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# NWLawyer



**MAY 2019**  
VOL. 73, NO. 4



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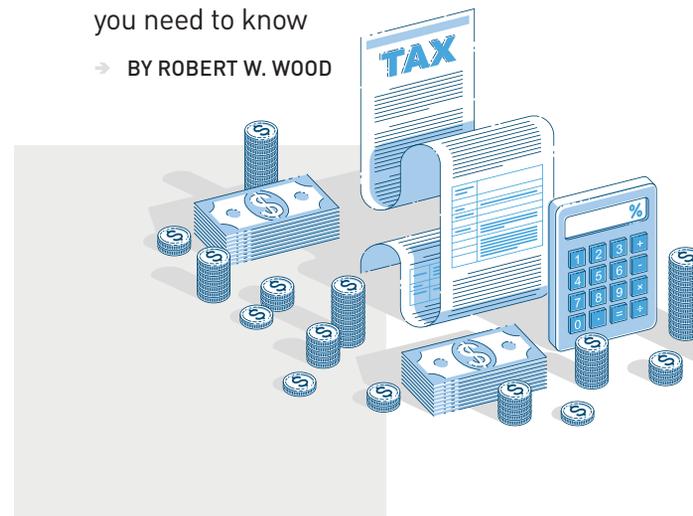
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# NWLawyer

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NWLawyer will inform, educate, engage, and inspire by offering a forum for members of the legal community to connect and to enrich their careers.

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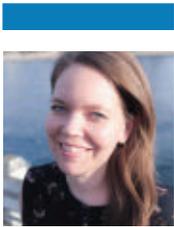


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# ARE YOU SURE?



**Terra Nevitt**  
WSBA  
Interim  
Executive  
Director

**A**re you sure? That's the main question I encountered when I agreed to step into the role of interim executive director following the departure of longtime leader Paula Littlewood. It's a fair question. If you have been paying attention to what has been going on at the bar, you know it has been a challenging year. The very structure of the organization is under scrutiny, leaving many of us feeling uncertain. Members of our Board of Governors—and many of you—have strong and diverse views about the future of this organization, and we have not yet coalesced on shared goals and values.

But in addition to the uncertainty, there is stability and there is optimism. Beneath the chaotic rhetoric, this organization thrives under the leadership, wisdom, and grace of our employees and the more than 1,400 volunteers who each year help carry out the WSBA's mission to serve the public and the members of the bar, to ensure the integrity of the legal profession, and to champion justice.

That mission, those people—that's why I am sure. I am proud of this organization, and I am proud of our profession. The work we do is too important to not step up when we most need to come together. We face big questions, and I am honored and excited for the

opportunity to lead the WSBA at this critical time. The WSBA may look completely different by this time next year—it may not. That uncertainty is both scary and full of possibilities.

So let me tell you about myself and how I plan to serve in the coming months until, with confidence in the bar's structure and direction, we can move forward

with an executive director search. I came to the bar almost five years ago to work with the Supreme Court's Access to Justice Board. For the past three years, I've served as the director of the Advancement Department, responsible for many of the programs that serve you, our members, and further access to justice and equity in our profession. I'm a Pacific Northwest native. I grew up in Raymond, Washington, and did my undergraduate work at the University of Washington. I've also lived in the "other" Washington, where I attended the George Washington University Law School and spent a couple of years living in Bangkok, Thailand. I'm a parent, a knitter, and a lover of sandwiches. My idea of happiness is digging weeds on a warm, sunny morning with a thermos of hot coffee at my side.

My primary focus in this first month as interim executive director has been to support the WSBA's employees and volunteers in continuing to serve the members and public with excellence. And that will be my focus in the months ahead, too. By appointing an internal candidate to the role, the Board of Governors has indicated it wants a seamless transition and continuation of the good and critical functions that the WSBA performs daily.

My next priority is to get out and speak to as many of you as I can. I don't think I could put it any better than our president, Bill Pickett, whose touchstone for the year is service, relationship, and trust. My proudest professional accomplishments involve mending broken relationships and helping groups with diverse interests find shared goals and values. The first step in each of those processes has been to learn about the needs of those involved, and to be of service to those needs. When that service is authentic, relationships are built and, eventually, trust follows.

And so we begin this transitional time, too. We are launching the 2019 listening tour in May. President Pickett, members of the Board of Governors, and I will be crisscrossing the state seeking to understand how we can be of service to you and the communities you care about. Look for that schedule soon and, please, come talk with us. Ask hard questions. We will do our best to answer them.

Let's all look to the future of our bar with optimism. 

---

**TERRA NEVITT** is the WSBA interim executive director and can be reached at [terran@wsba.org](mailto:terran@wsba.org).

The work we do is too important to not step up when we most need to come together.

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## Editor's Note

## A Quick Introduction

**T**his is my first full issue as editor of *NWLawyer*. Prior to joining the WSBA at the end of February, I worked as a writer and editor for a handful of monthly magazines in the Puget Sound area. The topics I've worked on throughout my career include business, politics, sports, and culture. And now, I am excited to delve more deeply into the world of law.

I grew up in Washington, raised in the small town of Steilacoom

in the south Puget Sound area. I attended the University of Washington and later, Columbia University. In my free time, I often can be found hiking, reading and writing poetry, or playing volleyball.

My aim as editor is to help cultivate dialogue-prompting stories that interest legal professionals in many different practice areas across the state. I also intend to highlight diverse and underrepresented voices from a variety of backgrounds and geographical locations.

In order to accomplish those goals, however, I need your help. I sincerely encourage you to write in—with story ideas and pitches, with questions, and even with criticisms. I look forward to hearing from you soon. 

**KIRSTEN ABEL** is the *NWLawyer* editor and can be reached at [kirstena@wsba.org](mailto:kirstena@wsba.org).

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WASHINGTON STATE  
BAR ASSOCIATION

# ATTORNEY LIENS: PROCEED WITH CAUTION

BY MARK J.  
FUCILE

In 1956, University of Washington School of Law Dean George Neff Stevens wrote in *Our Inadequate Attorney's Lien Statutes—A Suggestion*, “The average attorney has little interest in, nor does he realize the inadequacy of, the attorney’s lien laws of his state—until he finds himself personally involved.”<sup>1</sup>

Attorney liens haven’t changed much since Stevens wrote his incisive critique over a half-century ago. Neither has the average lawyer’s familiarity with attorney liens. An ambiguous statute and most lawyers’ infrequent use of liens is a potentially dangerous combination from the perspective of law firm risk management.

Attorney liens come in two forms in Washington under RCW 60.40.010.<sup>2</sup> The first, often called a “retaining” lien and codified at RCW 60.40.010(1)(a)-(b), places a lien for fees over a client’s file and funds in the lawyer’s possession. The second, usually called a “charging” lien and created by RCW 60.40.010(1)(c)-(e), places a lien for fees on, respectively, the client’s money held by an adverse party in a proceeding in which the lawyer was involved, an action the lawyer handled successfully creating a fund for the client, or the resulting judgment in the client’s favor. Each variant has its own risks, which are outlined in this column.

## RETAINING LIENS

Under RCW 60.40.010(1)(a)-(b), retaining liens encumber, respectively, client papers or money in the lawyer’s possession. “Papers” are usually the client’s file and “money” is usually an advance

fee deposit or other funds held in the lawyer’s trust account. Retaining liens are most often triggered when the lawyer and client go their separate ways in an ongoing matter—with the lawyer still owed money for legal services provided to the client.

**Papers:** This aspect of the lien statute has not changed fundamentally since it was adopted by



the Territorial Legislature in 1863. Over 100 years ago, the Washington Supreme Court in *Gottstein v. Harrington*, 25 Wash. 508, 511-12, 65 P. 753 (1901), described liens over client files in terms that remain accurate today:

It seems apparent that the statute did not intend to confer an enforceable lien against papers in possession, as it provides no method for the enforcement of such lien. This, indeed, is but a recognition of the general law that a retaining lien may not be enforced, but may merely be used to embarrass the client, or, as some cases express it, to “worry” him into the payment of charges. ... The lien of an attorney upon the papers of his client is personal to the attorney, and is not subject to assignment. Possession is of the essence of this lien, and, once parted with, the right is waived and relinquished. (Citations omitted.)

RPC 1.16(d), which addresses a lawyer’s duties on withdrawal, notes that a lawyer “may retain papers relating to the client to the extent permitted by other law.” While seemingly broad, WSBA Advisory Opinion 181, which was initially adopted in 1987 and was updated in 2009, tempers this right significantly:

If assertion of the lien would prejudice the former client, the duty to protect the former client’s interests supersedes the right to assert the lien.

A client’s need for the files will almost always be presumed from the request for the files. But this need does not mean that in every case the assertion of a lien will prejudice the

client. If there is no dispute about fees and the client has the ability to pay the outstanding charges, it is proper for the lawyer to assert the lien. In this situation, it is the former client’s refusal to pay that will cause any injury. When, however, there is a dispute about the amount owed, or the client does not have the ability to pay, the lawyer cannot assert lien rights if there is any possibility of interference with the former client’s effective self-representation or representation by a new lawyer.

The practical risks are twofold if a lawyer improperly withholds a file the client needs. First, the lawyer may be exposed to regulatory discipline for an alleged violation of RPC 1.16(d). Second, if the client’s position in an ongoing matter was compromised by the lawyer improperly withholding the file, the lawyer may also be at risk of a civil damage claim for breach of fiduciary duty.

**Money:** Less frequently, a client may have money in the lawyer’s trust account—such as a remaining advance fee deposit—when a dispute over the lawyer’s bill arises. Although RCW 60.40.010(1)(b) gives a lawyer a lien for fees “[u]pon money in the attorney’s hands belonging to the client,” the lawyer’s ability to enforce this lien is not automatic. RPC 1.15A(g) governs the disposition of disputed funds held in trust:

If a lawyer possesses property in which two or more persons (one of which may be the lawyer) claim interests, the lawyer must maintain the property in trust until the dispute is resolved. The lawyer must promptly distribute all undisputed portions of the property. The lawyer must take reasonable action to resolve the dispute, including, when appropriate, interpleading the disputed funds.

The practical risks are twofold if a lawyer improperly withholds a file the client needs.

CAUTION

CAUTION

Further, the Court of Appeals, in *Glick v. McIlwain*, 154 Wn. App. 729, 230 P.3d 167 (2009), found that a possessory lien against money cannot simply be foreclosed. Rather, Advisory Opinion 181 notes that the lawyer's entitlement to the fee must be litigated and a judgment entered in the lawyer's favor:

Since the retaining or possessory lien cannot be foreclosed, any funds held pursuant to the lien must be held in the lawyer's trust account. The lawyer can apply those funds against what is owed only by obtaining a judgment against the client and enforcing the judgment by the normal judgment enforcement processes.

Again, the practical risks are twofold. First, if the lawyer does not follow the procedure set out in RPC 1.15A(g), the lawyer runs the risk of regulatory discipline. Second, if the lawyer simply takes the money and a court determines later that the lawyer was not entitled to the amount involved, the lawyer may also be exposed to a civil damage claim.

### CHARGING LIENS

**C**harging liens are a potentially powerful collection tool if a lawyer's work has resulted in the creation of a fund for the client. RCW 60.40.010(1)(c), for example, allows a lawyer to pursue a lien claim against adverse parties holding money due the lawyer's client from an "action or proceeding" that the lawyer handled for the client. RCW 60.40.010(1)(d), in turn, provides a lien over the proceeds of an action "to the extent of the value of any services performed by the attorney in the action[.]" Finally, RCW 60.40.010(1)(e) grants a lien over a judgment "to the extent of the value of any services performed by the attorney in the action[.]"

Nonetheless, three practical risks remain.

First, a lawyer asserting a charging lien should carefully review RCW 60.40.010 to make sure that the lawyer has properly perfected the lien involved and is asserting it against an available asset. On the former, for example, notice is required for liens under RCW 60.40.010(c) and (e). On the latter, the Supreme Court, in *Ross v. Scannell*, 97 Wn.2d 598, 647 P.2d 1004 (1982), concluded that attorney liens cannot be recovered against real property.

Second, a lawyer who improperly asserts a charging lien is at disciplinary risk. *In re Vanderbeek*, 153 Wn.2d 64, 86-88, 101 P.3d 88 (2004), offers a

telling illustration. The lawyer in *Vanderbeek* recorded attorney liens on real property owned by several clients, contrary to *Ross*.<sup>3</sup> She was disciplined both under the fee rule (RPC 1.5) and under RPC 8.4(d) for conduct prejudicial to the administration of justice.

Third, because attorney fees are subject to reduction or denial for breach of fiduciary duties, a lien may be invalidated if the attorney claiming the lien was in breach. In *Gustafson v. City of Seattle*, 87 Wn. App. 298, 941 P.2d 701 (1997), for example, a lawyer who successfully resolved a case for a client argued that a prior lawyer's lien was invalid because the earlier lawyer had a conflict. The Court of Appeals sent the case back to the trial court for further review of the first lawyer's conduct and, in doing so, observed that the trial court had the discretion to invalidate the lien.

### SUMMING UP

**T**he Court of Appeals, in *King County v. Seawest Inv. Associates, LLC*, 141 Wn. App. 304, 312, 170 P.3d 53 (2007), noted both the ambiguity of the lien statute and that "Washington case law sheds little light on the correct interpretation[.]" An attorney lien can be a useful collection device, but there are enough traps for the unwary that lawyers should proceed with caution when using them. 

### NOTES:

1. 31 Wash. L. Rev. 1,1 (1956)
2. See also RPC 1.8(i)(1) and accompanying Comment 16—which permit lawyers to acquire liens "authorized by law" to secure their fees and associated expenses.
3. See also *In re Koehler*, 110 Wn.2d 24, 750 P.2d 254 (1988) (disciplining lawyer for failure to promptly remove attorney lien from real property following the *Ross* decision).

An attorney lien can be a useful collection device, but there are enough traps for the unwary that lawyers should proceed with caution when using them.



**MARK J. FUCILE** of Fucile & Reising LLP handles professional responsibility, regulatory, and attorney-client privilege matters and law-firm-related litigation for lawyers, law firms, and legal departments throughout the Northwest.

He is a former chair of the WSBA Committee on Professional Ethics and is a past member of the Oregon State Bar Legal Ethics Committee. He is a co-editor of the *WSBA Law of Lawyering in Washington*, the *WSBA Legal Ethics Deskbook*, and the *OSB Ethical Oregon Lawyer*. He also teaches legal ethics as an adjunct for the University of Oregon School of Law at its Portland campus. He can be reached at 503-224-4895 and [mark@frrllp.com](mailto:mark@frrllp.com).



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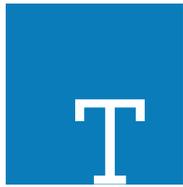


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# Embracing the Singular 'They'



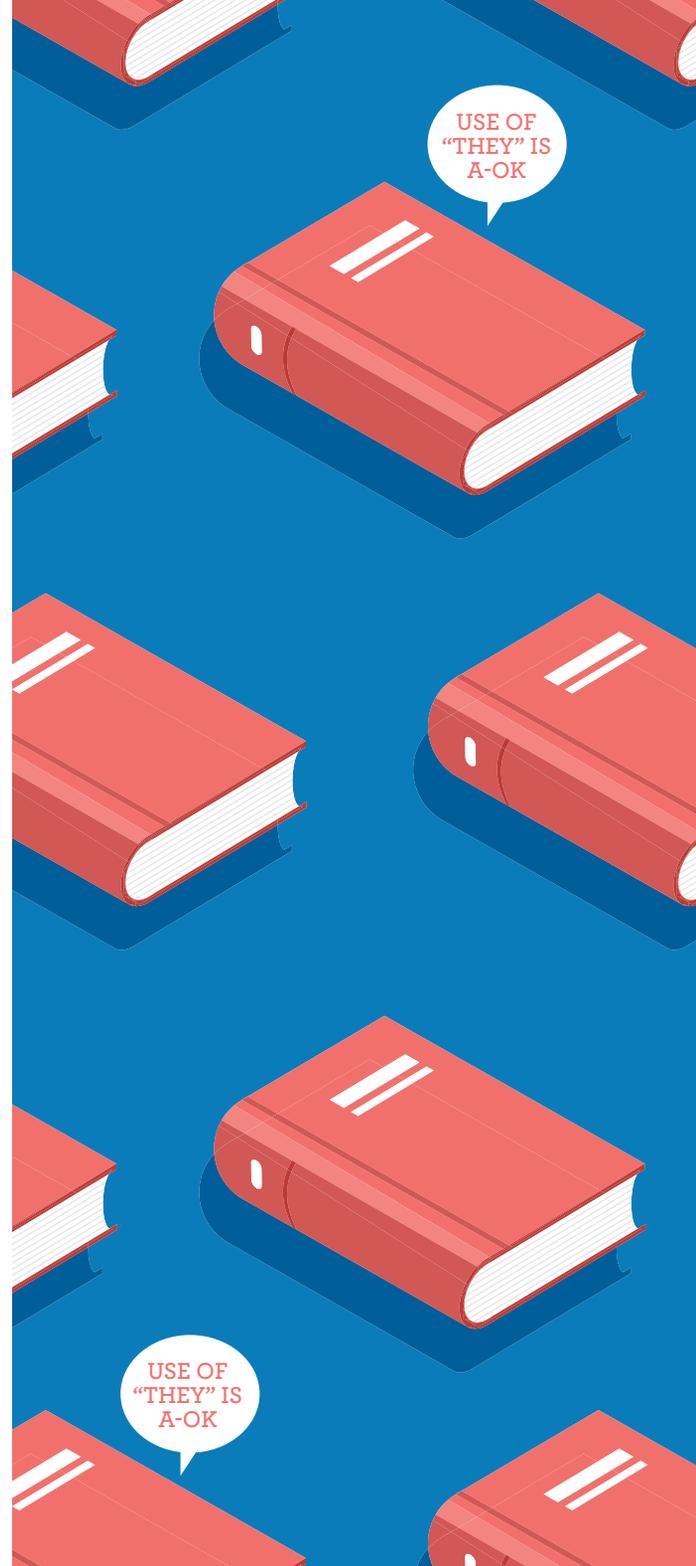
The singular “they” has been gaining ground on two fronts: first, as a preferred pronoun

for people with non-binary gender identities; and second, as a generic singular pronoun that refers to a person whose gender we do not know. Despite a long history—the *Oxford English Dictionary* (OED) traces this use of the pronoun back to the 14th century—the singular “they” still remains grammatically, and even politically, controversial.

Most U.S. style guides advise writers to avoid it whenever possible, if only to escape the wrath of grammatical quibblers; to them it may suggest the writer is uneducated. It is also sometimes politically controversial. For example, the Tennessee Legislature cut state funds to the University of Tennessee, Knoxville, Office of Equity & Diversity, because it had promoted gender-neutral pronouns, including “they.”

Despite these controversies, the singular “they” has distinguished supporters. In 2015, it was chosen as the word of the year by the American Dialect Society, a prominent organization of linguists. The OED endorses the singular “they” for all purposes, and the *Washington Post* recently blessed its use when avoidance is too awkward.

BY TOM  
COBB



My goal in this article is to help legal writers make credible pronoun choices that sound good, respect grammatical norms, avoid sexism, and don't confuse readers, all while maintaining a sense of political neutrality helpful to clients. To do so, I draw on the latest edition of the *Chicago Manual of Style*, which the Washington Supreme Court adopted as the official arbiter of style and punctuation in its style sheet. The most useful sections are: *Chicago* 5.251 (Maintaining



USE OF  
"THEY" IS  
A-OK

credibility); 5.252 (Gender bias); 5.253 (Other biases); 5.255 (Techniques for achieving gender neutrality); 5.256 (Gender-neutral singular pronouns); and 5.48 (Singular “they”).

### SINGULAR ‘THEY’ AS PREFERRED PRONOUN

Some individuals identify with the pronouns “they/ them,” rather than “he/him” or “she/her.” Others identify as a gender different from their birth gender.

5.48.) Thus, when referring to a person who does not identify with gender-specific pronouns, the following sentences are correct:

They have a law degree.  
They hurt themselves [or themselves].

*Chicago* embraces alternative preferred pronouns as well. (*Chicago* 5.256; see also *Chicago* 5.48,

# they

pronoun, plural in construction

\ 'thā \

## Definition of *they*

- 1 a : those ones —used as a third person pronoun serving as the plural of *he*, *she*, or *it* or referring to a group of two or more individuals not all of the same sex // *they* dance well
- 1 b : HE entry 1 sense 2 —often used with an indefinite third person singular antecedent
- 1 b : // everyone knew where *they* stood  
— E.L. Doctorow
- 1 b : // nobody has to go to school if *they* don't want to  
— N.Y. Times
- 2 : PEOPLE sense 2 —used in a generic sense  
// as lazy as *they* come

When writing about people—whether clients, colleagues, witnesses, jurors, or judges—you will most likely need to use pronouns. In English, the difficulty is that the only non-gendered singular pronoun is “it,” which doesn’t refer to human beings. Should we then use “they” despite grammatical friction?

Yes. *Chicago* is clear on this point: “In general, a person’s stated preference for a specific pronoun should be respected.” (*Chicago*



## Ask us

If you have a question or a pet peeve about legal writing that you’d like to see addressed in a future “Write to Counsel” column by UW Law writing faculty, please submit it to [nlawyer@wsba.org](mailto:nlawyer@wsba.org), with the subject line “Write to Counsel.”

noting “[a] number of other gender-neutral singular pronouns are in use.”)

The same rule applies if people identify with a pronoun that does not match their appearance or birth gender. Thus, just as writers should not use “he” to refer to someone who identifies as “they,” writers should also not use “he” to refer to someone who identifies as “she.” Because even unintentional misgendering can be disrespectful, legal organizations should create an intake process for clients, witnesses, and others that asks people for their preferred pronouns, rather than requiring staff to guess based on appearance or other indicators. (Query whether lawyers should start filing briefs or other court papers with our preferred pronouns below the signature, as in emails. I have not seen it yet.)

Even if you follow *Chicago* on preferred pronouns, readers might sometimes be confused. If so, drop a footnote to explain your pronoun choices. For example, when you use “they” to refer to a non-binary individual, you might drop a footnote saying: “This brief uses ‘they’ to refer to the client because it is the individual’s preferred pronoun.” These footnotes also protect against any negative inferences grammatical quibblers in the audience might make.

### SINGULAR ‘THEY’ FOR UNSPECIFIED GENDER

Choosing singular pronouns to refer to people of unspecified gender raises more complicated problems than simply respecting someone’s preferred pronoun.

Here’s an example: “Please ask each of the witnesses what they want for lunch.” We don’t know the gender of the witnesses. Maybe it is a mixed group. Some readers (I tend to be among them) experience a feeling of grammatical friction when confronted with a sentence like this. The reason is that the word “each” is singular, but the pronoun “they” is plural.

But the alternatives are not always better. Here are some possible rewrites that avoid the grammatical friction and a few comments about each:

- 1 Please ask each of the witnesses what *he* wants for lunch.

This rewrite substitutes the male pronoun “he” for each witness whether the witness is male or female or a person who has non-binary gender. The theory is that “he” is the standard ungendered generic singular pronoun in English. This use

of “he” is no longer accepted. Writing for the Oxford University Press’s blog, Professor Dennis Baron calls it a “universally indefensible option.” Similarly, *Chicago* notes that this option “is no longer universally accepted as a generic pronoun referring to a person of unspecified gender.” Writers who continue to use “he” in this way risk being seen as sexist, out of touch, or intentionally flouting usage norms to make a political point.

Even if it weren’t sexist, using “he” this way poses other problems. For example, a letter to the editor of the *New York Times Magazine* suggested this example:

The average American needs the small routines of getting ready for work. As he shaves or blow-dries his hair or pulls on his panty hose, he is easing himself by small stages into the demands of the day.

It’s hard to read that sentence without feeling gender tension or even semantic confusion. The masculine pronoun clashes with the presumed gender of its antecedent and makes us think of the antecedent as male. Even when used generically, the pronoun “he” still connotes the antecedent—the average American—is a man, a man who wears hose, but still a man! The point is “he” isn’t gender-neutral even when it pretends to be.

- 2 Please ask each of the witnesses what *she* wants for lunch.

Like the previous example, this rewrite substitutes “she” for witnesses even though some may be male or non-binary. I see this approach fairly often; the point is to call attention to the fact that “he” was used as generic pronoun for so long and to right that past wrong. The idea is attractive: What’s good for the gander is good for the goose. If a masculine-gendered pronoun can perform this epicene function, then why should a feminine pronoun not do the same?

There are several variations on this theme. You can alternate between “he” and “she” within a single text randomly. You can use “she” consistently in one document and then switch to “he” in the next (this appears to be Justice Ruth Bader Ginsburg’s approach when writing opinions). You can always use “she” to raise awareness of gender discrimination. You can simply use the pronoun that conforms to your own gender. As one commentator put it, I think half

Query whether lawyers should start filing briefs or other court papers with our preferred pronouns below the signature, as in emails.



facetiously, “Mix it up! Make it fun! Keep people on their toes!”<sup>1</sup>

But all the variations have problems. Some are confusing to the reader; others arguably foreground the writer’s politics too much (especially in the context of representation, rather than individual expression). Perhaps worst of all, they all presume that male and female are the only relevant gender categories, eliding people with non-binary gender. I recommend against those approaches.

**3** Please ask each of the witnesses what *s/he* wants for lunch.

Neologisms like this were coined at various points in history to work around the absence of an ungendered singular personal pronoun. They are clunky and distracting, and *Chicago* recommends avoiding all the variations, including “(s)he,” “s/he,” “(wo)man,” etc. If your brief starts to look post-modern, you know you have taken a wrong turn.

**4** Please ask each of the witnesses what *he or she* wants for lunch.

Despite its awkwardness, this is the most accepted variation that maintains the singular antecedent. *Chicago* includes it as one possible way to achieve gender neutrality. But I think “he or she” is losing ground for at least three reasons: (1) it often sounds awkward; (2) “she” appears second, an order without a good reason; and (3) the “he or she” construction leaves out people with non-binary gender. Even though it is well accepted, most usage guides recommend minimizing use of this construction. *Chicago* recommends it “be used sparingly, preferably only when no other [avoidance] technique is satisfactory.”

**5** Please ask the witnesses what *they* want for lunch.

This variation avoids the grammatical problem by pluralizing the antecedent and restoring agreement and consistency. There are other means of avoidance, too, but they don’t always work. These include revising the sentence, omitting the pronoun (“Please ask each of the witnesses about lunch.”), and repeating the noun

(“Please ask each of the witnesses what the witness would like for lunch.”). Often, the effort to avoid sexist language or awkwardness through revision results in better sentences anyway, but as the revisions above make clear—not always.

But what about the original example: “Please ask each of the witnesses what they want for lunch”? Yes, it produces grammatical unease in some readers. But maybe grammar can be thought of as more of a standard than a rule. Maybe the singular “they” has so many advantages that we should overlook the awkwardness to help fill a troublesome linguistic gap. After all, the singular “they” avoids both sexism and limiting gender categories to male or female. It is more inclusive than “he or she” because it matches with the pronoun many people with non-binary gender already choose.

More radically, maybe the singular “they” isn’t even ungrammatical. The singular generic “they” certainly isn’t new. You can find examples in classics like Chaucer, Shakespeare, and the Bible, and in prestigious modern literature and scholarship as well. The *Washington Law Review* has endorsed it. Even style guides have begun to change with the times. And the entire U.K. is OK with the singular “they.” Other guides hold the line, including *Chicago*, which continues to recommend writers avoid the generic, singular “they.”

In making any rhetorical or stylistic decision, lawyers must remember: We write for clients, not ourselves, and clients rely on us (and pay us) for our credibility. For now, the safest course for legal writers is to stick with *Chicago*’s advice and reserve the singular “they” for people who have expressed a preference for that pronoun.

But I can’t help giving legal *readers* some friendly advice, too. Stop being so finicky! It’s normal for language to change in response to social changes or even to just drift. Over time, the plural “you” came to replace the singular “thou”; I don’t hear much grammatical originalism in that case. And it was 18th century grammarians who installed “he” as the default genderless pronoun by influencing grammar school texts. That pronoun now seems out of date after feminists and others began unseating it in the 1970s.

Given this push and pull, and stronger and stronger consensus about the singular “they,” it’s no longer fair to infer that writers who embrace the singular “they” lack basic education, grammatical knowledge, or professionalism. 

NOTES:

1. Jen Doll, *The Singular They Must be Stopped*, The Atlantic (<https://www.theatlantic.com/entertainment/archive/2013/01/singular-their-affront-good-writing/319329/>).



**TOM COBB** is a senior lecturer at the University of Washington School of Law. A proud grammar and rhetoric nerd, Tom joined the UW law faculty in 2004. Before that, he clerked for Justice Susan M. Leeson at the Oregon Supreme Court and was an Assistant Attorney General in the Appellate Division at the Oregon Department of Justice.



# Where to Find Fantastic, Free Legal Research Guides

BY ANNA L. ENDTER

One of the questions we frequently get at the University of Washington Gallagher Law Library is how to do legislative history research. Perhaps it's because this kind of research can seem intimidating and confusing, especially if you are a little rusty about how the legislative process works (more on this later). This is where a good research guide (and skilled librarians) can help. As it happens, at the Gallagher Law Library we have an excellent guide about Washington legislative history (<http://guides.lib.uw.edu/law/waleghis>) that breaks down the research process, helps you focus your attention on the right resources, and makes your use of

fee-based research databases more efficient. And that's just one of the guides we make available.

Like many other law libraries in Washington, Gallagher is open to the public and we welcome visitors who need to use our resources. Attorneys and pro se patrons visit or contact us regularly to ask



## Have a legal research question?

Greetings! I am the head of Research Services at the University of Washington School of Law Gallagher Law Library. I will be writing this recurring column to answer your burning legal research questions. If you have a question you'd like to have answered in this column, please email it to me at [nwlawyer@wsba.org](mailto:nwlawyer@wsba.org). I highly encourage you to submit questions—I'll do my best to answer as many as I can.

common questions about—you guessed it—how to research a legal issue. We often suggest that users begin with a topical research guide for information about how to approach a particular question and to identify the resources available for carrying out the research to answer it. Good legal research guides are free, created by research experts (i.e., law librarians), and provide guidance about how to navigate specific areas of the law. Gallagher's collection of research guides is accessible on our website for anyone who wants to use them (<https://guides.lib.uw.edu/law/guides>); the guides cover a broad range of topics, from how to use our library to what's in our briefs collection to how to conduct treaty research.

Using the library's state legislative history guide, you might discover that all you need is the Legislature's website to trace an RCW section back to its bill number and other legislative documents and reports. Another advantage to using a guide like ours is that we track content changes and update the guide frequently so you don't have to remember how far back in time that bill database actually goes or how to find committee hearings on good old TVW. <https://www.tvw.org/>.

Other law libraries have also created useful research guides on Washington legislative history, among other legal research topics:

- **Gonzaga University School of Law's Washington Legislative History Research Guide.** <http://libguides.law.gonzaga.edu/waleghistory>.
- **Washington State Law Library's guide on Washington Legislative History and Legislative**

**Intent.** <http://www.courts.wa.gov/library/?fa=library.displayGuides&fileID=rschGuideLeg>.

- **Public Law Library of King County’s Legislative History guide.** <http://www.plllkc.org/wp/research/research-guides/legislative-history>.

All of these guides are quite comprehensive and helpful. Should you need a refresher about the legislative process here in Washington, consider reviewing this helpful overview from the Washington State Legislature: <http://leg.wa.gov/legislature/Pages/Overview.aspx>. For an excellent and accessible civics refresher, I also highly recommend the *The State We’re In: Washington*, published by the League of Women Voters of Washington. <https://www.lwvwa.org/the-state-we-are-in>.

The next time you are confronted with a tough research issue, consider starting with a legal research guide as a new strategy for understanding the research process and materials available, saving money, and focusing your attention on resources that will lead you to the most relevant materials for your topic. Unsure how to find a research guide? Visit the Gallagher Law Library’s website or try Googling “research guide” followed by the name of your topic. 

**ANNA L. ENDTER** is the head of Research Services at the University of Washington, School of Law, Gallagher Law Library. Endter is a member of the Washington and California state bars and before becoming a law librarian was a litigator and community mediator. She can be reached at [aendter@uw.edu](mailto:aendter@uw.edu).



### **You Are Not a Lawyer Anymore: A Primer for Those Who Want to be a Good Judge**

Amazon  
Publishing 2018

By Judge T.W. Small (Ret.)



**RENEE MCFARLAND** served on the Editorial Advisory Committee of *NWLawyer* for several years, including a year as chair, and then worked for several months as the interim *NWLawyer* editor on a part-time basis. She can be reached at [reneemcf93@hotmail.com](mailto:reneemcf93@hotmail.com).

## Literary Lawyer

### BOOK REVIEW BY RENEE MCFARLAND

Judge T.W. “Chip” Small (Ret.), an award-winning<sup>1</sup> Chelan County Superior Court judge, draws on 27 years of judicial experience in *You Are Not a Lawyer Anymore: A Primer for Those Who Want to be a Good Judge*. In his book, Judge Small offers wide-ranging and heartfelt advice, written in a conversational tone:

As a judge, you are obviously in a position of leadership. Therefore, everything you say and do is amplified. When you speak sternly from the bench, it will sound like you are yelling to those who are listening. Try to always be mindful of this effect on your speech and actions. (p. 36)

The book is concise, but contains a wealth of personal insights and practical examples, with advice that is infused with cheerfulness and optimism. In discussing important character traits a trial judge should have, Judge Small shares this:

One of my favorite movies is *Chisum*, a John Wayne Western. There is a scene in it with Billy the Kid and a sheriff-to-be Pat Garrett. In the scene Pat says, “Billy, I have the patience of an oyster.” That is what we should all strive for. (p. 26)

In my first job after law school, I had the good fortune of serving as a law clerk to the Superior Court judges of Chelan and Douglas Counties, including Judge Small. Despite working extremely long hours, Judge Small never hesitated to discuss cases or the law with me, and he cared deeply about his office and the community he served.

A longtime dedicated advocate of judicial education amid funding challenges, he gives concrete suggestions for judges to pursue various options. He explains that, in addition to the large number of baby boomer judges retiring, the prohibitively high cost of going to trial, coupled with a rise in mandatory alternative dispute resolution, has meant that newer judges often take the bench without having had much experience trying cases.

Judge Small provides a framework for judges to think about their role in their communities and society and suggests that a judge should develop a personal judicial philosophy early in their career. Readers will appreciate his advice about creating and maintaining a robust court system that prioritizes and best serves a wide range of litigants. From specific, practical advice and enjoyable, instructive anecdotes, to a broader discussion of a judge’s role in promoting public trust and the rule of law, Judge Small’s primer is essential reading for judges, those contemplating a judicial career, and those who would like an inside view of the bench. 

#### NOTES:

1. Among other awards, Judge Small received the Norm Maleng Leadership Award—given jointly by the Washington State Bar Association (WSBA) and the Access to Justice Board in honor of the late King County Prosecutor Norm Maleng’s legacy as a leader—in the 2013 WSBA APEX (Acknowledging Professional Excellence) awards.





## In Remembrance

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This In Remembrance section lists WSBA members by bar number and date of death. The list is not complete and contains only those notices the WSBA has learned of through correspondence from members.

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William John Colwell, #40407, 7/15/2018  
Edward T. Crawford, #22546, 11/27/2018  
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Andrew Curtis Jr., #2473, 1/17/2019  
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William Thomas Mablesen, #12107, 06/4/2018  
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William Nicholas Mathias III, #4739, 12/12/2018  
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Daron George Morris, #32524, 2/15/2019  
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Monte Lynn Scaggs, #6906, 3/11/2019  
J. Bruce Smith, #11600, 10/29/2018  
Janell Stewart, #35211, 1/3/2019  
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Fredric C. Tausend, #3148, 12/18/2018  
Candace M. Taylor, #2628LPO, 3/9/2019  
William H. Thomas, #7272, 10/28/2018  
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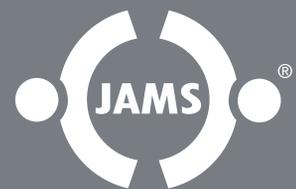
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*STATE v. GREGORY*

Statistical evidence of racial bias and arbitrariness in its imposition led the Washington Supreme Court to end the use of capital punishment.



THE CASE THAT

INVALID





BY KEN MASTERS

In *State v. Gregory*,<sup>1</sup> the Washington Supreme Court struck down the state's capital punishment statute as “invalid because it is imposed in an arbitrary and racially biased manner.” With this decision, Washington joins 19 other states in abandoning modern-day capital punishment schemes.

#### DISCRETION AND DISCRIMINATION IN DEATH

Why did the Washington Supreme Court find that the death penalty has been imposed unfairly, and why have other states been unsuccessful in addressing the problem? It boils down to discretion. Any time decision-makers have broad discretion to choose different outcomes, those outcomes will vary in ways that are random, arbitrary, and rooted in implicit or explicit biases.

The United States Supreme Court recognized this problem in the 1972 case of *Furman v. Georgia*.<sup>2</sup> In a short per curiam opinion, the Court struck down the capital punishment statutes that existed at that

time because they afforded too much discretion to prosecutors and juries to determine which crimes would result in the death penalty. Five justices wrote concurring opinions, with the narrow opinions of Justices Stewart and White representing the holdings of the case.<sup>3</sup>

The Court acknowledged that only a small percentage of defendants received the death penalty, which at first glance might appear to demonstrate judicious selection of only the “worst of the worst” for the ultimate punishment. But closer inspection revealed that this small group did not represent the worst offenders, but instead a group that appeared to have been selected by a

process as random and capricious as being “struck by lightning.”<sup>4</sup> Justice White observed that “the death penalty is exacted with great infrequency even for the most atrocious crimes and ... there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not.”<sup>5</sup>

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#### ALSO INSIDE

##### REFLECTIONS ON *STATE v. GREGORY*

First-person accounts from the prosecutor and counsel for appellant and amici on the case that ended the use of the death penalty in Washington. | pp. 26-30

# I D A T E D

## THE STATE'S DEATH PENALTY



Photo ©Getty / allanswart

Justice Stewart noted that “if any basis can be discerned for the selection of these few to be sentenced to die, it is the constitutionally impermissible basis of race.”<sup>6</sup>

Because the death penalty was imposed arbitrarily on a few defendants and the evidence raised the specter of racial bias, the *Furman* Court held the capital punishment schemes at issue violated the Eighth Amendment’s prohibition on cruel and unusual punishment.<sup>7</sup>

### ‘GUIDED DISCRETION’

The *Furman* majority believed the problems it identified could be fixed by amending states’ statutes to reduce the discretion of prosecutors and juries in charging and imposing the death penalty.<sup>8</sup>

But the Court forbade one attempted solution: mandatory death sentences for certain crimes. Although this “solution” would eliminate discretion at one of the decision points, it would also violate a different Eighth Amendment requirement: individualized sentencing with “consideration of the character and record of the individual offender and the circumstances of the particular offense.”<sup>9</sup>

Instead, the Court endorsed statutes which narrowed, but did not eliminate, the discretion of prosecutors to charge capital crimes and of judges and juries to impose death sentences. The new statutes limited the number of crimes that were eligible for the death penalty, and defined “aggravating circumstances” to guide discretion. Decision-makers were still required to consider any “mitigating circumstances” that might warrant a life sentence, rather than the death penalty, for a given defendant.<sup>10</sup>

In *Gregg v. Georgia*,<sup>11</sup> the petitioner argued that the new statutes would not fix the problems identified in *Furman*, but the Supreme Court disagreed. The Court was willing to assume the new procedures would eliminate arbitrariness in capital sentencing, and it relied on the American Law Institute’s Model Penal Code provision for the proposition that statutes could simultaneously permit the exercise of discretion yet eradicate caprice and bias.<sup>12</sup> The Court optimistically opined, “No longer should there be no meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many cases in which it is not.”<sup>13</sup>

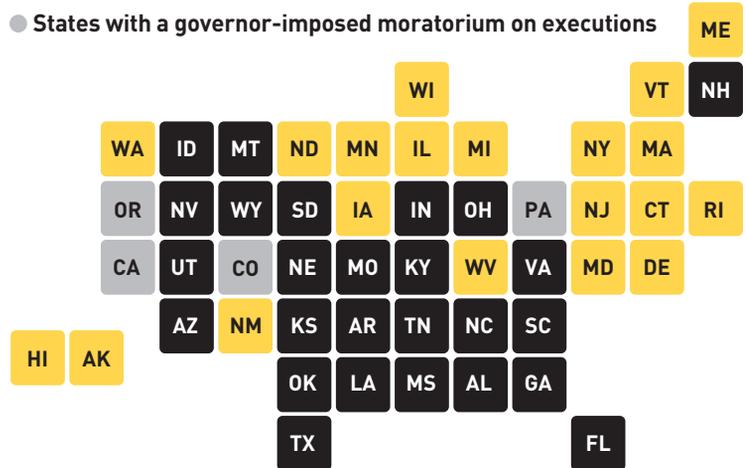
## STATES WITH AND WITHOUT THE DEATH PENALTY

As of March 13, 2019

● States with the death penalty

● States without the death penalty

● States with a governor-imposed moratorium on executions



Source: Death Penalty Information Center

## 9/10/10

The last execution to occur in Washington state (Cal Coburn Brown, 52).

In another case a decade later, the petitioner presented statistical evidence demonstrating that the Court’s optimistic expectations had not been borne out.<sup>14</sup> The defendant in *McCleskey v. Kemp*<sup>15</sup> showed that even under the “*Furman* fix” statutes, defendants in Georgia who killed white victims were far more likely to receive the death penalty than those who killed black victims, and black defendants were slightly more likely to receive the death penalty than white defendants.<sup>16</sup> But in a 5-4 opinion authored by Justice Lewis Powell, the Supreme Court held the statistical study did “not demonstrate a constitutionally significant risk of racial bias affecting the Georgia capital sentencing process.”<sup>17</sup>

After retirement, when asked whether he would change any of his votes, Justice Powell replied: “Yes, *McCleskey v. Kemp*.”<sup>18</sup>

### WASHINGTON’S POST-FURMAN EXPERIENCE

In 1981, Washington adopted a new capital punishment statute that attempted to address the problems identified in *Furman*. It permitted capital punishment only for first-degree premeditated



## MORE ONLINE

Links to the oral argument, all briefs, and all statistical documents in *State v. Gregory* are available on a dedicated case page set up by the Supreme Court:

[http://www.courts.wa.gov/appellate\\_trial\\_courts/SupremeCourt/?fa=supremecourt.StatevGregory](http://www.courts.wa.gov/appellate_trial_courts/SupremeCourt/?fa=supremecourt.StatevGregory)

murder with one or more “aggravating circumstances” and where there were “not sufficient mitigating circumstances to merit leniency.”<sup>19</sup> The Washington Supreme Court would directly review each death sentence<sup>20</sup> to ensure, among other things, that it was “proportionate to the penalty imposed in similar cases.”<sup>21</sup> If it was not, the remedy was to remand for a sentence of life in prison without the possibility of parole—the only other available punishment for aggravated murder. To facilitate this so-called “proportionality review,” trial courts were required to file reports at the end of each aggravated murder case, whether the case resulted in a life sentence or a death sentence.<sup>22</sup> The reports included detailed information about the crimes and the defendants to be used for comparison purposes in capital cases.

The Washington Supreme Court never reversed a sentence as “disproportionate,” even as the pool of aggravated murder cases grew. Most defendants in aggravated murder cases received life sentences while only a few were sentenced to death. Sentences appeared rational and justifiable when considered in isolation, but as a whole the crimes and backgrounds of those on death row did not appear to be worse than those who received life sentences. Defense attorneys regularly raised these concerns, which culminated in *State v. Cross*<sup>23</sup> in 2006.

Cross had been sentenced to death for the aggravated murder of three victims. He argued that his sentence was disproportionate to the sentences imposed in other aggravated murder cases and that the death penalty violated the Eighth Amendment. He noted in particular that Gary Ridgway, notorious for murdering at least 49 people, received a life sentence. A bare majority rejected the arguments.<sup>24</sup>

Justice Charles Johnson wrote the dissent, which three other justices signed. He noted that Ridgway was not an outlier; in fact, several notorious mass murderers and serial killers in Washington had received life sentences, while others convicted of aggravated murder had received death sentences. Justice Johnson could find no rational explanation for “why some individuals escape the penalty of death and others do not.”<sup>25</sup>

But after the 5-4 decision in *Cross*, the Supreme Court continued to affirm death sentences in Washington, and did so with broader majorities. In *State v. Yates*, the court affirmed the death sentence



in an 8-1 opinion;<sup>26</sup> in *State v. Davis*, it was a 6-3 opinion.<sup>27</sup> The justices who had dissented in *Cross* voted to uphold these death sentences, presumably believing *stare decisis* compelled their votes.

But there were notable dissents in *Davis*, a case involving an African American man sentenced to death in Pierce County for the aggravated murder of one victim. Justice Mary Fairhurst wrote the principal dissent, highlighting the arbitrary nature of capital sentencing in Washington, and suggesting the sentence should have been reversed for failing proportionality review. Justice Fairhurst observed: “One could better predict whether the death penalty will be imposed on Washington’s most brutal murderers by flipping a coin than by evaluating the crime and the defendant.”<sup>28</sup>

Justice Wiggins signed Justice Fairhurst’s dissent, but he also wrote separately to highlight the apparent racial disparities in death sentences. Justice Wiggins reviewed the pool of aggravated murder reports and noted that it appeared “African American defendants are more likely to receive the death penalty than Caucasian defendants.”<sup>29</sup> Foreshadowing his later opinion in *State v. Saintcalle*,<sup>30</sup> Justice Wiggins emphasized the problem was likely not deliberate racism, but historical institutional discrimination and unconscious bias. Justice Wiggins would have remanded the case for an evidentiary hearing to determine whether the apparent racial disparity in capital sentencing was statistically significant.<sup>31</sup>

During the time between *Cross* and *Davis*, the American Law Institute withdrew the death penalty from its Model Penal Code. It did so in part because

2/11/14

Gov. Jay Inslee announced a moratorium on executions in Washington state.

“real-world constraints make it impossible for the death penalty to be administered in ways that satisfy norms of fairness and process.”<sup>32</sup> Among other issues, the group cited the “near impossibility” of addressing “conscious or unconscious racial bias” in a statute.<sup>33</sup>

### THE GREGORY LITIGATION

In the fall of 2012, attorneys Lila Silverstein and Neil Fox were appointed to represent Allen Gregory on appeal from his death sentence. Like Cecil Davis, Gregory was an African American man sentenced to death in Pierce County for the aggravated murder of one victim. Again acknowledging that all aggravated murders are serious offenses, Gregory’s attorneys argued that not only was his crime a single-victim crime, but he had no prior violent felonies in his record. Meanwhile, they contended, scores of defendants serving life sentences had committed aggravated murder against multiple victims and had violent felony histories.

Silverstein contacted University of Washington sociology professor Katherine Beckett, a member of the Washington State Academy of Sciences, to perform a statistical study of Washington’s aggravated murder cases. Beckett then recruited Heather Evans, an expert in quantitative analysis. Silverstein provided aggravated murder reports and explanations of the legal framework, while Fox gathered previously missing reports for other aggravated murder cases to develop a comprehensive data set to evaluate.

Beckett and Evans performed a multivariate regression analysis, which controlled for variables that are supposed to be relevant in determining a life sentence or death sentence (e.g., the number of victims, aggravating circumstances, mitigating circumstances, and criminal history). After controlling for relevant case characteristics, they determined that African American defendants in Washington are more than four times as likely to be sentenced to death as other defendants.<sup>34</sup>

Silverstein and Fox presented the results to the court in 2014 and argued that the sentence in *Gregory* failed proportionality review and that the death penalty violated both the Eighth Amendment to the U.S. Constitution and art. I, § 14, of the Washington State Constitution.<sup>35</sup> Pierce County prosecutors responded to Gregory’s legal arguments but urged

the court to disregard the statistical study.<sup>36</sup>

Also in 2014, Gov. Jay Inslee imposed a moratorium on executions, stating in part, “in death penalty cases, I’m not convinced equal justice is being served.” But the moratorium did not prevent death sentences from being imposed, or clear death row, so capital trials proceeded and the *Gregory* appeal continued.

The case proceeded to oral argument in February 2016. (Unlike standard arguments, which are 20 minutes per side, death penalty arguments are two hours per side, with a lunch break in the middle.)

During oral arguments, Silverstein urged the court to hold that Washington’s death penalty is unconstitutional because it is imposed in an arbitrary and racially biased manner. She emphasized that the court was not bound by earlier decisions because it now had significant new data from a much larger pool of cases and a new statistical study. Jeff Robinson presented arguments on behalf of amici, highlighting the historical connection between capital trials and the lynching of black Americans. Fox argued the underlying conviction and other assignments of error. (See pages 28-30.)

Pierce County Deputy Prosecutors John Neeb and Kathleen Proctor argued that the court should not consider the statistical study (see page 26). Fox and Silverstein then presented rebuttal, after which the case was submitted to the court for a decision.

Three weeks later, the court issued an unprecedented order asking Pierce County to respond to the statistical study on the merits and initiating special proceedings before Commissioner Narda Pierce. Those proceedings would last two years.

The prosecution hired its own expert, Dr. Nicholas Scurich from U.C. Irvine, who initially stated that he was unable to replicate the study’s results. Beckett and Evans responded that Scurich had committed important errors which resulted in a significant number of cases being dropped from the analysis. They also fixed several data entry errors Scurich identified, but there was no meaningful impact on the results. Commissioner Pierce issued multiple sets of “interrogatories,” to follow up on the disputed issues. Beckett and Evans presented results using alternative coding protocols, which were substantially similar to the earlier outcomes. And Scurich acknowledged he



**KEN MASTERS**  
(Founder, Masters Law Group, PLLC) has litigated hundreds of state and federal civil appeals in virtually every substantive legal area. He is listed as a Top 10 Super Lawyers® Honoree for 2017 and 2018 (“ranked No. 2”) and is also listed on the Washington State Supreme Court’s Pro Bono Honor Roll recognizing 50+ hours of pro bono service in a year—every year since 2004. Masters is a Fellow of both the American Bar Foundation and the American Academy of Appellate Lawyers.



The death penalty is invalid because it is imposed in an arbitrary and racially biased manner.”

— CHIEF JUSTICE FAIRHURST

was able to replicate the results after fixing his errors, but suggested the study relied on too small of a data set to be reliable. Beckett and Evans argued there was “strong, consistent, and compelling evidence that jury decision-making in capital cases in Washington state has been notably influenced by the race of the defendant.”

In November 2017, Commissioner Pierce issued her final report; the parties and amici filed supplemental briefs in January 2018. Gregory’s attorneys further highlighted decisions that had been issued after the original round of briefing. A dozen statisticians and social scientists from around the country filed an amicus brief endorsing the methods used by Beckett and Evans.

## THE DECISION

On Oct. 11, 2018, the Washington Supreme Court unanimously struck down Washington’s death penalty scheme under the cruel-punishment clause of the state constitution. Chief Justice Fairhurst wrote the lead opinion, and Justice Johnson wrote a concurring opinion.

The court held, “The death penalty is invalid because it is imposed in an arbitrary and racially biased manner.”<sup>37</sup> Justice Fairhurst explained, “[a]s noted by appellant, the use of the death penalty is unequally applied—sometimes by where the crime took place, or the county of residence ... or the race of the defendant.”<sup>38</sup> The court afforded “great weight” to the statistical study of Drs. Beckett and Evans, noting that their successive analysis “became only more refined, more accurate, and ultimately, more reliable.”<sup>39</sup>

The court concluded, “Our capital punishment law lacks ‘fundamental fairness’ and thus violates article I, section 14. ... All death sentences are hereby converted to life imprisonment.”<sup>40</sup>

10/11/18

The state Supreme Court unanimously struck down Washington’s death penalty.

## NOTES:

- 192 Wn.2d 1, 5, 427 P.3d 621 (2018).
- 408 U.S. 238 (1972).
- See *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976) (plurality) (“Since five Justices wrote separately in support of the judgments in *Furman*, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds: Mr. Justice Stewart and Mr. Justice White”).
- Furman*, 408 U.S. at 309 (Stewart, J., concurring).
- Id.* at 313 (White, J., concurring).
- Id.* at 309-10 (Stewart, J., concurring).
- Furman*, 408 U.S. at 309-10 (Stewart, J., concurring); *id.* at 313 (White, J., concurring).
- See *Gregg*, 428 U.S. at 168-69 (discussing *Furman*).
- Woodson v. North Carolina*, 428 U.S. 280, 304 (1976).
- See Charles L. Black Jr., *Capital Punishment: The Inevitability of Caprice and Mistake*, at 112 (Norton 2d ed. & Supp. 1981) (after *Furman*, some two-thirds of the states adopted new death penalty statutes).
- 428 U.S. 153 (1976).
- Id.* at 193.
- Id.* at 198.
- As early as 1981, Prof. Black noted a study showing a zero percent chance that a white person who killed a black person would receive the death penalty in Ohio and in many southern states. Black, *supra* n.10, at 101-02 n.2.
- 481 U.S. 279 (1987).
- Id.* at 287.
- Id.* at 313.
- <https://www.nytimes.com/1994/06/11/opinion/justice-powell-s-new-wisdom.html>.
- RCW 10.95.020, .030.
- RCW 10.95.100.
- RCW 10.95.130(2)(b).
- RCW 10.95.120.
- 156 Wn.2d 580, 132 P.3d 80 (2006).
- Id.* at 621-24, 630-34.
- Id.* at 652 (Johnson, J., dissenting).
- 161 Wn.2d 714, 792-93, 168 P.3d 359 (2007).
- 175 Wn.2d 287, 342-74, 290 P.3d 43 (2012).
- Id.* at 388 (Fairhurst, J., dissenting).
- Id.* at 389 (Wiggins, J., dissenting).
- 178 Wn.2d 34. (2013).
- Davis, 175 Wn.2d at 401 (Wiggins, J., dissenting).
- American Law Institute, Report of the Council to the Membership of The American Law Institute On the Matter of the Death Penalty 5 (2009) available at <https://www.ali.org/projects/show/sentencing/>.
- Id.*
- State v. Gregory, 192 Wn.2d at 12.
- Unlike the U.S. Constitution (requiring “cruel and unusual”), Wash. Const. art. I, § 14 forbids “cruel punishment.”
- The court denied Pierce County’s motion to strike the study before the prosecution filed its response brief.
- State v. Gregory, 192 Wn.2d at 5.
- Id.*
- Id.* at 19.
- Id.* at 35.

## REFLECTIONS ON *STATE V. GREGORY:*

First-person account from the deputy prosecuting attorney who tried the case (twice) and handled the appeal



BY JOHN NEEB

Allen Gregory savagely murdered Geneine Harshfield in 1996. Called Genie by her friends and family, she lived alone and worked as a bartender in a local restaurant. Genie had recently purchased a small bungalow next door to her mother's house on Hilltop in Tacoma, where she loved working in her flower garden. Allen Gregory had been staying with his grandmother, who lived across the alley from Genie's house. He sat on the back porch of his grandmother's house and watched Genie arrive home from work during the early morning hours of a hot summer night.

Allen Gregory attacked Genie in her kitchen. He tied her hands behind her back, dragged her into her bedroom, cut her clothes off of her, raped her vaginally and anally, stabbed her in the back three times, stabbed her in the neck, and then sliced her throat so deeply and completely that he cut through her windpipe and her esophagus and damaged her spinal cord. He stole her tip money, then he took her favorite diamond earrings out of her ears and pocketed them, too.

Pierce County prosecuted Allen Gregory, twice. The first 12-person jury found him guilty and decided that he should be sentenced to death. The conviction was affirmed but the death penalty sentence was reversed. At his second sentencing

hearing a second 12-person jury again found that he should be sentenced to death. Both juries were unanimous beyond a reasonable doubt.

The two sentencing verdicts were over 10 years apart. They were reached by 24 individual citizens of this state who took an oath to render a decision based solely on the evidence they heard and the law as the court instructed them. Only appropriate factors were presented as evidence for why Gregory should be sentenced to death. I remain convinced today that each one of those juries reached the right decision for the right reasons. Both of those juries were comprised of principled, honest, hard-working people, and each separate jury found the death penalty was appropriate, without bias, without prejudice, just simply for what Allen Gregory did to Genie.

While its holding was that the death penalty "is imposed in an arbitrary and racially biased manner,"<sup>1</sup> the Washington Supreme Court's decision in *State v. Gregory* was not based on any evidence that Gregory's sentence itself resulted from bias or prejudice. The court also did not consider in its decision any information that relates to the *initial decision to seek the death penalty*, in any Washington case, which can only be made by an elected prosecutor. In addition, the court had very little post-conviction information on other cases that was complete and consistent. Let me explain those things.

### PRE-CHARGING INFORMATION

In Pierce County, where Allen Gregory was prosecuted, an initial decision is made as to whether or not to file aggravated murder and not "just" first-degree murder. Only aggravated murder carries a potential sentence of death. Once that decision is made, the defense is provided an extended opportunity to present "mitigation" evidence, which is *any* information the defense team wants to provide about the defendant that is designed to convince the elected prosecutor *not* to file a notice of intent to seek death. The elected prosecutor in Pierce County rarely files a death notice, and only after completely vetting the case, both on its facts and considering the statutory aggravating factors and the mitigation presented. That decision is never easy.



None of this type of pre-charging information is ever provided to the Washington Supreme Court during an appeal, for the defendant whose death penalty is under review or for any other death penalty-eligible defendant. What that means is that the Supreme Court lacks information that is critical to determining *why* or even *how* an elected prosecutor makes the decision to seek death in one case and not in another. But the court must have that information in some fashion in order to truly analyze whether a death sentence that results from a trial is, in fact, “disproportionate” when compared to others. The Washington Supreme Court never had that information in *Gregory*.

#### POST-CONVICTION INFORMATION

**A**nother concern is the post-conviction information the court considered, specifically the “trial reports” that are completed whenever a defendant is convicted of aggravated murder, whether the jury later finds in favor of the death penalty or not. The problem with those reports is their inconsistency. Each report is completed by a different judge, with input from different prosecutors and defense lawyers, who have their own interpretations of what should and should not be included. While each court uses the same form, there is simply no way to statistically compare the reports with any consistent approach. Those reports also do not contain the single most important piece of information for a court deciding the constitutionality of the death penalty, as applied: *Why was the specific verdict reached in that case?* In Washington, the reasons juries decide the way they do “inheres in the verdict” and can almost never be used to overturn a jury verdict.

#### JURY UNANIMITY AND MERCY AS THE ULTIMATE MITIGATING FACTOR

**F**inally, there is the issue of jury unanimity. In Washington, a penalty phase verdict of anything less than 12-0 results in a default sentence of life in prison without the possibility of parole. Jurors are specifically instructed that they can consider “mercy” to be a mitigating factor, and “mercy alone” can be a sufficient reason to vote against a sentence of

**The Washington Supreme Court’s decision in *State v. Gregory* was not based on any evidence that Gregory’s sentence itself resulted from bias or prejudice.**

death. There are times—many times, really—when just one or two jurors find “mercy” is enough of a reason to vote for a life sentence, and that means a sentence of life without parole. The fact that any one member of a jury finds mercy to be a mitigating factor does not mean that another jury that unanimously sentences a defendant to death is racially biased, or that the death penalty is now somehow “disproportionate” compared to any other case. Sometimes, the defendant’s actions are just so bad that the only appropriate sentence is the ultimate sentence: death. And the defendant’s race, the victim’s race, the lawyers’ race, the jury’s racial mix? They are immaterial.

I have never asked a jury to sentence a defendant to death for anything other than legitimate and lawful reasons. There are issues that need to be addressed in our criminal justice system—we should never stop trying to be better—but I do not believe that reversing Allen Gregory’s death sentence was justice, nor was invalidating Washington’s death penalty as unconstitutional, as administered. 

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**JOHN NEEB** has been a deputy prosecuting attorney for Pierce County since 1992. He prosecuted Allen Gregory in 2001 and again in 2012 after the first death sentence was reversed. He has represented the state of Washington in more than 100 jury trials, which include 20-plus murder trials, four involving the death penalty, and has appeared a number of times before the Washington Supreme Court. He serves as the statewide prosecutor representative for the Washington Homicide Investigators Association (WHIA) Board of Directors.

#### NOTES:

1. *State v. Gregory*, 192 Wn.2d 1, 427 P.3d 621 (2018).

PROSECUTOR

## REFLECTIONS ON *STATE v. GREGORY*:

First-person accounts from counsel for appellant on preparing to argue the case that ended the death penalty in Washington



BY LILA SILVERSTEIN

**P**reparing to argue *Gregory* was different from preparing for a typical Supreme Court oral argument. Instead of speaking for 20 minutes, I would be speaking for over an hour—the first 45 minutes of the day and the last 20. I would need to explain why the death penalty as administered was unconstitutional in light of the regression analyses and other new evidence. This new evidence statistically validated what had long been empirically apparent: that the death penalty is imposed in an arbitrary and racially biased manner.

Instead of beginning preparations a few days before argument, I began a few weeks out. I met with my wonderful co-counsel Neil Fox and outstanding amicus counsel Jeff Robinson, and also prepped with my Washington Appellate Project colleagues, with Drs. Beckett and Evans, and with attorneys from other offices. Then I took time to think alone and work on my other cases.

Two days before argument Neil asked, “So how have you been preparing?” I laughed as I told him about my efforts to narrow the information into manageable pieces. I usually have a list of potential questions with potential answers, but for this case the list I’d created was overwhelming. So I created a new, smaller list called “Key Questions.” But that list was also too much, so I created an even shorter one called “Super Key Questions”!

It was fun to laugh with Neil, and I reflected on how lucky I was to work with him—we complemented each other well, got along great, and each made critical contributions that would not have occurred if either of us had been on the case alone. We didn’t know it at the time, but three weeks later the court would order “special proceedings” to evaluate the statistical study. Thank goodness Neil and I had each other—along with a couple of especially supportive colleagues—as we navigated those grueling proceedings with the statistical experts over the next two years.

But two days ahead of argument, we were blissfully ignorant of what was to come. Jeff called, and we shared how we were nervous for the usual reasons. We knew a lot of people would be watching the next day, including the brilliant amicus brief authors, Mr. Gregory’s family, our colleagues, friends, family, students, interested citizens, and lawyers who worked on similar issues for decades.

I attempted to calm myself with the standard platitudes—“It’s an opportunity, not a burden,” “The pressure is a privilege”—but my nerves rolled their eyes and remained.

Still, we forged ahead and the court ultimately invalidated Washington’s capital punishment scheme because the death penalty is imposed in an arbitrary and racially biased manner. I am grateful for the court’s courage in issuing this important decision, and for the opportunity to work with amazing advocates on the case. 

**LILA SILVERSTEIN** is an appellate public defender with the Washington Appellate Project where she represents indigent clients appealing criminal convictions, civil commitments, and terminations of parental rights. She is passionate about protecting the constitutional rights of individuals, ensuring equal access to justice for all, and promoting systemic reform. In addition to *Gregory*, her significant Supreme Court cases include *State v. E.J.J.* (reversing conviction for obstruction of justice and reaffirming First Amendment right to criticize police); *State v. Saintcalle* (recognizing pervasive problem of race discrimination in jury selection); and *State v. Snapp* (holding Washington Constitution provides greater privacy protection than federal Constitution in context of car searches). Silverstein also wrote and promoted significant subsections of new General Rule 37, which aims to reduce discrimination in the exercise of peremptory challenges.

C O U N S E L O R S



## BY NEIL FOX

One of our goals for this case was to place *State v. Gregory* into a broader historic context such that reversing this sentence and invalidating the capital sentencing scheme was the only logical outcome. I spent about two months rereading the major U.S. Supreme Court death penalty cases dating back to the 1960s, then reviewed every single Washington capital case over the same timeframe. It was fascinating to reread the opinions in the context of what had actually taken place in capital litigation over four decades. I was particularly impressed by the political sophistication of Justices Douglas, Brennan, and Marshall, whose views were much more progressive than even the liberal wing of the current U.S. Supreme Court.

I was tasked with arguing that our state's proportionality review was unconstitutional in light of the principles of *Apprendi v. New Jersey*, so I reread that line of cases as well as some of the key secondary sources involving 18th century jury trials. I also paid close attention to how the Washington

Supreme Court invalidated previous versions of the death penalty statute (*State v. Baker*, *State v. Green*, and *State v. Frampton*) and how it upheld the 1981 statute by judicially limiting it in the *Bartholomew* cases. I had copies of various court filings from 1979 to 1981 related to the Washington Supreme Court's first attempt (prior to *Frampton*) to determine whether the death penalty was disproportionate by ordering a hearing before a special master in Thurston County. In preparation for oral argument, I

referred back to these now ancient pleadings and orders so that our argument was in line with the historic trajectory.

This process was sometimes grueling. My case review spanned several months, so to keep my eyes on the prize, on the filing cabinet next to my desk I posted pictures of the Washington Supreme Court justices. When preparing, I would think about their

individual backgrounds as lawyers and judges and their various opinions in past cases involving race and the death penalty. On the same filing cabinet I also posted the lyrics to a Spanish Civil War song so that emotionally I could see this case in an even broader context, a historical and international perspective going back long before *Furman*.

I started law school at the University of Illinois in 1981, just as the "machinery of death" (as Justice Blackmun would later describe it) began its generational expansion. If someone had told me that 35 years later I would be arguing against the death penalty in the Washington Supreme Court, I would have answered, "That's exactly why I want to become a lawyer." In this regard, I am honored and proud to have been appointed with Lila Silverstein to the *Gregory* case, and to have been part of this historic experience. 

**NEIL FOX** started his practice as a staff attorney at the Washington Appellate Defender Association, then served as a staff attorney and supervisor at the Seattle-King County Public Defender Association before joining Cohen & Iaria, a small Seattle criminal defense firm, as "of counsel." He started his own firm, the Law Office of Neil Fox PLLC, in 2010, where he handles trials, direct appeals, and post-conviction cases in both state and federal court. Other capital cases that Fox has been involved in include *State v. Dearbone*, 125 Wn.2d 173 (1994), *Ramirez Cardenas v. Thaler*, 651 F.3d 442 (5th Cir. 2011), and *United States v. Burns* [2001] 1 S.C.R. 283, 2001 SCC 7 (American counsel). He is also a cooperating attorney with the Mexican Capital Legal Assistance Program (MCLAP), which represents the interests of the Mexican government in capital cases involving Mexican nationals.

### > CONTINUED

First-person account from Jeff Robinson, the counsel for amici on the case | p. 30

... on the filing cabinet next to my desk I posted pictures of the Washington Supreme Court justices. When preparing, I would think about their individual backgrounds as lawyers and judges and their various opinions in past cases involving race and the death penalty.

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## REFLECTIONS ON *STATE v. GREGORY*:

First-person account from counsel for amici on preparing to argue the case that ended the death penalty in Washington



BY JEFF ROBINSON

**A**s the director of the Center for Justice at the National American Civil Liberties Union (ACLU), the Capital Punishment Project reported to me and worked with the Orrick firm in Seattle and the ACLU of Washington to file an amazing amicus brief in the *Gregory* case. Seventy-five retired Washington judges, having had front-row seats to its unjust application, joined in the brief asking the Washington Supreme Court to strike down the death penalty.

My experiences growing up in Memphis, Tennessee, gave me a clear view into how race impacts the criminal law system, but my interest in the *Gregory* argument was more personal: I represented Jonathan Gentry, who was sentenced to death and, before *Gregory*, was one of the four black people on Washington's death row and the person who had been there the longest. As years went by I testified and submitted declarations at post-conviction hearings, but when I saw

the *Gregory* case, I knew it was a chance to do for my client what I could not do at trial—it was an opportunity to argue on the issue of racism in the death penalty process.

Luckily for me, Cassy Stubbs, director of the Capital Punishment Project; John Wolfe, a partner

at the Orrick firm; and Nancy Talner of the ACLU of Washington believed I was the right person to make the argument in *Gregory*. In fact, while I was trying to figure out how to ask Cassy if I could give the argument, she was trying to figure out *how to ask me* to give the argument.

The work of Lila Silverstein and Neil Fox was excellent and I knew they were prepared to go deep on all issues in the case. They had a rigorous and sophisticated statistical study showing that Washington juries were more than four times as likely to sentence a black defendant to death. The record contained the findings of a committee, led by one of the sitting Justices, that racism exists at every level of our court system.

I wanted the court to have what the author William Burroughs described as, “that moment when everyone has to look at what is really on the end of their fork.” I wanted the court to consider whether any definition of justice could include a system where someone who looked like me was four times more likely to get a death sentence than someone who looked like eight of the nine of them. I wanted to say to them that the evidence of racial bias was overwhelming and the only remaining question was whether they were willing to do anything about it.

I got to make those arguments and ask that question. I will always appreciate those who gave me the chance to do so. 

**JEFFERY ROBINSON** is a deputy legal director and the director of the ACLU Trone Center for Justice and Equality, which houses the organization's work on criminal justice, racial justice, and reform issues. Robinson graduated from Harvard Law School in 1981. For seven years, he represented indigent clients in state court at The Defender Association and then in federal court at the Federal Public Defender's Office, both in Seattle. In 1988, Robinson began a 27-year private practice at Schroeter, Goldmark & Bender. He has tried over 200 criminal cases to verdict and has tried more than a dozen civil cases representing plaintiffs suing corporate and government entities. In addition to being a nationally recognized trial attorney, Robinson is also a faculty member of the National Criminal Defense College; a past president of the Washington Association of Criminal Defense Lawyers; a life member and past member of the board of directors of the National Association of Criminal Defense Lawyers; and an elected fellow of the American College of Trial Lawyers.



**I wanted the court to have what the author William Burroughs described as, “that moment when everyone has to look at what is really on the end of their fork.”**

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**WASHINGTON LAW ON JURY  
CHALLENGES FOR BIAS UNDERMINES  
LITIGANTS' CONSTITUTIONAL RIGHT  
TO AN IMPARTIAL JURY**

**BY PAUL LUVERA**

The right to trial by jury includes the right to an unbiased and unprejudiced jury. A trial by a jury with any biased or prejudiced jurors is not a constitutional trial.<sup>1</sup> To that end, Washington statutes provide procedures intended to evaluate the impartiality of prospective jurors and ensure an impartial jury. However, Washington law regarding challenges for disqualification of prospective jurors due to actual bias raises concerns about protecting this constitutional right.



**INESCAPABLE**

## DISQUALIFICATION FOR BIAS IS A TWO-STEP PROCESS

In Washington, challenges to prospective jurors may be peremptory or for cause.<sup>2</sup> A challenge for cause may be based on actual bias on the part of the prospective juror. Actual bias means “the existence of a state of mind on the part of the juror, with reference to the action or to either party, which satisfies the court that the challenged person cannot try the issue impartially and without prejudice to the substantial rights of the party challenging ...”<sup>3</sup> A party claiming actual bias must establish it by proof.<sup>4</sup> The law presumes each juror sworn in is impartial and qualified to sit on a particular case, otherwise he or she would have been challenged for “cause.”<sup>5</sup>

Granting a challenge to disqualify for actual bias involves two discretionary determinations by the trial judge. First, the court must decide whether the prospective juror’s state of mind is such that he or she can try the case fairly and impartially.<sup>6</sup>

The statutes make clear, however, that even if the trial judge finds actual bias or the prospective juror admits to actual bias, the juror is not automatically disqualified from serving on the jury.<sup>7</sup> RCW 4.44.190 provides:

A challenge for actual bias may be taken for the cause mentioned in RCW 4.44.170(2). But on the trial of such challenge, although it should appear that the juror challenged has formed or expressed an opinion upon what he or she may have heard or read, such opinion shall not of itself be sufficient to sustain the challenge, but *the court must be satisfied, from all the circumstances, that the juror cannot disregard such opinion and try the issue impartially.* (Emphasis added.)

Consequently, unless the trial judge is “satisfied” from all the circumstances that the juror cannot disregard such opinion and try the case impartially, the juror shall not be excused despite actual bias.

In making these two determinations, the trial court exercises its discretion to weigh the credibility of the prospective juror. The appellate court assumes the trial court is in the best position to determine

whether a juror can be fair and impartial, because the trial court can observe and evaluate the juror’s demeanor.<sup>8</sup> For this reason, the court

reviews a trial court’s denial of a challenge for cause for a manifest abuse of discretion.

This discretionary process, and the standard of review on appeal, is illustrated by *State v. Fire*,<sup>9</sup> in which a defendant was charged with first-degree child molestation. A prospective juror responded to questioning about bias as follows: “I consider him a baby rapist, and it should be severely punished. I’m very opinionated when it comes to this kind of a crime. I hold innocent children, from conception on, very dear, and they should be protected.” However, when asked whether the juror would follow instructions given by the court, the juror responded: “Yes.” The defense lawyer challenged for cause. The trial judge denied the challenge, saying:

He did indicate that he would still follow the law. And I think that despite what he may have said, *he has indicated that he would be able to follow the law and he would be able to follow the instructions that the Court gives in determining guilt or innocence.* So, I will not excuse him for cause at this time. (Emphasis added.)

The defendant was found guilty and the verdict was upheld on appeal, illustrating the broad discretion given to the trial judge to evaluate the existence of bias in a prospective juror and to decide whether the juror can prevent such bias from influencing his or her decision.

## WITH RESPECT TO BIAS, THE LAW ASSUMES CAPABILITIES HUMAN BEINGS DON’T POSSESS

Washington statutes assume prospective jurors possess the ability to recognize their bias as well as to know their ability to set it aside and not let it influence their decision. In addition, the law assumes trial judges have the qualifications and skill to accurately evaluate a prospective juror’s personal beliefs and assurances about how the bias would or would not influence him or her. These assumptions are illustrated in *State v. Lawler*,<sup>10</sup> in which the court, reviewing claimed error regarding a challenge for actual bias, observed:

First, we emphasize again that the trial court is in the best position to evaluate whether a juror must be dismissed. *Davis*, 175 Wn.2d at 312. Our review is limited to juror 23’s transcribed voir dire answers. We cannot assess juror 23’s tone of voice, facial



Staff photo illustration / Source photo © Image Source

# BIAS

expressions, body language, or other forms of nonverbal communication when making his statements. We also are unable to assess juror 23's nonverbal reactions to the trial court, counsel, or the other jurors' voir dire answers. The trial court was able to observe and evaluate juror 23 in a way that we cannot.

The constitutional right to an impartial jury rests upon the reliability of the statutory assumptions about human capabilities regarding issues of bias. These assumptions, however, conflict with established scientific research.

### SCIENTIFIC STUDIES CONFIRM THE INABILITY TO DISREGARD ACTUAL BIAS IN DECISION MAKING

A substantial body of psychological research has established that no matter how sincerely we try, our personal biases are surprisingly difficult to self-identify. Behavioral studies show that people frequently hold the mistaken belief that they are not biased on a matter, or they significantly underestimate the intensity of their biases. Psychologists have referred to the mistakes people make in self-examination regarding bias as the "illusion of objectivity."<sup>11</sup>

In addition, psychological research confirms the inability to be impartial on an issue once one has formed an existing opinion or value belief. A 2014 study<sup>12</sup> reached the following conclusions:

1. Most people are unaware of how much their attitudes affect their behavior in general ... . Even mock jurors who promise to be impartial and to disregard pretrial publicity show bias in their decisions.
2. People are largely unsuccessful at setting aside bias (assuming they are aware of their bias in the first place).
3. People don't generally want to admit that they are unable to be completely fair and impartial.
4. People (even attorneys, judges, and jury consultants) have been shown to be terrible lie detectors and unable to tell whether those who claim impartiality are dissembling, fooling themselves, or both.



5. People are reluctant to admit that they are biased. Once prospective jurors report for voir dire, new pressures are involved. The jurors are facing a judge perched high on a bench, a court reporter taking down every spoken word, a room full of lawyers dressed in suits, and all eyes focused on the jury box. In this setting, prospective jurors want to appear intelligent, responsible, and unbiased.

Nor does the judge's instruction to the jury that they must follow the law, irrespective of any personal opinions, change the situation. In another study,<sup>13</sup> the authors conclude: "The inability of jurors to set aside or disregard information has been well studied in areas such as pre-trial publicity, inadmissible evidence limiting uses of evidence, and severance." The authors recommend that judges should liberally grant challenges for cause to ensure fair and impartial juries and doing so should be the rule, rather than the exception.

Other research has demonstrated people mistakenly believe they can avoid the influence of their biases even when they are aware of them. For example, in a 2015 study,<sup>14</sup> it was found that even when a bias is known to a prospective juror, assurances by the juror that he or she had the ability to be impartial, despite the bias, were unreliable. In studying why people are incapable of being objective about their biases, the authors found the psychological principle of "social desirability" was a strong reason — i.e., when prospective jurors acknowledge a bias, they feel the need to publicly claim they can be impartial anyway. The reluctance to admit they are compelled by the bias, and the desire to be a reasonable and fair person, unconsciously motivates a response of being able to be impartial despite the bias. Even when a good faith assurance is offered, the fact is, the person cannot help being influenced by a biased idea. An additional finding was that prospective jurors are far more likely to give judges, rather than lawyers, socially acceptable answers regarding an issue of their bias because they think that is what the judge wants to hear. This makes their responses to the judge even more untrustworthy.

THE CONSTITUTIONAL  
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ABOUT HUMAN  
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“THE INABILITY  
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PROPOSALS FOR IMPROVEMENT

Washington law should be revised to be in conformity with scientific evidence regarding human behavior, thought processes, and decision-making abilities. The simplest solution would be for the law to provide that once a trial judge has found that a prospective juror has actual bias, granting a challenge to that person serving on the jury should be mandatory, despite assurances that the juror could disregard the bias.

The same result could be reached, without revising the statutes, if trial judges exercised their statutory discretion to grant challenges for cause once actual bias is found, regardless of assurances by prospective jurors that their biases would not influence their decisions.

Another reasonable solution would be for the trial judge to apply the same standard in evaluating a prospective juror's bias as applied under the Judicial Conduct Code: “A judge shall disqualify himself or herself in any proceedings in which the judge's impartiality might reasonably be questioned.”<sup>15</sup> Under this standard, it is not whether the judge is impartial, but whether the judge's “impartiality might reasonably be questioned.” Applying this test, the court could appropriately exercise its discretion by disqualifying a prospective juror from serving if his or her impartiality could reasonably be questioned irrespective of any assurances about “following the law” or “disregarding” such bias in deliberations.

An illustration of how this discretionary policy could reasonably be applied comes from the facts in *State v. Noltie*,<sup>16</sup> in which the defendant was charged with child rape. A juror had initially said she “might” have trouble being fair. She explained that she had two granddaughters and thought it would be traumatic when the child victim testified. She explained that her concern was that she might find it difficult to give the accused a fair trial. She also said she hoped she would be fair, and she would try to be fair. When asked by defense counsel whether she might already lean in favor of one side, she responded, “That's what I was afraid of at first, yes. The more I've listened to the Court and the more I participated in it, it seems that it would be a lot easier to be fair, but at first I was very

apprehensive about it.” When asked if she would want a person like her on the jury, she responded, “No, I don't think so ... I don't know.”

The defendant's challenge of this juror for actual bias was denied by the trial judge and upheld on appeal:

We have recently and repeatedly held that equivocal answers alone do not require a juror to be removed when challenged for cause, rather, the question is whether a juror with preconceived ideas can set them aside. *A judge with some experience in observing witnesses under oath becomes experienced in character analysis, in drawing conclusions from the conduct of witnesses. The way they use their hands, their eyes, their facial expression, their frankness or hesitation in answering, are all matters that do not appear in the transcribed record of the questions and answers. They are available to the trial court in forming its opinion of the impartiality and fitness of the person to be a juror. The Supreme Court, which has not had the benefit of this evidence recognizes the advantageous position of the trial court and gives it weight in considering any appeal from its decision. Unless it very clearly appears to be erroneous, or an abuse of discretion, the trial court's decision on the fitness of the juror will be sustained.*

Based on our careful review of the voir dire examination of this challenged juror, we conclude that at most it demonstrates a mere possibility of prejudice, and we do not perceive a manifest abuse of discretion by the trial judge. (Emphasis added.)

If the test applied was whether this juror's impartiality could reasonably have been questioned, despite her assurances, the challenge for cause would have been granted.

Another solution would be for trial judges to apply an “appearance of fairness” standard. Government decision makers are required to conduct non-court hearings and proceedings in a way that is fair and unbiased in both appearance and in fact.<sup>17</sup> Under this doctrine, the proceedings must not only be impartial, but they must also have the *appearance* of fairness, measured by asking whether a fair-minded person would be able to conclude that the proceedings were fair and unbiased both in appearance and in fact. Trial judges could reasonably adopt this criterion



## Inescapable Bias

in the exercise of their discretion regarding the prospective juror with actual bias.

As an illustration, *Otis v. Stevenson-Carson School District*<sup>18</sup> involved a student who sustained a serious injury while wrestling during a physical education class. The student sued the school district for injuries. During jury selection, after the plaintiff had exhausted all his peremptory challenges, a juror, Hurley, a schoolteacher with the district, was seated. He had been an assistant wrestling coach and had coached the plaintiff's brother in football. However, on voir dire, he insisted he could render an impartial verdict and not be influenced by his past experiences. Plaintiff's counsel challenged him for cause and the court denied the motion. Following a defense verdict, the plaintiff appealed. The appellate court found no error in the trial court's refusal to grant the challenge:

[T]he trial judge did not abuse factual determination that Hurley's state of mind was such that he could fairly and impartially try the case. To be sure, Hurley's long-term contact with various persons involved in the case, as well as his duties for and long association with the school district, was enough to support a reasonable inference that his state of mind was such that he could not try the case fairly and impartially. *On the other hand, Hurley's responses to various questions, including his testimony that he could set aside his prior knowledge and associations and render a fair decision, supported a reasonable and competing inference that he could try the case fairly and impartially.* Because the evidence supporting each inference was such that a reasonable person could adopt either one, the choice of inferences was for the trial judge, and he acted within his discretion when he found that Hurley's state of mind did not constitute actual bias. (Emphasis added.)

An appearance of fairness test would have safeguarded an impartial jury in this case as well.

## CONCLUSION

Washington law allows jurors with actual bias to serve on a jury subject to a two-step process that incorrectly assumes that judges and prospective jurors are able to accurately analyze bias and its impact on

## NOTES:

1. *Turner v. Stime*, 153 Wn. App. 581 (2009).
2. RCW 4.44.130; see also CR 47(e).
3. RCW 4.44.170(2).
4. *State v. Munzanreder* 199 Wn. App. 162 (2017).
5. *State v. Latham*, 30 Wn. App. 776, 781, (1981), aff'd, 100 Wn.2d 59.
6. RCW 4.44.190.
7. *Id.*
8. *State v. Birch*, 151 Wn. App. 504, 512, 213 P.3d 63 (2009).
9. 145 Wn.2d 152 (2001).
10. 194 Wn. App. 275 (2016).
11. Armor, D. A. (1999). *The illusion of objectivity: A bias in the perception of freedom from bias*. Dissertation Abstracts International: Section B: The Sciences and Engineering, 59(9-B), 5163.
12. Mykol C. Hamilton, Emily Lindon, Madeline Pitt, & Emily K. Robbins, Centre College Kentucky, *The Ubiquitous Practice of 'Pre-habilitation' Leads Prospective Jurors to Conceal Their Biases*, The Jury Expert, available at <http://www.thejuryexpert.com/2014/08/the-ubiquitous-practice-of-prehabilitation-leads-prospective-jurors-to-conceal-their-biases/>.
13. Arthur H. Patterson & Nancy L. Neuffer, *Removing Juror Bias by Applying Psychology to Challenges for Cause*, Cornell Journal of Law and Public Policy, Vol. 7 Issue 1 (1997).
14. Professors Robertson, Yokum & Palmer, *The Inability of Jurors to Self-Diagnose Bias* (7th Annual Conference on Empirical Legal Studies, Arizona Legal Studies Discussion Paper No. 12-35 (Jan. 2015).
15. Washington Code of Judicial Conduct 2.11.
16. 116 Wn.2d 831 (1991).
17. Chapter 42.36 RCW.
18. 61 Wn App 747 (1991).

decision making during trials. Consequently, there is a serious risk of violating litigants' constitutional rights to an impartial jury under our present statutes. Until the Legislature changes the language of the statutes, trial judges could adopt discretionary policies that would ensure jurors are, in fact, impartial and litigants' constitutional rights to an impartial jury are assured. 

**PAUL LUVERA** is the retired founder of the Luvera Law Firm; he has tried over 280 cases to juries in 55 years of practice. He is the past president of the Inner Circle of Advocates and the Washington State Association for Justice. He is a fellow of the American College of Trial Lawyers, the International Academy of Trial Lawyers, the American Board of Trial Advocates, and the International Barristers Society, and has taught at the Spence Trial College. He is the only Washington lawyer inducted into the National Trial Lawyers Hall of Fame. He is the author of five books on law and the contributing author to seven other legal books. He has published more than 200 articles in legal journals and has lectured throughout the U.S. to professional legal organizations.



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# PRESTIGE & PUNISHMENT

THE FUZZY WORLD OF WHITE-COLLAR CRIME AND WHERE IT'S HEADED



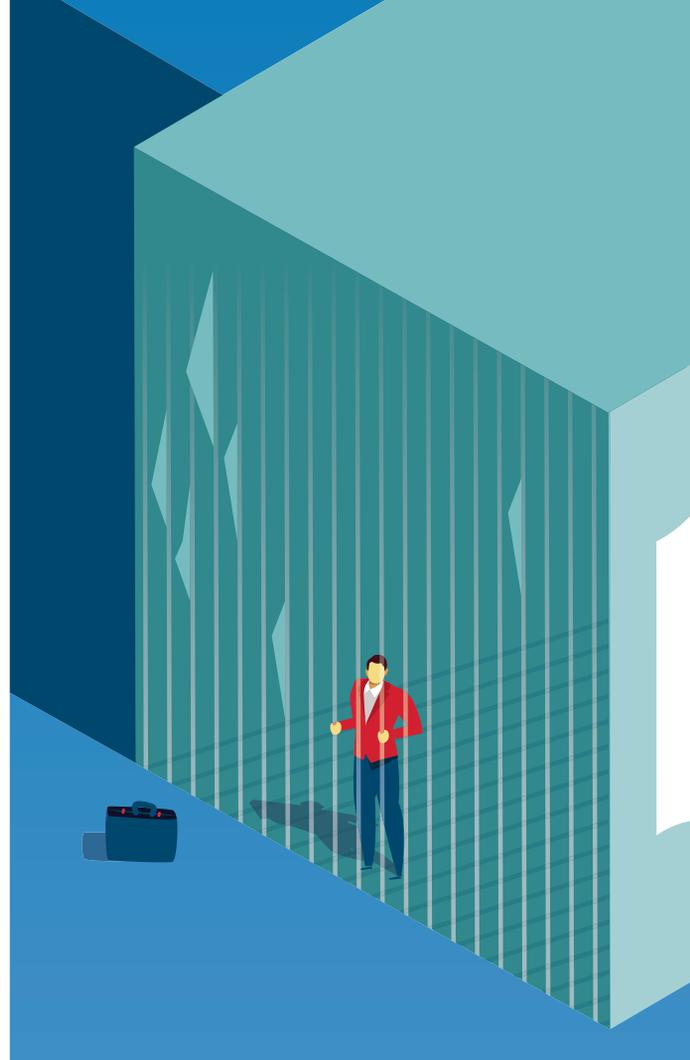
White-collar crime enjoys an aura of glamor. The term conjures visions of Enron CEO Jeffrey Skilling's sports-coated per-p-walk, Bernie Madoff's hand-dog mugshot, and the Alderson Federal Prison Camp—a.k.a. "Camp Cupcake"—where one

might rub elbows with the likes of Martha Stewart while serving time.

The glamor is probably unwarranted; prison is still prison even with a cutesy moniker. But the persistence of that glamor points to a tension within the term "white-collar crime" itself. Crime is at its root a transgression against what society deems acceptable. But "white-collar" connotes respectability and high status, a badge of societal approval. The contradiction tastes of classist euphemism—crime, sure, but not a crime like *those* people commit.

White-collar crime is also one of the staples of criminal defense practitioners. Persons accused of these offenses stand a better chance of having access to money or indemnification clauses that allow them to fund a vigorous defense. The combination of resources and cachet elevates white-collar crime's status within the legal industry and makes it the criminal law practice area in which prestigious, silk-stocking firms are most likely to engage (although those firms may prefer the less-salacious label "white-collar investigation").

BY ISHAM  
M. REAVIS

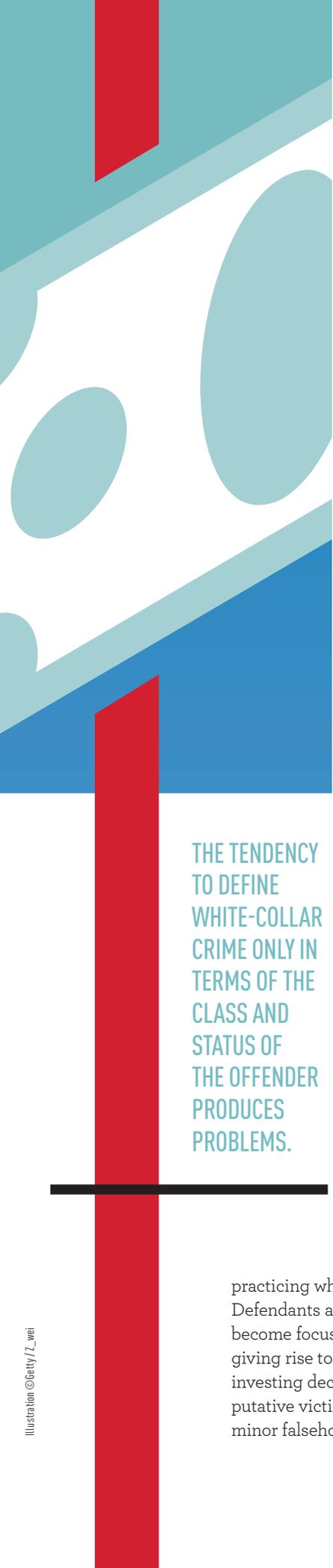


## WHAT MAKES THE COLLAR WHITE?

For all its industry prestige, white-collar crime is surprisingly slippery to pin down. The difficulty in identifying a consistent or useful definition has become in itself one of white-collar crime's defining traits.<sup>1</sup> Sociologist and criminologist Edwin Sutherland coined the term in a 1939 speech and later codified it in his 1949 treatise, *White Collar Crime*, as "a crime committed by a person of respectability and high social status in the course of his occupation."<sup>2</sup> Sutherland later admitted the term was imprecise.

But an emphasis on class distinction has been present from birth. Sutherland's criminology was concerned with examining how criminality arose within the professional caste. His impulse was, if anything, egalitarian—aiming not to elevate one class of criminal, but to equalize the classes within the field of criminology, by challenging the then-popular conception that crime was a pathology only of the poor.<sup>3</sup>

As use of the term spread, the initial focus on class has translated into a focus on the status and identity of the offender as the quintessential element of white-collar crime. Some theorists omit even a category of wrongdoing entirely, defining white-collar crime simply and tautologically as "lawbreaking among



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the middle and upper (or ‘white collar’) socioeconomic classes.”<sup>4</sup> The typical white-collar criminal is older than other offenders, and the majority are white and male.<sup>5</sup>

This tendency to define the term only in terms of the class and status of the offender produces problems. Consider the scenario in which a janitor pays a bribe to the mayor—is the transaction a white-collar crime for the high-status, government-professional mayor, but not for the janitor? That would be incongruous. Or take a fictional example: Sherman McCoy from Tom Wolfe’s *The Bonfire of the Vanities*—the bond trading, self-described master of the universe who’s tried for hit-and-run manslaughter. McCoy certainly sits in the upper socioeconomic class, but the crime in question isn’t what most would consider a white-collar crime, despite his wealth and status. And beyond merely theoretical conundrums, isn’t there a risk in recognizing a separate lane of criminal law for those who already enjoy wealth and privilege?

The alternative is to define white-collar crime by category of offense. This largely, though not completely, boils down to fraud. Thomas Hillier II, a pillar of Washington’s criminal-defense bar with decades of front-line experience, doesn’t get hung up on the “white-collar” label.

“To me, they’re fraud cases,” Hillier said. “From Social Security fraud to bank fraud, mail fraud, securities fraud—there’s a million permutations.”

For years, Hillier was the Western District of Washington’s Federal Public Defender; now he’s senior counsel at Perkins Coie,

practicing white-collar investigation and defense. Defendants accused of white-collar offenses can become focused on the ins and outs of the dealings giving rise to charges, or on whether it was bad investing decisions or other factors that led to the putative victims’ loss. They may overlook seemingly minor falsehoods, especially in business environments

where a certain amount of puffery or duplicity is common. But the charge usually comes back to deceit. Defendants sometimes forget that the lie is the crime.

The FBI also defines the term by offense, specifically fraud, identifying white-collar crime as the “full range of frauds committed by business and government professionals.”<sup>6</sup> From the FBI’s website:

These crimes are characterized by deceit, concealment, or violation of trust and are not dependent on the application or threat of physical force or violence. The motivation behind these crimes is financial—to obtain or avoid losing money, property, or services or to secure a personal or business advantage.<sup>7</sup>

Professor Scott Schumacher, who teaches courses on criminal law and procedure, taxation, and white-collar crime at the University of Washington School of Law, agrees that a good working definition includes nonviolent money or property crimes characterized by fraud or deception. But he points out that there are still gaps: Environmental offenses are often considered white-collar crimes, but don’t always involve dishonesty. And Sutherland’s initial research into white-collar crime swept in non-fraudulent offenses such as antitrust or labor-law violations, as well as infringement of patent, trademark, and copyright.<sup>8</sup> Similarly, seemingly core white-collar offenses such as insider trading or a corporate officer bribing a foreign official don’t necessarily involve fraud—except in a loose sense of concealing wrongdoing. And what crime doesn’t involve that sort of concealment?

Ultimately, white-collar crime has become another of the law’s “I know it when I see it”<sup>9</sup> labels. There are, however, certain features familiar to lawyers who handle white-collar cases.

They are frequently complex in a practical sense, which is to say they tend to have extensive and usually electronic discovery. Because white-collar prosecutions are typically federal cases involving business crimes, and federal investigations often continue for long periods of time before maturing into criminal charges, discovery frequently comprises years’ worth of business records. The 18-GB discovery collection from the Federal Energy Regulatory Commission’s investigation of Enron has become an industry-standard dataset for electronic discovery training and testing,<sup>10</sup> though that volume of discovery seems increasingly quaint as ever more voluminous cases roll in.

White-collar cases also tend to require specialized legal knowledge (or research) because the offenses often arise out of business or financial regulation. Securities regulation, environmental regulation, the

## Prestige and Punishment

tax code—these fall outside of the heartland of criminal code and procedure. Lawyers who handle white-collar cases often find themselves consulting with experts in those fields, as well as relying on the expertise of their clients.

And speaking of the client, as or more distinctive than white-collar discovery or legal issues is the white-collar client.

### THE WHITE-COLLAR CLIENT

By the nature of the offense they're charged with, accused white-collar criminals tend to be highly intelligent and capable business people. They are often used to dealing with lawyers and may have been advised by one or more during the course of the charged conduct. "Acting in good faith based on advice of counsel" is a not-uncommon defense in these cases—though it can be a delicate needle to thread to argue that your client was a sophisticated operator surrounded by trusted professionals, who still somehow erred as to what was legally permitted.

As a result of the client's relative expertise, as well as the relative complexity of their business and the pretrial discovery, as you develop the defense of a white-collar case, you'll rely on the client for direction more than in other cases. No one will know the client's business like the client. And sorting through a million discovery documents becomes much more manageable when someone has alerted you what to look for, and where.

On the obverse of the coin, the advice and tough truths criminal defense lawyers are accustomed to dispensing can be harder to get across when your client is used to being the smartest person in the room. This tendency may also be fed by the idea that society is more willing to allow leeway for those accused of white-collar crimes than in other types of cases. Professor Schumacher offers the counter-analogy of murder—coming across the crime scene, you can usually tell what happened was murder, "But investigating a white-collar offense, it's not always clear whether the act was a crime." It can be ambiguous as to whether an act was morally wrong or more-or-less acceptable.

Tax evasion furnishes a good illustration of this ambiguity. It's a five-year felony under 26 U.S.C. § 7201 to willfully evade or defeat a federal income tax payment. But tax *avoidance*, as opposed to *evasion*, is perfectly legal—everyone is entitled to lower their tax payment by taking advantage of the tax code's multifarious deductions and exemptions. In fact, you're encouraged to, as Congress enacts deductions to incent desirous

behavior. If it turns out you've claimed a deduction when you shouldn't have, the dividing line between (a) having to pay it back if audited and (b) facing a criminal prosecution is intent. And intent can be difficult to prove. "Skilling would say 'Everything I did was to benefit the shareholder,'" Professor Schumacher noted.

This ambiguity can be an obstacle when advising some clients.

"If a guy's robbing banks, he knows there will be a price to pay," Hillier said.

But someone from a middle-class background accused of fraud may reflexively turn to excuses and denial when they find themselves caught up in a criminal justice system that treats and labels them differently from what they're used to. A client accustomed to societal approval may find it especially difficult to pivot toward an acknowledgment of wrongdoing and acceptance of responsibility.

Such acknowledgments, when expressed to a sentencing judge, are crucial for mitigating the weight of a criminal penalty. They can be equally important in persuading a prosecutor to agree to a deferred prosecution deal, or potentially to forego criminal prosecution in favor of civil administrative penalties.

"A lot of powerfully good front-end lawyering goes into dissuading prosecutors from trying to meet their burden of proof," Hillier said, especially if a client can pay restitution to make any financial victims whole. "Of course, the ability to do that is another byproduct of being rich."

### THE FUTURE OF WHITE-COLLAR PROSECUTIONS

Criminal prosecutions are functionally about deterrence, assigning negative consequences to harmful acts. This returns to white-collar crime's inherent contradiction: Historically, its perpetrators have been less likely to experience censure for wrongdoing. Wealth and social standing remain tremendous advantages in the face of a criminal investigation or prosecution. And many federal statutes are written broadly enough that the decision to treat an act as a prosecutable offense may depend

on how outrageous a prosecutor considers the underlying conduct—a decision in which the prosecutor's sensibilities may be influenced by the same social norms that perhaps taught the potential defendant to consider his actions acceptable. This may be part of why Sutherland devoted early research to asking whether white-collar crime was, in fact, crime—the legal system had to be gently eased into the concept of punishing the privileged.

Eventually, the legal system got

DEPARTMENT  
OF JUSTICE DATA  
SHOWS THE  
NUMBER OF NEW  
WHITE-COLLAR  
PROSECUTIONS  
IS DOWN 40.8  
PERCENT FROM  
20 YEARS AGO.

used to the idea. In 1989 and again in 2001, the federal sentencing guidelines significantly increased the range calculations for high-loss-amount frauds. The increases were based on a policy decision to put white-collar sentences on par with drug sentences, which had themselves been elevated based on war-on-drugs policy preferences.<sup>11</sup> And in Hillier's experience, white-collar defendants certainly get no breaks when they do go to trial and lose: "The prosecutors and judges like to make an example of them; they get hammered."

There may be a logic at work similar to one of the rationales underlying punitive damages—increasing penalties to capture all the malfeasance that didn't get caught. In this way, the fact that so many white-collar criminals evade consequences through status and resources make the penalties all the more severe for those relative few who are targeted for prosecution.

If that's the case, expect individual white-collar sentences to go up—because the total number of white-collar prosecutions is ebbing. Fraudulent progenitors of the junk-bond bubble of the 1970s, the savings-and-loan crisis of the 1980s, and the high-profile accounting frauds of the 1990s (Enron, WorldCom) were successfully prosecuted. But the 2008 financial crisis produced no similar prosecutions of executives at the financial institutions most directly responsible. As federal district court Judge Jed Rakoff, a prolific writer and frequent commentator on white-collar crime, has written, it's not as if the Department of Justice concluded these top executives were innocent—rather, it seems to have made the decision in part that they were "too big to jail." But another part of this trend is a shift in the Department of Justice toward focusing on investigating corporations rather than individuals. These often result in corporate deferred prosecution agreements and the adoption of internal compliance programs, rather than convictions and prison sentences.<sup>12</sup>

Federal prosecution for white-collar offenses has fallen to its lowest level in two decades.<sup>13</sup> Department of Justice data shows the number of new cases is down 4.4 percent from last year, down 33.5 percent from five years ago, and down 40.8 percent from 20 years ago. Prosecution for official corruption is down, too.<sup>14</sup> This comes as the overall level of federal prosecutions has risen to a historical high—largely driven by a surge in immigration prosecutions beginning in March 2018.<sup>15</sup> One could be forgiven from concluding this reflects a shift away from holding society's privileged accountable.

Of course, there will always be fraud prosecutions, even if fewer of the defendants are the sort to warrant a news crew at their arrest. Though none of the financial titans responsible for the 2008 crash faced charges,

NOTES:

1. Susan P. Shapiro, *Thinking About White Collar Crime: Matters of Conceptualization and Research*, U.S. Department of Justice National Justice Institute (1980), available at <https://www.ncjrs.gov/pdffiles1/nij/71090.pdf>.
2. Edwin H. Sutherland, *White Collar Crime* 9 (1949).
3. Shapiro, *Thinking About White Collar Crime*, *supra* note 1, at 2.
4. *Id.* (quoting Marshall B. Clinard, *White Collar Crime* in *International Encyclopedia of the Social Sciences* 483 (1968)).
5. Cynthia Barnett, U.S. Department of Justice, *The Measurement of White-Collar Crime Using Uniform Crime Reporting (UCR) Data 5* (2002), available at [https://ucr.fbi.gov/nibrs/nibrs\\_wcc.pdf](https://ucr.fbi.gov/nibrs/nibrs_wcc.pdf).
6. U.S. Department of Justice, *What We Investigate: White-Collar Crime*, <https://www.fbi.gov/investigate/white-collar-crime> (last visited Jan. 11, 2019).
7. *Id.*
8. See Edwin H. Sutherland, *Is "White Collar Crime" Crime?* 10 *Am. Sociological Rev.* 132, 132 (1945).
9. After Justice Potter Stewart's famous "definition" of obscenity in *Jacobellius v. Ohio*, 378 U.S. 184, 197 (1964) (Potter, J., concurring).
10. You can practice on the Enron discovery yourself—it's available through Duke Law's EDRM at <https://www.edrm.net/resources/data-sets/edrm-enron-email-data-set/>.
11. Jeffrey S. Parker & Michael Block, *The Sentencing Commission, P.M. (Post-Mistretta): Sunshine or Sunset?*, 27 *Am. Crim. L. Rev.* 289, 318–20 (1989) (describing the circumstances of the 1989 increase); Davis Debold & Matthew Benjamin, *"Losing Ground"—In Search of a Remedy for the Overemphasis on Loss and Other Culpability Factors in the Sentencing Guidelines for Fraud and Theft*, 160 *U. Pa. L. Rev. Pennumbra* 141, 145 (2011) (describing 2001 increase); see also U.S. Sentencing Guidelines Manual, amends. 99, 154 (1989), and 617 (2001).
12. See Jed S. Rakoff, *The Financial Crisis: Why Have No High-Level Executives Been Prosecuted?*, *NY. Rev. of Books* (Jan. 9, 2014), available at <https://www.nybooks.com/articles/2014/01/09/financial-crisis-why-no-executive-prosecutions/>. Jed S. Rakoff, *Justice Deferred Is Justice Denied*, *NY. Rev. of Books* (Feb. 19, 2015), available at <https://www.nybooks.com/articles/2015/02/19/justice-deferred-justice-denied/>.
13. *White Collar Prosecutions Fall to Lowest in 20 Years*, TRAC Reports, Syracuse Univ. (May. 24, 2018), <https://trac.syr.edu/tracreports/crim/514/> (last visited Jan. 25, 2019).
14. *Official Corruption Prosecutions Drop Under Trump*, TRAC Reports, Syracuse Univ. (Oct. 15, 2018), <https://trac.syr.edu/tracreports/crim/532/> (last visited Jan. 25, 2019).
15. *Federal Prosecution Levels Remain at Historic Highs*, TRAC Reports, Syracuse Univ. (Dec. 12, 2018), <https://trac.syr.edu/tracreports/crim/540/> (last visited Jan. 25, 2019).



**ISHAM M. REAVIS** practices criminal defense and complex litigation at Aoki Law PLLC, and is a member of the WSBA's Court Rules Committee and the King County Bar Association's Judiciary and Litigation Committee. He can be reached at [isham@aokilaw.com](mailto:isham@aokilaw.com).



there were plenty of downstream prosecutions as businesses and investments collapsed, exposing lesser frauds and schemes that may have gone undetected had the economic tides not receded. We're in a decade-long stretch of economic growth; who knows what will surface when that trend reverses?

We should probably aspire to a system that treats all white-collar prosecutions as run-of-the-mill criminal cases, without it being noteworthy that members of certain classes are prosecuted, and without the need to make noteworthy examples of the small cadre who face consequences. Perhaps in such a system we could put aside the term white-collar crime as a useful descriptor. But for now, we have the label, and the collar. 



# A BLIND EYE

SEX TRAFFICKERS AND SEX TRAFFICKING SOLICITORS ARE UTILIZING LOCAL BUSINESSES FOR ILLEGAL ACTIVITY, REGULATORS ARE TAKING NOTICE, AND EMPLOYERS ARE AT RISK.

**BY CHRIS WILLIAMS AND MAR BRETTMANN, Ph.D.**

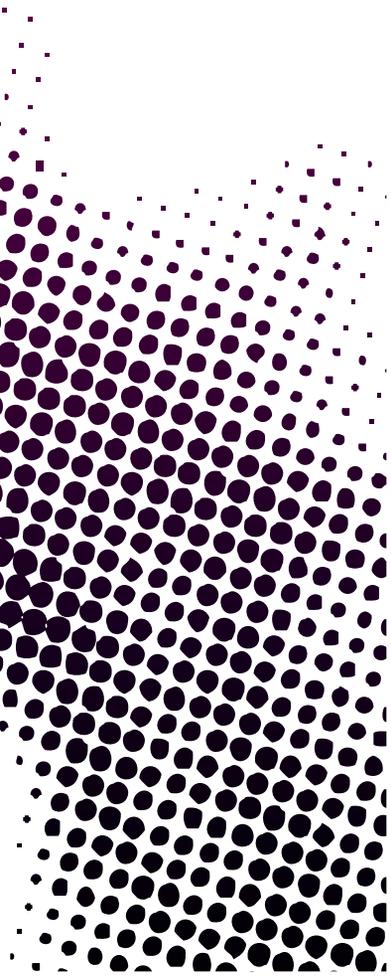
Noel was only 15 when her father kicked her out. Getting kicked out meant she had escaped the abusive household where she grew up, but she was on the street and, heartbreakingly, vulnerable to an even more insidious type of abuse.

Soon after being forced from her childhood home, Noel met a man who promised her everything she needed and she readily accepted his help.

Noel fell in love.

But like her father, her new boyfriend was abusive. Worse, he began selling Noel to other men for sex. He also kept the money, leaving Noel with little hope that she could escape.

Sadly, Noel's story is but one example taken from thousands of similar stories of vulnerable people who are victimized by pimps and buyers and forced into the dark world of sex trafficking.

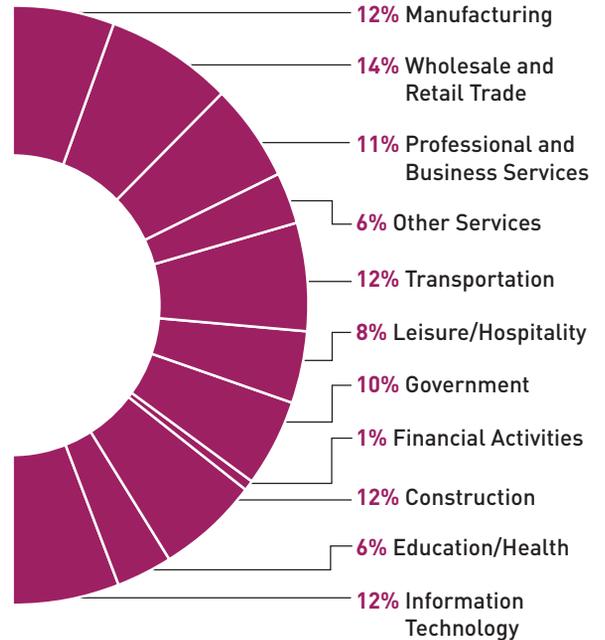


## INDUSTRY SECTORS OF SEX BUYERS (WITH MINOR VICTIMS)

Of 104 people charged with soliciting sex from children in King County between 2014 and 2017, the majority worked in local businesses, in a variety of industries.

*Note: Due to rounding, percentages do not equal 100*

Source: King County Prosecuting Attorney's Office response to a public information request by BEST for employer information about sex buyers charged.



many people's assumptions, the majority of sex trafficking victims are U.S. citizens, often exploited in their own communities.

The level of exploitation is so high because there is high demand. The City of Seattle, King County, and other jurisdictions have shifted their charging focus to the people who are driving that demand: the sex buyers. In 2014, researchers at Arizona State University revealed that an estimated 6,800 men solicited sex online in Seattle in a single 24-hour period.<sup>2</sup>

Perhaps surprising to some, the evidence shows that sex buyers are frequently employees of respected companies here in the Northwest.<sup>3</sup> It is critical, therefore, that both in-house and outside counsel help their business clients understand the serious risks if any of their employees are involved in sex buying.

### EXPOSURE FOR BUSINESS ASSETS

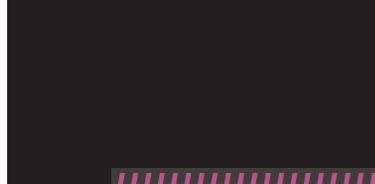
Studies of recent arrests have helped increase understanding of the behaviors of men who buy sex. Those who have been charged with

soliciting or attempting to solicit sex in the U.S. come from a wide variety of industries. Data collected by several organizations, including Seattle Against Slavery, Demand Abolition, Businesses Ending Slavery and Trafficking (BEST), and the Organization of Prostitution Survivors (OPS), further suggests that the peak time for soliciting sex online is between noon and 5 p.m., during the traditional workday, meaning some of this illegal activity is likely occurring on company property.<sup>4</sup>

Preliminary data collected by an ongoing study by OPS found that 63 percent of prostituted people have visited clients at their place of work.<sup>5</sup> Sex trafficking, which now includes the purchase of sex from trafficking victims, is intertwined with businesses, employees, properties, products, and services. Accordingly, businesses are now becoming targets of litigation.

One of the most widely publicized lawsuits was filed in 2012 against a website called Backpage.com. (Backpage.com is featured in the documentary,

By definition, "sex trafficking" is the prostituting of a minor or the use of force, fraud, or coercion to compel an adult into commercial sex work. In 2015, the federal definition expanded to include sex buyers—including not only those who profit but also those who benefit from the exploitation of vulnerable people. See, e.g., 22 U.S.C. § 7102(9). Although the true scope of the problem is hard to determine, it is undeniably large. A 2008 report by Seattle's Human Services Department estimated that at that time, 300 to 500 minors were abused by the sex trade in the Seattle area alone.<sup>1</sup> Contrary to



*I am Jane Doe.*) Seattle-based law firm Pfau Cochran Vertetis Amala represented three girls in the lawsuit who alleged they were sold for sex on the website when they were minors. In 2017, another lawsuit was filed in Philadelphia's Common Pleas Court on behalf of a victim identified as M.B., who claimed that at age 14 she was "sold into sexual slavery at the Roosevelt Motel" in Philadelphia and exploited there for months while the staff looked the other way.<sup>6</sup>

Business owners who ignore evidence that their property is being used to solicit sex expose themselves to legal liabilities. Businesses could find themselves the target of both law enforcement and private actions available to victims. While there are statutes making it a crime to engage in sex trafficking, there are also criminal sanctions against failing to take action to "halt or abate" known prostitution or commercial sexual abuse of a minor on property under your control. RCW 9A.88.103; RCW 9A.88.090. Attached to all of these crimes is the possibility of civil forfeiture of assets used in the commission of the acts, a commonly known tool available to law enforcement after an act of prostitution has been exposed. RCW 9A.88.150.

But the private bar has a number of tools as well. Depending on the facts, a number of actions in tort could be brought against businesses that support or turn a blind eye to the sex trade. Generally, an employer can avoid liability by showing that the employee's conduct was "(1) intentional or criminal and (2) outside the scope of employment."<sup>7</sup> Another vein of case law under

## HOW TO ADVISE BUSINESS CLIENTS OF SEX TRAFFICKING LIABILITY

- Adopt new company policies or enhance existing ones that address sex trafficking and sex buying. This should include internal employee policies, as well as policies that apply to business partners, suppliers, and subcontractors.
- Advise that top leadership communicate the new and/or enhanced policies to all employees and constituents to set the tone for the company's values from the top down.
- Establish employee training in human trafficking awareness to protect the company from potential accountability and turn employees into advocates against human trafficking. (Employees can often identify human trafficking activity before law enforcement or social services.)
- Urge companies to donate to charities that fight human trafficking by sponsoring media campaigns that raise awareness.
- Advise companies to consider offering employment to human trafficking survivors.



the respondeat superior doctrine, which can make an employer liable for employee actions even if he or she breaks a company rule, can be tapped when the employee combines his own purposes with those of an employer to "any appreciable extent." *Rahman v. State*, 170 Wn.2d 810, 246 P.3d 182 (2011).<sup>8</sup> If there is no clear rule against sex trafficking behaviors while at work, arguments that the employee's actions also benefitted the employer may be accepted by the court. For example, the employee could claim he was in transit to a job function and used a company phone to arrange commercial sex.

Plaintiffs' counsel also commonly utilize the theory of negligent supervision, which establishes an employer's limited

responsibility for wrongful acts committed by an employee:

Even where an employee is acting outside the scope of employment, the relationship between employer and employee gives rise to a limited duty, owed by an employer to foreseeable victims, to prevent the tasks, premises, or instrumentalities entrusted to an employee from endangering others.<sup>9</sup>

Another under-utilized statute is Washington's Criminal Profiteering Act, RCW 9A.82 et. seq., which creates a private right of action (that the attorney general or a prosecutor could also bring). It allows victims to sue businesses for "any property or other interest

DEPENDING ON THE FACTS, A NUMBER OF ACTIONS IN TORT COULD BE BROUGHT AGAINST BUSINESSES THAT SUPPORT OR TURN A BLIND EYE TO THE SEX TRADE.

acquired or maintained” through a “pattern of criminal profiteering activity,” which includes certain crimes that include prostitution, extortion, gambling, drugs, and pornography.<sup>10</sup> There are nuances to meeting the statute’s requirements, but in some cases prosecutors who have obtained convictions on which to base a case will have already completed much of the work for the corresponding litigation against the employer. Such offenders may be more than willing to get back into business unless such a lawsuit is brought against them (and not all of them are “judgment proof”).<sup>11</sup>

Businesses could also run astray of the Act through accomplice liability after turning a blind eye to the operations of sex traffickers utilizing their property or, in the case of illicit massage parlors, actively engaging in the trafficking themselves. The “property or other interest acquired” in such situations, which could be recovered from the business by a plaintiff, could include fees paid for “massages,” hotel room fees, passenger fares, rent proceeds, parking fees, or any other assets acquired as a result of the transactional sex. The Criminal Profiteering Act’s primary purpose

is to make victims whole through its penalties. It incentivizes lawsuits against criminals who profit from such crimes and allows for the recovery of investigative and attorney fees necessary for bringing claims. It also creates civil penalties and treble damages intended to overcome difficulties in calculating profit or damages from the criminal activity with precision, which the court has recognized will not always be possible. *Winchester v. Stein*, 135 Wn.2d.835, 856, 859-60, 959 P.2d 1077 (1998).

The Southern Poverty Law Center has created a thoroughly researched guide to bringing “Civil Litigation on Behalf of Victims of Human Trafficking” and it provides invaluable guidance to both plaintiffs’ attorneys who may bring a lawsuit and businesses seeking to avoid such litigation.<sup>12</sup>

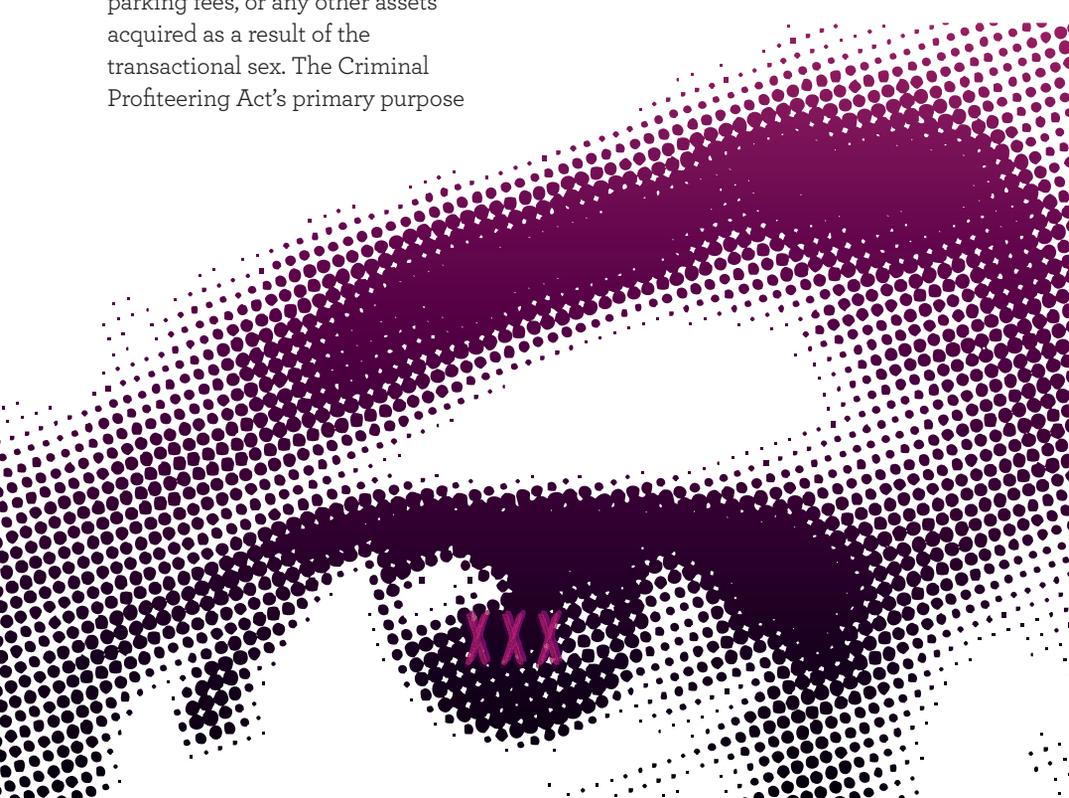
#### **PREVENTIVE REGULATIONS AIMED AT BUSINESSES**

In addition to the potential legal liability, there are other costs to businesses when sex trafficking is revealed. Industries are often

*THE RISK TO BRAND IMAGE AND PUBLICIZED LEGAL ACTIONS NOT ONLY COULD HARM CUSTOMER RETENTION, BUT IT COULD IMPACT EMPLOYEE RECRUITMENT AND RETENTION AS WELL.*

targeted with increased regulation and enforcement when they exhibit behaviors commonly tied to sex trafficking. For example, the City of Puyallup insisted on windows in doors of massage facilities and inspections during work hours.<sup>13</sup> A “prostitution loitering” ordinance that damaged the reputations of parts of the city was upheld in Seattle in 1989.<sup>14</sup> Washington legislators have also proposed bills to require training of employees in a variety of industries. At the federal level, the passage of FOSTA-SESTA (the Fight Online Sex Trafficking Act, and the Stop Enabling Sex Traffickers Act)<sup>15</sup> in April 2018 imposed new penalties for companies that own interactive computer services and act with reckless disregard for conduct that contributes to sex trafficking. For this reason, many businesses recognize the importance of proactively addressing this issue in order to avoid costly regulations.

When it comes to sex trafficking, business reputations are at stake. Two Seattle-based technology companies received negative media attention when two ex-directors were charged in 2016 with promoting prostitution.<sup>16</sup> The men were active participants in a larger organization called “The League of Extraordinary Gentlemen,” a review website and social network for buying sex. Some of the women recovered from brothels funded by participants of The League were suspected to be victims of sex trafficking. The seizure of websites associated with The League revealed significant engagement by employees who used company assets including work badges and work email addresses to prove that they were not law enforcement. At a minimum, the risk to brand image and publicized legal actions not only could harm



## A Blind Eye

customer retention, but it could impact employee recruitment and retention as well.

### HOW POLICIES AND PRACTICES CAN SHAPE EMPLOYEE BEHAVIOR

Many businesses are enacting policies and practices aimed at protecting both the victims and the company's assets that could be lost if sex trafficking is exposed. Employers often begin by adopting more robust policies that specifically address sex trafficking and sex buying. Like sexual harassment policies, explicit sex trafficking policies address corporate properties, resources, and travel. They can provide meaningful guidance to employees engaged in illegal activity, such as soliciting prostitution, that has historically been mischaracterized as a victimless crime and overlooked in the workplace. Explicit policies not only clarify the values of the company but can also mitigate risks imposed by this common illegal conduct.

Imagine, for example, an online retailer that profits from the sale of items related to sex trafficking to such a degree that it appears to have turned a blind eye to the practice. Policies that clearly denounce such practices and refuse to accept related revenues leave companies in a much safer position. The connections between sex trafficking and online retail could easily entangle companies such as retailers providing sex products, ride-share companies, hotel, and short-term property rental services.

Employers like King County have communicated their values and policies to their employees, framed within their commitment to uphold social equity.<sup>17</sup> Such communications have been well-

#### NOTES:

1. Debra Boyer, Who pays the price? Assessment of youth involvement in prostitution in Seattle. City of Seattle Human Services Department, Domestic Violence and Sexual Assault Prevention Division. June 2008.
2. Subsequent study to original study by Dominique Roe-Sepowitz, et al, Invisible Offenders: A Study Estimating Online Sex Customers, Arizona State University, August 2013. Subsequent study of Seattle market completed by Roe-Sepowitz in September 2014.
3. King County Prosecuting Attorney's Office response to a public information request by BEST for employer information about sex buyers charged between 2014 and 2017.
4. Test data collected during a project by Seattle Against Slavery in partnership with Demand Abolition, April 2015. Peak time data has been further confirmed by an initial study by OPS and BEST in January 2015, in which 72% of prostitution survivors who responded said that clients contacted them between noon and 5 p.m. to set up meetings.
5. Interview data in an ongoing study by OPS and BEST, January 2015 to present.
6. See, <https://www.philly.com/philly/news/crime/First-of-kind-lawsuit-accuses-NE-Phila-hotel-of-accomodating-sex-trafficking.html>.
7. *Robel v. Roundup Corp.*, 148 Wn.2d 35, 53, 59 P.3d 611 (2002).
8. This holding was superseded by statute *as to injuries to passengers in company vehicles*. S.H.B. 1719, 2011 Wash. Sess. Laws. The case is still cited favorably for the proposition that employers are in the best position to impose rules that control their employees' behaviors. See e.g., *LaPlant v. Snohomish County*, 162 Wn. App. 476, 271 P.3d 254 (2011); *Ferguson v. King County*, 2012 Wash. App. LEXIS 682 (2012)(unpublished).
9. See e.g., *Niece v. Elmview Group Home*, 131 Wn.2d 39, 51, 929 P.2d 420 (1997).
10. See RCW 9A.82.100; See also *Winchester v. Stein*, 135 Wn.2d.835, 959 P.2d 1077 (1998).
11. Washington's Act requires proof of three requisite crimes in the past five years to show the necessary "pattern of criminal profiteering activity," while the federal RICO Act requires only two crimes over the prior 10 years. Washington's "little RICO" Act also requires that the predicate crimes were motivated by economic gain, whereas the federal Act does not. *National Org. for Women, Inc. v. Scheidler*, 510 U.S. 249, 114 S.Ct. 798, 127 L. Ed. 2d 99 (1994).
12. Available at [https://www.splcenter.org/sites/default/files/d6\\_legacy\\_files/downloads/splc\\_human\\_trafficking.pdf](https://www.splcenter.org/sites/default/files/d6_legacy_files/downloads/splc_human_trafficking.pdf).
13. See *Door v. City of Puyallup*, 33 Wn. App. 310, 654 P.2d 720 (1982).
14. *City of Seattle v. Slack*, 113 Wn.2d 850, 784 P.2d 494 (1989).
15. Free speech advocates opposed these laws that were created to reduce the online advertising of sex trafficking victims, citing concerns that the laws limit free speech on the internet. In addition, some people who are not coerced to work in the sex trade said that they experienced a disruption in the market and were concerned about facing increased harm by sex buyers as a result.
16. See <https://projects.seattletimes.com/2017/eastside-prostitution-bust/>.
17. See <https://www.kingcounty.gov/audience/employees/policy-forms/hr-policies.aspx>.

### LEGAL COUNSEL CAN HELP BUSINESSES SHIELD THEMSELVES BY ADVISING THEM TO DEVELOP EMPLOYEE TRAINING.

received by employees who want to work for employers who share their values. And employers across the U.S. have increasingly adopted trainings to identify and prevent sex trafficking.

It is essential that business leaders acknowledge their role in shaping an organization's ethics from the top down. They can create a workplace climate that strengthens the company's reputation and

clearly opposes all forms of sexual exploitation. Executives who ignore such ethics run the risk of liability in today's increasingly rigorous legal environment. Businesses that do not take steps to actively prevent sex trafficking by their employees are opening themselves to a variety of risks and claims against their company.

Legal counsel can help businesses shield themselves

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**MAR BRETTMANN, PH.D.**, is the executive director and founder of the Seattle-based nonprofit, Businesses Ending Slavery and Trafficking (BEST). She has provided professional consultation on the topic of human trafficking to hundreds of businesses and has developed human trafficking awareness training programs for employees as well as a free continuing legal education course on sex trafficking and employers, available at [www.bestalliance.org/cle](http://www.bestalliance.org/cle). Brettmann is the author of *Theories of Justice* and numerous articles on human rights topics. She can be reached at [mar@bestalliance.org](mailto:mar@bestalliance.org).



by advising them to develop employee training that includes human trafficking awareness and prevention.

Creating a strong workplace culture and implementing human trafficking awareness that encourages good employee conduct is the best way to discourage damaging misconduct, which will protect businesses, brands and assets. 

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***Brunson v. Lambert Firm & Bechtel Nat'l***,  
\_\_\_ Fed. Appx. \_\_\_, WL 6620079 (2018)  
(Court upholds district court confidentiality rulings in  
qui tam action)

***Chan Healthcare Group v.  
Liberty Mutual Fire Insurance Co.***,  
431 P.3d 484, WL 6567085 (2018) (court dismissing  
new class action based on Full Faith & Credit)

***H.B.H.; S.A.H.; & Hamrick v. State of WA***,  
192 Wn.2d 154, 429 P.3d 484 (2018) (recognizing a duty  
owed to children negligently placed in foster care)

***Arp v. Riley***,  
6 Wn. App. 2d 1003, WL 5806605 (2018)  
(application of judicial estoppel)

***Babbitt v. Kingsgate Ridge Manor  
Assoc. of Apt. Owners***,  
5 Wn. App. 2d 1052, WL 5538390 (2018)  
(enforcing promissory note and prejudgment interest)

***Sinsheimer v. Kruger***,  
2 Wn. App. 2d 1005 (2018) (affirming child support orders)  
***Sachdev, M.D. v. Oregon Medical Board***,  
292 Or. App. 778, 426 P.3d 118 (2018)  
(reversing discipline against M.D.)

***Kenco Constr. v. Porter Bros. Constr.***,  
4 Wn. App. 2d 1008, WL 2966785 (2018) (affirming  
judgment for subcontractor in constr. project)

***Burien Town Square Condo. Ass'n  
v. Burien Town Square Parcel 1***,  
3 Wn. App. 2d 571, 416 P.3d 1286 (2018) (reversing  
summary judgment on Wash. Condo Act claims)

***Easterly v. Clark County***,  
2 Wn. App. 2d 1066 (2018) (rev'd fee decision: trial  
court failed to address hourly rate and a multiplier)

***Huynh v. Aker Biomarine Antarctic***,  
199 Wn. App. 1005, cert. denied, 139 S. Ct. 64 (2018)  
(complex jurisdictional issue)

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# Legal Fees in a Post-Tax-Reform World

New tax rules may impact legal fee deductions—  
here's what you need to know

BY ROBERT  
W. WOOD

For many, the Tax Cuts and Jobs Act of 2017 (TCJA) is regarded as a positive development. But for one group—plaintiffs involved in lawsuits—the opposite may actually be true. By establishing taxation on gross recovery amounts in certain

cases, without allowing any deduction for attorney fees, the new law could, in cases involving large recoveries, create a dire tax situation for plaintiffs, their lawyers, and even some defendants who could end up paying more to resolve cases.

Part of the problem triggered by the sweeping TCJA dates back to 2005, when the U.S. Supreme Court held, in *Commissioner v. Banks*,<sup>1</sup> that plaintiffs in contingent fee cases must generally recognize gross income equal to 100 percent of their recoveries. That means plaintiffs must figure out a way to deduct the 40 percent (or other amount) of their recovery paid to their attorneys under the contingency fee agreement.

Months before *Banks*, Congress enacted an above-the-line deduction for employment claims and certain whistleblower claims. An above-the-line deduction is almost like not having the income in the first place; it subtracts the qualifying fees before you reach the second page of your tax return.

After the TCJA, plaintiffs in employment cases

are still mostly OK, unless those cases involve sexual harassment (more on that below). That is, the above-the-line deduction for legal fees remains in the law. This generally ensures that plaintiffs bringing employment claims are taxed on their net recoveries, not their gross.

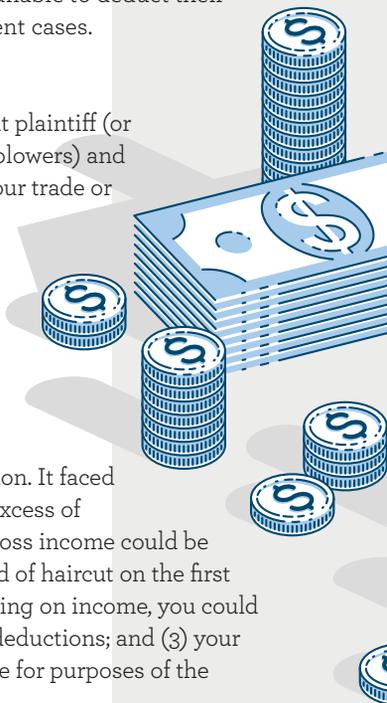
But there are nagging problems even for employment plaintiffs. For example, a plaintiff's above-the-line deduction for fees in employment and qualifying whistleblower cases cannot exceed the income the plaintiff received from the litigation in the same tax year. As long as all the legal fees are paid in the same tax year as the recovery (such as in a typical contingent fee case), that might not be an issue.

However, what if the plaintiff has been paying legal fees hourly over the course of several years? There are several possible workarounds, but none are foolproof. Some plaintiffs can end up unable to deduct their legal fees even in employment cases.

## IMPACTED PLAINTIFFS

If you are not an employment plaintiff (or one of a few types of whistleblowers) and your claim did not involve your trade or business, you may not be able to deduct legal fees above the line. Until now, that meant deducting your legal fees below the line.

A below-the-line (or miscellaneous itemized) deduction was more limited, but still counted as a deduction. It faced three limits: (1) only fees in excess of 2 percent of your adjusted gross income could be deducted (so there was a kind of haircut on the first part of your fees); (2) depending on income, you could be subject to a phase-out of deductions; and (3) your legal fees were not deductible for purposes of the



## Alternative Minimum Tax (AMT).

Now there is no below-the-line deduction for legal fees for tax years 2018 through 2025. If you are not an employment plaintiff or qualified type of whistleblower—and you cannot find a way to position your claim as a trade or business expense, or to capitalize your fees into the tax basis of a damaged asset—you get no deduction. Period. That means you are taxed on 100 percent of your recovery. Examples of impacted plaintiffs include those whose recoveries are:

- From a website for invasion of privacy or defamation;
- From a stockbroker or financial adviser for bad investment advice unless you can capitalize your fees;
- From your ex-spouse for anything related to your divorce or children;
- From a neighbor for trespassing, encroachment, or anything else;
- From the police for wrongful arrest or imprisonment;
- From anyone for intentional infliction of emotional distress;

**Many plaintiffs in many types of litigation will feel the full force of paying taxes on their gross recoveries, with no deduction for the attorney fees they've paid.**

- From your insurance company for bad faith;
- From your tax adviser for bad tax advice;
- From your lawyer for legal malpractice; and
- From a truck driver who injures you if you recover punitive damages.

Conversely, the list of cases where you should not face this double tax is much shorter. For example:

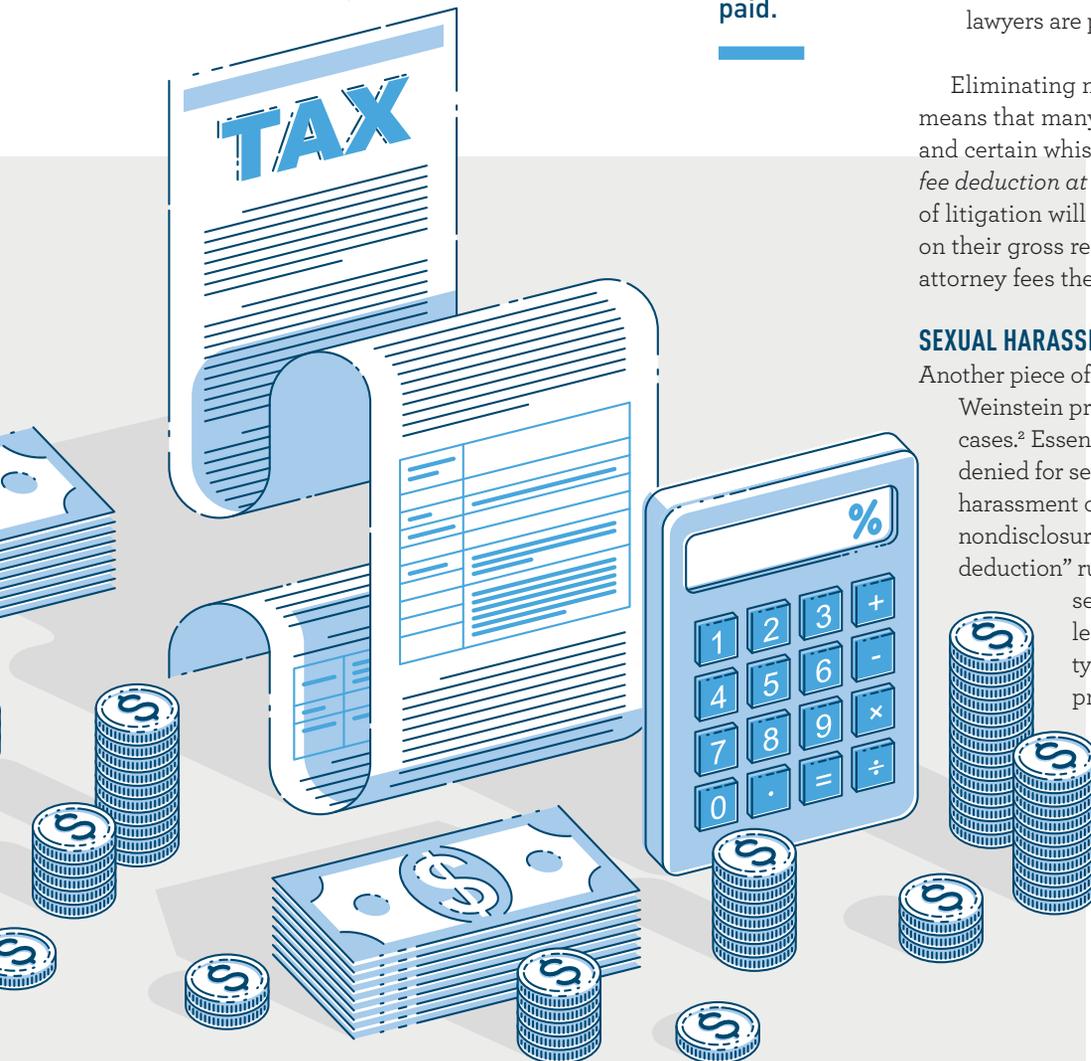
- Your recovery is 100 percent tax-free in a pure physical injury case with no interest and no punitive damages. If the recovery is fully excludable from your income, you cannot deduct attorney fees, but you do not need to;
- Your employment recovery qualifies for the above-the-line deduction (but watch out if it involves a sexual harassment claim);
- Your recovery is in a federal False Claims Act case or IRS whistleblower case, qualifying for the above-the-line deduction;
- Your recovery relates to your trade or business, and you can deduct your legal fees as a business expense; or
- Your recovery comes via a class action, where the lawyers are paid separately under court order.

Eliminating miscellaneous itemized deductions means that many plaintiffs (outside employment and certain whistleblower cases) will have *no legal fee deduction at all*. Many plaintiffs in many types of litigation will feel the full force of paying taxes on their gross recoveries, with no deduction for the attorney fees they've paid.

## SEXUAL HARASSMENT

Another piece of the TCJA, known as the Harvey Weinstein provision, addresses sexual harassment cases.<sup>2</sup> Essentially, all tax deductions are now denied for settlement payments in sexual harassment or sex abuse cases if there is a nondisclosure agreement. Notably, this “no-deduction” rule applies to attorney fees as well as settlement payments. Of course, most legal settlement agreements have some type of confidentiality or nondisclosure provision. And many employment cases have a mixture of facts and claims and a settlement agreement that is comprehensive.

Arguably, Congress's intent with the Harvey Weinstein provision was only to limit the *defendant's* trade or business deduction for settlement



payments and related legal fees. Nevertheless, the language actually enacted into the tax code is much broader.<sup>3</sup> If it applies, even legal fees paid by the *plaintiff* in a confidential sexual harassment settlement could be covered.

The provision provides that “No deduction shall be allowed *under this chapter*.”<sup>4</sup> It therefore could disallow the above-the-line deduction for a plaintiff’s employment and qualifying whistleblower claims as well. So far, this evident error has not been corrected. Small allocations to sexual harassment in settlement agreements might be one answer, to preserve the availability of deductions for the other claims. However, it is not clear if the IRS will respect them.

So what to do? For many types of cases involving significant recoveries and significant attorney fees, the lack of deductions for attorney fees may seem downright confiscatory. Plaintiffs and their lawyers are unlikely to take the situation lying down. Here are potential ideas for addressing the new rules.

#### Separately paid lawyer fees:

Some defendants will agree to pay lawyers and clients separately. But do two checks obviate the income to a plaintiff? According to *Banks*, no. The Form 1099 regulations may not help either. They generally require defendants to issue a Form 1099 to the plaintiff for the full amount of a settlement, even if part of the money is paid to the plaintiff’s lawyer. However, some taxpayers may still claim reporting positions on these facts.

**Business expenses:** One possible way of deducting legal

fees could be a business-expense deduction. Businesses did well in the tax bill, and business-expense deductions remain unaffected (aside from the Weinstein provision). But are your activities sufficient to show that you are really in business, and is the lawsuit really related to that business?

Alternatively, could your lawsuit itself be viewed as a business? A plaintiff filing their first Schedule C as a proprietor for a lawsuit recovery probably will not look very convincing. Before the above-the-line deduction for employment claims was enacted in 2004, some plaintiffs argued that their lawsuits amounted to business ventures so they could deduct legal fees. But plaintiffs usually lost those tax cases.<sup>5</sup> After all, just suing your employer doesn’t seem like a business. It might be regarded as an investment or income-producing activity (which used to give rise to a below-the-line deduction), but not as a business. And remember, after the 2017 tax reform, investment expenses—whether legal fees or otherwise—do not qualify for a tax deduction.

A plaintiff doing business as a proprietor and regularly filing Schedule C might claim a deduction there for legal fees related to that trade or business.<sup>6</sup> It seems inevitable that we should expect more arguments based on Schedule C from plaintiffs in the future.

**Capital gain recoveries:** If your recovery is capital gain, you arguably can capitalize your legal fees and offset them. You might

regard the legal fees as capitalized, or as a selling expense to produce the income. But, at least, you should not have to pay tax on your attorney fees. Ironically, the new “no-deduction” rule for attorney fees may encourage some plaintiffs to claim that their recoveries are capital gain, just to “deduct” those fees.

**Exceptions to *Banks*:** There will also be new efforts to explore the exceptions to the Supreme Court’s 2005 holding in *Banks*. The Supreme Court laid down the general rule that plaintiffs have gross income on contingent legal fees. But general rules have exceptions, and the Court alluded to situations in which this one might not apply, discussed below.

**Injunctive relief:** Legal fees for injunctive relief may not count as income to the client. The parameters of this exception are not clear, but it may offer a way out on some facts. If there is a big damage award with small injunctive relief, will that remove all the lawyer’s fees from the client’s tax return? This seems unlikely.

**Court-awarded fees:** Court-awarded fees may also provide relief, depending on how the award is made and the nature of the fee agreement. Suppose a lawyer and client sign a 40-percent contingent fee agreement. It provides that the lawyer is also entitled to any court-awarded fees. If a verdict for the plaintiff yields \$500,000, split 60-40, the client has \$500,000 in income and cannot deduct the \$200,000 paid to their lawyer.

#### NOTES:

1. 543 U.S. 426 (2005).
2. TCJA, Section 13307.
3. See I.R.C. Section 162(q).
4. TCJA, Section 13307(a)(emphasis added).
5. See, e.g., *Alexander v. Comm’r*, 72 F.3d 938 (1st Cir. 1995).
6. *Id.*

**ROBERT W. WOOD** practices law with Wood LLP and is the author of *Taxation of Damage Awards and Settlement Payments* and other books. He can be reached at wood@WoodLLP.com. This discussion is not intended as legal advice.



However, if the court separately awards another \$300,000 to the lawyer alone, that should not have to go on the plaintiff's tax return. What if the court sets aside the fee agreement, and separately awards *all* fees to the lawyer? Does such a court order mean the IRS should not be able to tax the plaintiff on the fees? It's not clear, but the IRS has an incentive to scrutinize such attempts.

**Statutory attorney fees:** Statutory fees are another potential battleground. If a statute provides for attorney fees, can this be income to the lawyer only, bypassing the client? Perhaps in some cases, although contingent fee agreements may have to be customized in unique ways. The relationship between lawyer and client is that of principal and agent. It may take considerable effort to distance a plaintiff from the fees due to their lawyer.

## CONCLUSION

For many types of cases involving significant recoveries and attorney fees, the lack of tax deductions for legal fees can be catastrophic. We should expect plaintiffs to more aggressively try to avoid receiving gross income on their legal fees in the first place. For those who are saddled with the gross income, we should expect some to go to new lengths to try to deduct or offset their attorney fees.

Few plaintiffs receiving a \$1 million recovery will think it is fair to pay taxes on the full amount, if legal fees have consumed 40 percent of their recovery. For cases with higher contingent fee percentages and costs, the situation will be worse still. It seems even more important now to engage in tax planning before a case is settled. Settlement time for legal disputes could become more stressful in this troubling new tax world. Tax time will be, too. 

*When you need advice on attorney fees, an evaluation of fees, a declaration on fees, or testimony on fees—CALL US.*

***Our latest law review article on attorney fees in Washington is:***

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

***We have a track record of success in fee cases:***

Easterly v. Clark County, 2 Wn. App. 2d 1066 (2018)  
Arnold v. City of Seattle, 185 Wn.2d 510, 374 P.3d 111 (2016)  
Bright v. Frank Russell Investments, 191 Wn. App. 73, 361 P.3d 245 (2015)  
Tupas v. Washington State Dept. of Ecology, 191 Wn. App. 1036 (2015)

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**A** Ahmed, Kaleab Kassaye, *Seattle*  
Arnold, Allexia Bowman, *Seattle*  
Auld, Erin Aileen, *Bellingham*

**B** Baily, Beaumont Anthony, *Seattle*  
Bernardo, Lucas, *Miami, FL*  
Betsworth, Lea Marie, *Surrey, BC*  
Bishop-Foster, Patrice D.,  
*Federal Way*  
Black, Bailey Conner Eileen,  
*Kennewick*  
Blanco, Monique Francine,  
*Tacoma*  
Bock, Jenna Michelle, *Spokane*  
Boome, Lois, *University Place*  
Borcherding, Austin Thomas,  
*Seattle*  
Boudreaux, Lejon, *Redmond*  
Bruderer-Schwab, Romana,  
*Del Mar, CA*  
Brunelle, Russell D., *Lynnwood*  
Bruno, Christopher Britten,  
*Ann Arbor, MI*  
Bukoskey, Kevin Andrew, *Everett*  
Bunting, Samuel Evan,  
*Danville, IL*

**C** Cardoza, Dylan Ruben, *Edmonds*  
Carrick, Yvonne Renée, *Kennewick*  
Carter, Mary Emily, *Spokane*  
Cengizlier, Murat, *Seattle*  
Chandrashekar, Smriti, *Seattle*  
Charbonneau, Claire Rochelle,  
*Seattle*  
Choi, Do Nam, *Wailuku, HI*  
Cisneros, Luis Quitaig, *Kennewick*  
Clifton, Casey E., *Edmonds*  
Coatsworth, James David,  
*Bainbridge Island*  
Colburn, Travis Barton, *Seattle*  
Cole, Amy, *Kirkland*  
Compton, Nathan Grant, *Seattle*  
Cook-Lee, Tracey Suzanne, *Bellevue*  
Cummings, Kelli, *Loon Lake*  
Cunningham, Brittany, *Oakland, CA*

**D** Delay, Hailey Kathryn, *Mercer Island*  
Deporto-Plick, Isaiah Manuel,  
*Seattle*  
Dickey-North, Jason Robert, *Lacey*  
Diehl, James Glenn, *Honolulu, HI*  
Diwan, Ashima, *University Place*  
Dorsett, Anthony James, *Prosser*  
Draper, Kriste, *San Diego, CA*  
Duarte, Erin Nicole, *Woodinville*  
Durbin, Emily Lynn, *Seattle*  
Durr, Regina Andrea, *San Francisco, CA*

**E** English, Leslie Kathleen, *Seattle*  
Enrico, Geraldine Anne Tibar, *Kent*  
Erickson, Cody Austin, *Seattle*

**F** Frank, Derek Red Arrow, *Seattle*  
Franquemont, Margaret Vail, *Renton*  
Friese, Andrew Kyle, *Seattle*

**G** Gaffey, Evan, *Edgewood*  
Gallant-Rider, Joann Ruth,  
*Mill Creek*  
Gaskin, Emily Anna Louise  
Makane, *Honolulu, HI*  
Gendotti, Ashley Dorette,  
*San Carlos, CA*  
George, Brenda Lynn, *Suquamish*  
Gildersleeve, Andrew Jesse,  
*Bellingham*  
Gill, Jessica Kaur, *Bellingham*  
Glinskiy, Richard Andreyavich,  
*Lynnwood*  
Goddard, Jaron Elizabeth, *Seattle*  
Grego, Courtnee Amber, *Shoreline*  
Gritten, Margaret Elena, *Seattle*  
Groff, Mari, *Wenatchee*

**H** Harms, Andrew Jonathan,  
*Weatherby Lake, MO*  
Heinz, Michelle Camps, *Issaquah*  
Hejmanowski, Evan David  
Edward, *Everett*  
Horst, Dana Putney, *Seattle*  
Howie, Dustin Arthur William,  
*Spokane*  
Hsieh, Adam, *Bellevue*  
Huff, Brian, *Alpharetta, GA*  
Hurtado Cola, Jaime Jose,  
*Tomball, TX*

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*Port Orchard*  
Jalili, Sahar, *Seattle*  
Jeon, Daphne, *Seattle*  
Jimenez, Jeffrey Russell,  
*Moscow, ID*  
Jordan, David John, *Carrollton, TX*  
Jugpall, Hardeep Kaur,  
*Spokane Valley*  
Junio, Isabela Rose Jane  
Benitez, *Federal Way*

## 2019 WINTER BAR EXAM PASS LIST

Of the 315 candidates who took the Winter 2019 bar exam, 160 candidates passed. Congratulations! The full pass list is printed here.

**K** Kim, Daehyun, *Issaquah*  
Kobes, Brett, *North Bend*  
Ku, Nathaniel, *Oakland, CA*  
Kwak, Elaine, *Seattle*

**L** Lao, Zijiao, *Sammamish*  
Lee, Kiyah Cheyanne Myrrhgana-Gurley, *Modesto, CA*  
Li, Sally, *Seattle*  
Luo, Wenjun, *Seattle*  
Lynch, Reagan, *Seattle*

**M** MacLean, Mary Kaili, *Seattle*  
Mariappuram, Rosann, *Seattle*  
Maxwell, Marielle Jeanne, *Medina*  
McClendon, Emily, *Vancouver, BC*  
McNabb, Meghan, *Seattle*  
McNeary, Danyelle, *Escondido, CA*  
Miller, Jeffrey Ross, *Seattle*  
Milliman, Jennifer Stanton, *Seattle*  
Moberg, Mary M., *Ephrata*  
Montufar, Nikole Mia, *Lynnwood*  
Murray, Philip Carey, *Edmonds*  
Myles, Brittney Nicole, *Spokane*

**N** Nichols, Shannon Ryan,  
*Mill Creek*

**O** Obomanu, Benjamin, *Renton*  
O'Brien, Allison, *Auburn, IN*  
Okantey, Elliott Nathan, *Seattle*  
O'Keefe, Shawn, *Chehalis*  
O'Meara, John Benjamin,  
*Mercer Island*

**P** Pence, Abigael Drew, *Tacoma*  
Peterson, Derek Douglas, *Olympia*  
Philbrick, Robert C., *Mercer Island*  
Phillips, John N., *Seattle*  
Pippin, Lucy Michelle, *Seattle*  
Polakovic, Raymond Michael, *Seattle*  
Polonsky, Mitchell Andrew, *Bellevue*  
Preshaw, Johnathan Edwin,  
*Edmonds*  
Puryear, Joanna Lee, *Spokane*

**Q** Qi, Meng Yu, *Harbor City, CA*  
Quintanar, Humberto, *Seattle*

**R** Raitt, Darla Anne, *Issaquah*  
Romero, Eric, *Mystic, CT*  
Rosdahl, Andrew, *Seattle*  
Rusher, Erika Suzanne, *Seattle*  
Ryan, William Louis, *Puyallup*

**S** Sanchez, Ricco Christopher,  
*Federal Way*  
Scott, Christina Jean, *Seattle*  
Sergiyenko, Mariya, *Auburn*  
Shah, Himal Parth, *Bellevue*  
Shapiro, Drew, *Redmond*  
Shimizu, Kenneth Cuyler  
Norio, *Seattle*  
Sidhu, Gagandeep Kaur, *Seatac*  
Singh, Amrita K., *Auburn*  
Skriletz, Corey Storme, *Olympia*  
Spencer, Marina Claire, *Portland, OR*  
Squires Monfre, Tia Michelle, *Auburn*  
Stephenson, Teresa, *Bellevue*  
Strelau, Serena Hser, *Seattle*  
Strom, Zachary Joseph, *Seattle*  
Sulzberg, Jill, *Bellevue*  
Swearengin, Brendan Andrew, *Seattle*  
Swift, Briana Michelle, *Seattle*

**T** Tan, Tyler Jay, *Cupertino, CA*  
Tran, Trinh Tuyet, *Snohomish*

**U** Unterbrink, Elizabeth Anne,  
*Gig Harbor*  
Uuganbayar, Boloroo, *Edmonds*

**V** Valadez, Sierra Haley, *Bellingham*  
Van Slyck, Kara Marie, *Everett*  
Vandenbelt, Sara Rose, *Seattle*

**W** Wada, Jordan Thomas, *Mountlake  
Terrace*  
Wedgeworth, Bria Cheri, *Seattle*  
Weeks, Virginia Aprahamian, *Seattle*  
West, David, *Seattle*  
West-Herr, Gonca, *Bellevue*  
Whisenand, David Christopher,  
*Whittier, CA*  
White, Joseph Dale, *Richland*  
Wicknick, Connor, *Bellingham*  
Wiedman, Zachary Aaron,  
*Tarzana, CA*  
Williams, Jarquita Katrice,  
*Wenatchee*  
Wilson, Lily Kendall, *Lake Tapps*  
Wu, Wan-Yu, *Seattle*

**Y** Yoo, Jihee, *Seattle*

**Z** Zheng, Xiaoju, *Seattle*  
Zimova, Adriana, *Bainbridge Island*  
Zukic, Amela, *Lynnwood*

## Need to Know

News and information of interest to WSBA members. Email [nwlawyer@wsba.org](mailto:nwlawyer@wsba.org) if you have an item you would like to share.

## WSBA NEWS



### WSBA BUDGET

WSBA's fiscal year 2019 budget was approved at the Board of Governors September 2018 meeting before the end of the WSBA fiscal year. The fiscal year 2019 budget, and information about the programs and services that it supports, is available at [www.wsba.org/about-wsba/finances](http://www.wsba.org/about-wsba/finances).

### WSBA BUDGET AND AUDIT COMMITTEE'S STATEMENT ON FISCAL INTEGRITY

The Budget and Audit Committee expresses a high degree of confidence in WSBA's financial integrity following another clean yearly audit opinion for Fiscal Year 2018. Committee members reviewed the independent auditor's report in January that certified that WSBA finances are well managed and accurate in all material respects. WSBA has received similar clean "unmodified opinions" (no adjustments made, no material weaknesses, no management letter issued) from independent audit firms for at least the past 30 years. The positive opinion indicates that WSBA has strong internal financial controls.

The Board of Governors sets operational priorities and approves WSBA's annual budget, and the Budget and Audit Committee meets monthly to oversee financial matters. Committee members are committed to being accountable to members and the public through a high level of transparency and active examination of fiscal operations. As such, the WSBA will continue to work with independent auditors to ensure robust and appropriate audits into the future.

Most financial information, including detailed financial statements, the current budget with revenues and expenditures by line item, Treasurer Reports, and audit reports, are online at [www.wsba.org/about-wsba/finances](http://www.wsba.org/about-wsba/finances).

## VOLUNTEER

### CUSTODIANS NEEDED

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



## ETHICS

### FACING AN ETHICAL DILEMMA?

Members facing ethical dilemmas can talk with WSBA professional responsibility counsel for informal guidance on analyzing a situation involving their own prospective ethical conduct under the Rules of Professional Conduct (RPC). All calls are confidential. Any advice given is intended for the education of the inquirer and does not represent an official position of the WSBA. Call the Ethics Line at 206-727-8284 or 800-945-9722, ext. 8284.

### SEARCH WSBA ADVISORY OPINIONS ONLINE

WSBA advisory opinions are available online at [www.wsba.org/for-legal-professionals/ethics/about-advisory-opinions](http://www.wsba.org/for-legal-professionals/ethics/about-advisory-opinions). You can search opinions by number, year issued, ethical rule, subject matter, or keyword. They are also available on Casemaker and Fastcase. Go to [www.wsba.org/legalresearch](http://www.wsba.org/legalresearch). Advisory opinions are issued by the WSBA to assist members in interpreting their ethical obligations in specific circumstances. The opinions are the result of study and analysis in response to requests from WSBA members. For assistance, call the Ethics Line at 206-727-8284 or 800-945-9722, ext. 8284.



## WSBA COMMUNITY NETWORKING



### ACCESS TO JUSTICE CONFERENCE

Save the date for the 2019 Access to Justice Conference, to be held June 14-16 at the Spokane Convention Center. Information will be posted to the Alliance for Equal Justice website, [www.allianceforequaljustice.org](http://www.allianceforequaljustice.org), as it becomes available.

### WSBA CLE FACULTY DATABASE

If you are currently serving as CLE faculty, or are interested in working with the WSBA as a future CLE faculty member, we encourage you to register in our CLE faculty database. Serving as a faculty member provides you with the opportunity to engage with other attorneys across the state, give back to your profession, and advance your professional growth. Whether it's upcoming changes in the law, emerging hot topics, or substantive content, our goal is to ensure we are engaging with the right faculty at the right time, matching practice expertise and knowledge to our educational programming needs. We hope to capture the information of all those who plan to teach—both current CLE faculty and those interested in future opportunities. To register, please log in to your myWSBA account, go to "My WSBA Profile" and select "CLE Faculty Database Registration."

### JOIN THE WSBA NEW LAWYERS LIST SERVE

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

### ALPS ATTORNEY MATCH

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

### CHECK ONLINE

#### FIND CLEs AND LEGAL EVENTS

For the latest information about CLEs and legal events, go to [www.wsba.org/news-events/events-calendar](http://www.wsba.org/news-events/events-calendar).

## WSBA PRACTICE MANAGEMENT ASSISTANCE

The WSBA offers free resources and education on practice management issues, including financial management, marketing and client retention, and technology. For more information, visit [www.wsba.org/pma](http://www.wsba.org/pma).



### LENDING LIBRARY

The WSBA Lending Library is a free service to WSBA members offering the short-term loan of books on health and well-being as well as the business management aspects of your law office. You can view available titles and arrange for a book loan by visiting [www.wsba.org/library](http://www.wsba.org/library). Books may be borrowed by any WSBA member for up to two weeks. If you live outside of the Seattle area, books can be mailed to you; you will be responsible for return postage. For walk-in members, we recommend calling first to check availability of requested titles.

### GET DISCOUNTS ON NEW SOFTWARE AND SERVICES

Looking to build up your practice? Visit the Practice Management Discount Network for discounts on tools to help you improve your legal service delivery—featuring practice management software, credit card processing, and more. Visit [www.wsba.org/discounts](http://www.wsba.org/discounts) to get started.

### FREE LEGAL RESEARCH TOOLS

The WSBA offers resources and member benefits to help you with your research. Learn more and get started at [www.wsba.org/legalresearch](http://www.wsba.org/legalresearch). You can conduct legal research for free using Casemaker, as well as a new second member benefit tool: Fastcase. Fastcase is a next-generation legal research service that provides powerful data visualization to help you understand your research results.

## QUICK REFERENCE



### USURY RATE

The maximum allowable usury rate can be found on the Washington State Treasurer's website at [www.tre.wa.gov/partners-for-state-agencies/investments/historical-usury-rates-archives/](http://www.tre.wa.gov/partners-for-state-agencies/investments/historical-usury-rates-archives/).

Need to Know

WSBA MEMBER WELLNESS PROGRAM



WSBA CONNECTS

WSBA Connects provides free counseling in your community. All bar members are eligible for three

free sessions on topics including work stress, career challenges, addiction and anxiety, as well as other issues. Upon calling 1-800-765-0770, a telephone representative will arrange a referral using KEPRO's network of clinicians throughout the state of Washington. There is no need to let problems build up unnecessarily. We hope you make the most of this valuable resource.

CAREER CONSULTATION

Want someone at the WSBA to take a look at your résumé? Or maybe you want to brainstorm approaches to networking. The job search requires a game plan. We are happy to set up a time to speak. Email wellness@wsba.org.

THE 'UNBAR' ALCOHOLICS ANONYMOUS GROUP

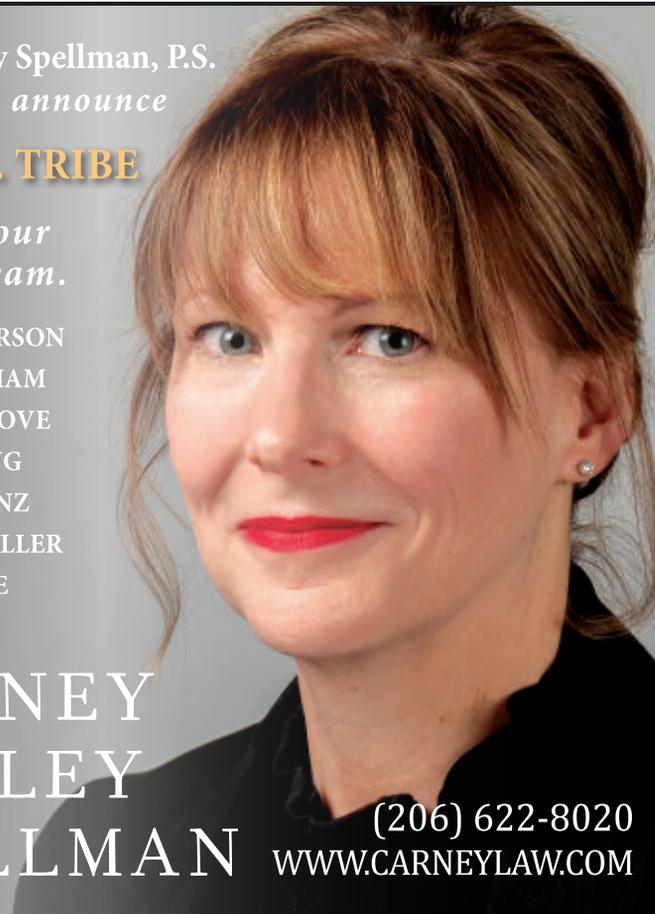
The Unbar is an "open" AA group for attorneys that has been meeting for over 25 years. Meetings are held Wednesdays from 12:15 to 1:30 p.m. at the Skinner Building at 1326 Fifth Ave., Seventh Floor, Seattle. If you are seeking a peer advisor to connect with and perhaps walk you to this meeting, the WSBA Member Wellness Program can arrange this; call 206-727-8268.

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## Discipline and Other Regulatory Notices

### **THESE NOTICES OF THE IMPOSITION OF DISCIPLINARY SANCTIONS AND ACTIONS**

are published pursuant to Rule 3.5(c) of the Washington Supreme Court Rules for Enforcement of Lawyer Conduct. Active links to directory listings, RPC definitions, and documents related to the disciplinary matter can be found by viewing the online version of NWLawyer at [nwlawyer.wsba.org](http://nwlawyer.wsba.org) or by looking up the respondent in the legal directory on the WSBA website ([www.wsba.org](http://www.wsba.org)) and then scrolling down to "Discipline History."

As some WSBA members share the same or similar names, please read all disciplinary notices carefully for names, cities, and bar numbers.

### **Resignation in Lieu of Discipline**

**Robert Grant Meyers** (WSBA No. 15199, admitted 1985) of Wauna, resigned in lieu of discipline, effective 4/10/2019. The lawyer agrees that he is aware of the alleged misconduct in disciplinary counsel's Statement

of Alleged Misconduct and rather than defend against the allegations, he wishes to permanently resign from membership in the Association. The Statement of Alleged Misconduct reflects the following violations of the Rules of Professional Conduct: 1.4 (Communication), 1.5 (Fees), 1.15A (Safeguarding Property), 1.15B (Required Trust Account Records), 1.16 (Declining or Terminating Representation), 8.1 (Bar Admission and Disciplinary Matters), 8.4 (Misconduct). Marsha Matsumoto acted as disciplinary counsel. Robert Grant Meyers represented himself. The online version of NWLawyer contains a link to the following document: Resignation Form of Robert Grant Meyers (ELC 9.3(b)).

### **Interim Suspension**

**Richard E. Kriger** (WSBA No. 16346, admitted 1986), of Everett, is suspended from the practice of law in the State of Washington pending the outcome of supplemental proceedings, effective 3/13/2019, by order of the Washington Supreme Court. This is not a disciplinary sanction.

**J. J. Sandlin** (WSBA No. 7392, admitted 1977) of Zillah, is suspended from the practice of law in the State of Washington pending the outcome of supplemental proceedings, effective 2/28/2019, by order of the Washington Supreme Court. This is not a disciplinary sanction.

### **ONLINE**

See full details of disciplinary and other regulatory notices by accessing the links in the online version: [www.wsba.org/news-events/nwlawyer](http://www.wsba.org/news-events/nwlawyer)



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## Congratulations Roy!

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*State v. Letourneau,*  
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*Fordyce v. Seattle,*  
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#### WILL SEARCH

**Seeking a will for William Thomas Reshaw DOB 7/11/42.** The will would most likely have been drafted between 2007 and 2010 and the attorney would have been the executor. Please contact Sara Reshaw at [sarareshaw@gmail.com](mailto:sarareshaw@gmail.com) or 661-333-1940.

**Seeking the will/living trust for Gerald Louis Higgins DOB 7/8/39.** The will/living trust would most likely have been drafted between 1997 and 2018 and the attorney would have been the executor. Please contact Diane Larson at [777gardensbydi@gmail.com](mailto:777gardensbydi@gmail.com) or 805-432-6284.

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# Beyond the Bar Number

## WILL NICHOLSON

Bar No. 42306

Law School: University of  
Washington School of Law

- If I took one day off in the middle of the week, I would take my wife out to lunch.
- My favorite place in the Pacific Northwest is the Elwha Valley on the Olympic Peninsula.
- Friends would describe me as absentminded.
- I regret not taking more time to write. I wish I had set aside more time before I had children to write, both personally and professionally.
- On all local (King County) issues, I vote in step with my mother-in-law.
- This makes me smile: wrestling with my two boys.
- I purchased my first car, a 1995 Honda Accord, in the summer of 2000.
- If I had a time machine, I would not purchase that Honda Accord. Its engine quit on me three years later in the middle of the night.
- You should give this a try: McCarthy, Alaska.
- My all-time favorite movie or TV show: *The Wire*.
- My dream trip would be to load up an RV with bikes and kayaks and drive all over North America.
- My heroes are my dad and mom, who have always been a source of strength in my life.
- I would like to learn how to play the guitar.

I am a judge advocate in the U.S. Army. Currently, I am an assistant legal counsel for United States Africa Command (USAFRICOM), specializing in national security law. Originally from Staunton, Virginia, I live in Stuttgart, Germany, with my wife, Sarah, and two young boys, Reeves and Cormac. Following college, I served in the Army as an armor officer for five years. Before moving to Washington to begin my 1L year, I taught in the ROTC Department of the University of North Carolina at Charlotte.

### WE'D LIKE TO LEARN ABOUT YOU!

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- My career has surprised me by how many areas of the law I have practiced, and the different places I have lived and worked. After beginning our legal careers in Dongducheon, South Korea, my wife and I have since moved six times: to Virginia, the District of Columbia, Alaska, Tennessee, Kansas, and Germany.
- The best advice I have for new lawyers is maintain your sense of humor.
- In 10 years, I see myself planting tomatoes at a small house in the Pacific Northwest.
- During my free time, you can find me out hiking or riding bikes with my wife and two boys.
- The most memorable trip I ever took was to a back-alley sushi bar in Seoul with my wife, Sarah. Assuming we can still find it, returning there is on our bucket list.
- I look up to: There are many, but my brother, Jon, a park ranger at Yellowstone National Park, and my sister, Susannah, a surgeon at University Hospital in San Antonio, both stand out.

Photo courtesy of the author



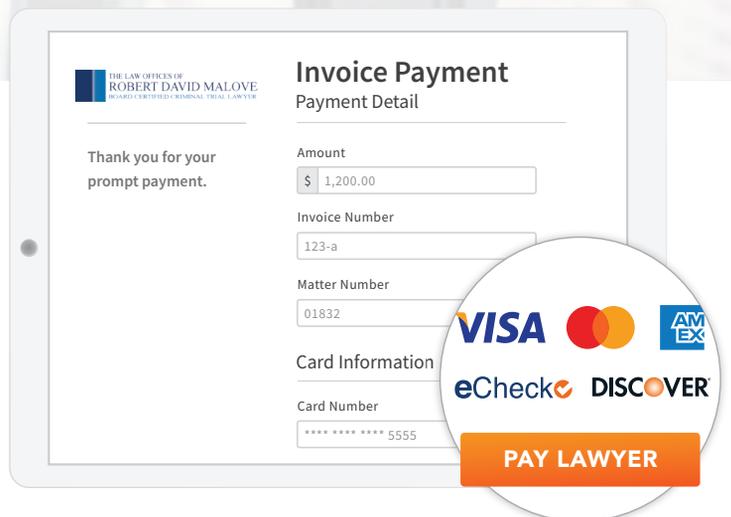
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