage over the disclosure. This secrecy is particularly admirable, given the journalistic culture of the age. Unlike today’s media outlets, many of which seek to practice journalism, the multitude of papers in the late 18th century were forums for specific political beliefs. Hamilton, Yates, and many others of the age published long political arguments in newspapers (as well as pamphlets) under pseudonyms. The work of the convention would have been overwhelmed by the tidal wave of public opinion (and hyperventilation, and invective) that would have accompanied general publication of the proceedings.

One incident at the convention demonstrates what happens when the oath of secrecy joins with an anchoring presence. One day, during a break, a delegate saw a copy of a discussion draft of the new government plan lying on the floor. He picked it up and brought it to George Washington. Washington waited until just before adjournment and then stood and, with controlled anger, said that one of their body had been “so neglectful” as to leave this paper lying on the floor and they must be careful not to allow “our transactions to get into the newspapers and disturb public repose by premature speculations.” He continued, “I know not whose paper it is, but there it is.” With that, Washington threw the paper on the table before him, bowed, and left the room. After a stunned silence, the delegates filed out of the room—nobody picked up that paper.

CONCLUSION
While notable for its effectiveness—and the near inconceivability that it could be honored today—the oath of secrecy is but one of the array of conflict-resolution tools that allowed the delegates to the 1787 Constitutional Convention in Philadelphia to complete their task.

Joseph Shaub is an attorney and mediator in Bellevue. His three-hour CLE program, The Constitutional Convention Through the Mediator’s Lens, will be provided in various locations throughout the state during August and September. Visit http://workshops.josephshaub.com/current-workshops/ for details. Those wishing to read about the other conflict resolution tools mentioned in this article are invited to visit Shaub’s blog at www.josephshaub.com for a link to a lengthier essay on the topic.

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NOTES:
Washington’s Clean Energy Transition Act and the state’s big shift to zero emissions

BY MOLLY BARKER

In its latest session, the Washington State Legislature passed one of the most aggressive pieces of clean energy legislation in the country. SB 5116, Washington’s Clean Energy Transition Act, was signed into law by Gov. Jay Inslee on May 7. The law puts the state on a path toward achieving zero carbon emissions and will have a significant impact on business operators and residents in Washington and beyond.

The new law contains three ambitious components. These three components (referred to in the law as “standards”) are referred to as the following:

1. A coal-elimination standard,
2. A greenhouse-gas-neutral standard, and
3. A clean-energy standard.

These standards now require Washington to phase out all coal-fired utilities resources by 2025 and to become carbon-neutral by 2030, and they set a goal for the state to provide 100 percent carbon-free power by 2045.

The coal-elimination standard and greenhouse-gas-neutral standard expand on existing Washington law. The clean-energy standard, however, stands alone as the first goal of its kind in the state, which will undoubtedly require reconciliation between it and Washington’s existing laws that set less stringent standards. This article will break down each of the standards and outline their implications for the state and its existing laws.

COAL-ELIMINATION STANDARD

The coal-elimination standard will likely impact customers and coal plants beyond state lines. The standard requires that by Dec. 31, 2025, all utilities must eliminate all costs from electric rates associated with electricity that is generated from a coal-fired resource.

The new law requires that electric utilities eliminate all power from coal resources from their allocation of electricity and pay off any remaining investments.

Impact on Existing Law

In 2011, the TransAlta Energy Transition Bill required the one remaining coal-fired power plant in Washington to meet certain greenhouse gas emissions standards by 2020 and then by 2025. It effectively required that one boiler be shut down by Dec. 31, 2020, and the other by Dec. 31, 2025.

The new law requires that electric utilities eliminate all power from coal resources from their allocation of electricity and pay off any remaining investments.
associated with such coal plants—such as construction costs or other loans—through accelerated depreciation by the end of 2025.

To recoup through accelerated depreciation the costs of the coal plant's investment loss, the law allows utilities to increase electric rates for customers through 2025 (although it allows decommissioning and remediation costs to continue to be assessed on utility customers after the 2025 deadline). In other words, the new requirements do not call for the last coal plant to be shut down, since this was already mandated under the TransAlta Energy Transition Bill. Instead, the law requires utilities to cease including power from coal resources in their electric allocation to customers and to accelerate all depreciation payments associated with such plants to remove coal resources from utilities by Dec. 31, 2025 (other than remediating what the coal plants left behind). Washington utilities investing less and ultimately ceasing investments in coal plants across state lines could impact active coal plants in nearby states like Wyoming and Montana, in which Washington utilities have part ownership interest but which are not otherwise subject to Washington's phase-out deadline under the TransAlta Energy Transition Bill.

GREENHOUSE-GAS-NEUTRAL STANDARD

The greenhouse-gas-neutral standard requires that by Jan. 1, 2030, and each year thereafter until Dec. 31, 2044, all retail sales of electricity to Washington customers be greenhouse-gas-neutral. To achieve this requirement, utilities must use electricity from renewable resources and non-emitting electric generation in an amount equal to 100 percent of a utility's average annual retail electric load. Up to 20 percent of a utility's power may come from fossil fuels if the utility meets the overall compliance obligation through alternative measures that effectively cancel out the use of fossil fuels. These alternative measures can include any combination of the following:

- An alternative compliance payment of $100 per megawatt-hour (MWh) of energy that is not generated from renewable resources or non-emitting electric generation, but instead from emitting or "unspecified electric generation";
- Using unbundled renewable energy credits (RECs);
- Investing in energy transformation projects that reduce emissions, such as home weatherization projects, incentives for supporting electrification of the transportation sector, battery storage, or investment in distributed energy resources; or
- Using electricity from an energy recovery facility constructed prior to 1992 that uses municipal solid waste as its principal fuel source.

Qualifying proposed energy transformation projects must not already be required under law and must not be "reasonably assumed to occur" without investment or additional investment.

Impact on Existing Law

The greenhouse-gas-neutral standard makes current Washington energy-related law much more stringent. For example, in 2006, Washington voters approved Initiative 937, the Energy Independence Act (EIA), which requires every electric utility serving more than 25,000 customers to either use eligible renewable resources or acquire equivalent RECs, or both, to make up the following:

- At least 3 percent of its load by Jan. 1, 2012, and each year thereafter through Dec. 31, 2015,
- At least 9 percent of its load by Jan. 1, 2016, and each year thereafter through Dec. 31, 2019, and
- At least 15 percent of its load by Jan. 1, 2020, and each year thereafter.

The new law amends the above provisions in the EIA and provides that such utilities must use electricity from renewable resources, non-emitting electric generation, and RECs in an amount equal to 100 percent of their average annual retail electric loads by Jan. 1, 2030.

CLEAN-ENERGY STANDARD

The clean-energy standard aims to make non-emitting electric generation and electricity from renewable resources supply 100 percent of all sales of electricity to retail customers by Jan. 1, 2045.
The Big Zero

The clean-energy standard started as a requirement in the original bill, but was amended to satisfy industry concerns and comments. While it remains an aggressive goal for Washington, and one of the most aggressive goals of any state in the country, the fact that it is a goal and not a requirement may impact the extent of the law’s ultimate success. This goal will require some harmonization with existing laws to ensure the renewable energy requirements and targets of existing laws are aligned with this new energy strategy.

Impact on Existing Law

Under the new law, the Department of Commerce will develop an energy strategy advisory committee to assist with reviewing the state’s energy strategy every eight years to ensure it is aligned with the new requirements and the emission-reduction targets outlined in RCW 70.235.020. Currently, RCW 70.235.020 calls for the following statewide emissions reductions targets:

- By 2020, reduce overall emissions of greenhouse gases to 1990 levels.
- By 2035, reduce emissions to 25 percent below 1990 levels.
- By 2050, reduce emissions to 50 percent below 1990 levels, or 70 percent below the state’s expected emissions for 2050.

The review of Washington’s energy strategy will require some reconciliation between the goal of RCW 70.235.020 to reduce overall emissions to 50 percent below 1990 levels by 2050 and the new goal to achieve the 100 percent clean-energy standard by 2045.

Compliance Incentive: Penalties

The most controversial part of the law is that it imposes a penalty for noncompliance with the coal-elimination standard and the greenhouse-gas-neutral standard (but, notably, not for noncompliance with the clean-energy standard) of $100 per MW hour of electric generation from non-renewable sources, emitting sources, or unspecified electric generation sources (because the unspecified source may come from fossil fuels). The funds collected from these penalties, or from any equal sums paid as alternative compliance payments, will be devoted to low-income housing weatherization projects.

CONCLUSION

This law represents Washington’s most detailed and ambitious effort to achieve zero emissions in energy generation and distribution. Washingtonians and stakeholders in the region will be anxious to evaluate potential impacts on customer rates and grid stability and resiliency as it is implemented.

Molly Barker focuses her practice primarily on environmental, real estate, energy, and land use law. Barker works with clients to conduct environmental due diligence, obtain regulatory closure for contaminated sites, bring business operations into environmental regulatory compliance, and sell or purchase contaminated properties. Barker also advises clients on federal and state permitting rules as well as local land use requirements for energy and other project developments. She can be reached at mbarker@martenlaw.com.

NOTES:
1. Senate Bill 5116, Engrossed Second Substitute, Session Law, §3(1)(a).
2. Senate Bill 5769 (2011 Regular Session), Engrossed Second Substitute, §106(2)(a); see also Memorandum of Agreement (December 23, 2011); RCW 80.80.040.
3. Senate Bill 5116, Engrossed Second Substitute, Session Law, §3(1).
4. Id. at §4(1).
5. The law defines “non-emitting electric generation” as electricity from a generating facility or non-renewable resource that provides electric energy, capacity, or ancillary services to an electric utility and that does not emit greenhouse gases as a byproduct of the energy generation. See id. at §2(28).
6. Id. at §4(1)(b).
7. The law reads that any funds deposited as part of compliance payments shall be used by the state on home weatherization projects. See Senate Bill 5116, Engrossed Second Substitute, Session Law, §9(8).
8. The law defines “unbundled renewable energy credits” as a renewable energy credit that is sold, delivered, or purchased separately from electricity. All thermal renewable energy credits are considered unbundled renewable energy credits. See Senate Bill 5116, Engrossed Second Substitute, §2(38).
14. See Senate Bill 5116, §7(1); Senate Bill 5116, Engrossed Second Substitute, §8(1); Senate Bill 5116, Engrossed Second Substitute, Session Law, §9(1).
15. Senate Bill 5116, Engrossed Second Substitute, §22(1).
16. Id.
17. RCW 70.235.020(1).
18. Senate Bill 5116, Engrossed Second Substitute, Session Law §9(1)(a). The penalty may be increased in 2040 for investor-owned utilities if it is determined doing so will accelerate compliance with the coal-elimination standard or carbon-neutral standard. Id. at §9(1)(b).
19. Senate Bill 5116, Engrossed Second Substitute, Session Law, §9(8).
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For more information, please contact César Torres, cesart@nwjustice.org; or Chiedza Nziramazanga, chiedzan@bjtlegal.com. To apply, email a letter of interest and résumé to barleaders@wsba.org by Sept. 6.

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The WSBA’s current Fiscal Year 2019 budget, with revenue and expenditures by line item, information about the programs and services it supports, and audit reports, is available at www.wsba.org/about-wsba/finances. The WSBA’s fiscal year 2020 budget is scheduled to be voted on at the Board of Governors meeting on July 26-27 in Richland.

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**Suspension**

Andrew M. Schlesinger (WSBA No. 41333, admitted 2009) of Salem, OR, was suspended for 30 days, with all of the suspension stayed based on his successful completion of one year of probation in Oregon, effective 5/30/2019, 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. Mark J. Fucile represented Respondent. The online version of NWLawyer contains a link to the following document: The Washington Supreme Court Order.

**Interim Suspension**

Julie Ann Anderson (WSBA No. 15214, admitted 1985) of East Wenatchee, WA, is suspended from the practice of law in the State of Washington pending the outcome of disciplinary proceedings, effective 6/01/2019, by order of the Washington Supreme Court. This is not a disciplinary sanction.

Thomas A. Mackin (WSBA No. 21062, admitted 1991) of Sammamish, WA, is suspended from the practice of law in the State of Washington pending the outcome of disciplinary proceedings, effective 5/23/2019, by order of the Washington Supreme Court. This is not a disciplinary sanction.

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

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

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

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FOR SALE

Established Pierce County insurance defense practice that was established in 1998 and has over 125 active clients as of April 2019. The average gross revenue the last three years was over $1,017,000. The practice/case breakdown by revenue is 50% bodily injury, 10% property damage, 10% product liability, 10% professional liability, 10% plaintiff work, and 10% other. Contact info@privatepracticetransitions.com or call 253-509-9224.

Thriving Bend, Oregon, law firm that has been a staple in the Bend community for over 42 years. In 2018, the practice brought in over $540,000 in gross revenues and over $357,000 in total owner perks. The practice has a case breakdown of 29% civil, 21% estate, 16% family/divorce, 16% other [contracts, real estate, criminal, business, PI, DUI, etc.], 5% land use, 5% landlord tenant, 4% corporate/LLC, and 4% water law. Contact info@privatepracticetransitions.com or call 253-509-9224.

Established Seattle estate planning practice that has a practice/case breakdown by revenue of approximately 45% estate & trust administration, 40% estate planning, and 15% other [collateral matters, estate tax preparation, real property issues, etc.]. The practice is located in the heart of downtown Seattle, has averaged gross revenues of over $286,000 the last three years (2016-2018), and is poised for growth under new ownership. Contact info@privatepracticetransitions.com or call 253-509-9224.

Successful King County insurance defense practice that is located in the heart of Seattle and had 2018 gross revenues over $1,800,000. The practice was established in 2006, has a great reputation in the legal community, and has five total employees, including the owner. Contact info@privatepracticetransitions.com or call 253-509-9224.

Regional and international business law practice with a stellar reputation and average gross revenues over $550,000 the last three years. The practice/case breakdown is 50% business law, 35% estate planning, 10% general legal services, and 5% intellectual property. The practice is located in East King County in a 2,000 SF leased office space. Contact info@privatepracticetransitions.com or call 253-509-9224.

Thriving Stevens County personal injury & family law practice that was established in 2009, has a strong client base, and brought in over $855,000 in gross revenue in 2018. The practice/case breakdown by revenue is approximately 48% personal injury, 43% family law, and 9% other (estate planning, probate, general litigation, etc.). The practice employs five people: one (1) owner/attorney, three (3) legal assistants, and one (1) office administrator. Contact info@privatepracticetransitions.com or call 253-509-9224.

Growing Pierce County personal injury practice that was established in 1975, has a great reputation in the community, and has over 90 active clients as of January 2019. The gross revenues in 2018 totaled over $415,000. The owner would like to sell the practice as a turnkey operation. The practice/case breakdown by revenue is 99% personal injury and 1% other. Contact info@privatepracticetransitions.com or call 253-509-9224.

Thriving virtual appellate law practice that has experienced 17%, 30%, and 47% YoY growth the last three years (2016-2018). In 2018, the firm’s gross revenues were over $915,000! The practice was established in 2009, has a great reputation in the legal community, and has over 150 active clients as of January 2019. The owner would like to sell the practice as a turnkey operation. The practice/case breakdown by revenue is 100% appeals. Contact info@privatepracticetransitions.com or call 253-509-9224.

Established Kitsap County estate planning, guardianship, & probate practice that has been a staple in Kitsap County for over 14 years. The practice/case breakdown is 40% guardianships and trusts, 25% probate, 25% estate planning, and 10% other [prenuptial, estate litigation, GAL]. The owner runs the practice out of her home office, which makes this a great opportunity for an attorney wishing to grow his/her current practice and/
or start a practice with an established book of business. The owner took in over $125,000 in income and perks in 2017. Contact info@privatepracticetransitions.com or call 253-509-9224.

Thriving and well-rounded Pierce County law practice that has been a staple in Pierce County for over 20 years. The practice is absolutely thriving with average gross revenues over $1.6 million the last three years. The practice/case breakdown is 30% trusts, estates, and probate; 15% business formation; 15% plaintiffs' personal injury; 15% commercial and corporate litigation; 8% real estate; 7% municipal; and 10% other. Contact info@privatepracticetransitions.com or call 253-509-9224.

Profitable Snohomish County personal injury and bankruptcy practice that has been in business for more than 27 years. The practice/case breakdown by revenue is approximately 60% personal injury, 35% bankruptcy, and 5% other. The practice is located in a 1,022 SF, fully furnished office that is also available for sale, if desired. Contact info@privatepracticetransitions.com or call 253-509-9224.

Established estate planning, probate, and business law practice with offices in King and Kitsap Counties. The practice/case breakdown is 60% estate planning and probate, and 40% real estate, business law, and bankruptcy. Contact info@privatepracticetransitions.com or call 253-509-9224.

Profitable Pacific Northwest intellectual property practice that operates locally, nationally, and internationally. This individual has a thriving business with discretionary earnings over $250,000 each of the last three years, and desires to sell the practice as a turnkey operation. The practice/case breakdown is 100% intellectual property, with a majority of the focus on patent preparation and prosecution, and clients locally, nationally, and internationally. The practice is mobile and would afford the new owner the ability to work out of a home office, with a flexible month-to-month office lease available for assignment to new ownership. Contact info@privatepracticetransitions.com or call 253-509-9224.

East King County real estate and estate planning practice that has been operating for more than 40 years! A true staple in the community, the practice offers a variety of services, focusing on estate planning (35%) and real estate (25%). Contact info@privatepracticetransitions.com or call 253-509-9224.

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» I became a lawyer because it was 2009 and I’d graduated from college with two B.A.s.

» In my practice, I work on improving everything, including strategy, negotiation, and trial skills, as well as communication with my clients.

» My career has surprised me by showing me how many people are not getting the justice they deserve, both in the criminal and civil courts.

» The best advice I have for new lawyers is network early and often! It’s amazing how much work and insight you can get from other attorneys.

» I wish that more lawyers would communicate well with their clients. Customer (client) service is important!

» If I could have tried one famous case, it would be Korematsu v. United States. As a longtime student of history, I find this decision to be one of the most galling of the 20th century.

» The most memorable trip I ever took was an eight-month experience in China, teaching elementary school and traveling.

» I look up to both of my parents. I couldn’t have asked for a better pair.

» If I took one day off in the middle of the week, I would do everything I usually do on the weekends and actually relax on Saturday/Sunday!

» I enjoy reading science fiction (Dune, Ender’s Game) and history (anything by Ron Chernow).

» My fitness routine is presently nonexistent.

» My favorite place in the Pacific Northwest is just about any campground in the mountains. I was born in a mountain town, and the mountains always feel like a second home.

» I am happiest when I’m spending time with my wife. She’s the best thing that ever happened to me.

» I grew up in Charlotte, North Carolina.

» This is on my bucket list: traveling to a Nordic country and seeing the northern lights.

» My idea of misery is my wife being really angry at me.

» My motto is happy wife, happy life.

» My dream trip would be a year-long luxury trip around the world.

» If I had a time machine, I would travel to various time periods and just be an observer. There’s so much beauty and horror, and many important events that we don’t have a firm understanding of.

» I would like to meet Jesus, because the guy was clearly a rebel, and I’d like to know what he thinks of the doctrine that has been attributed to him and disputed for thousands of years. I’d like to discuss it with him over a beer.

» If I could pick a superpower, it would be the ability to speak every language and dialect in the world like a native speaker.

» If $100,000 fell into my lap, I would immediately invest it. This working thing kind of stinks. I’d like to retire someday.

» If I could get free tickets to any event, I would go to the World Cup.

» If I have learned one thing in life, it is that things never work out like you think they will. As my best friend says, “If you want to hear God laugh, tell him your plans.”
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