MEETING THE RISKS OF REMOTE WORK

Does your telecommuting policy increase potential workers’ compensation liability? / p. 30

Are you supervising adequately and maintaining confidentiality in your hybrid office? / p. 16
As you discover what strength you can draw from your community in this world from which it stands apart, look outward as well as inward.

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- SONIA SOTOMAYOR

THANKS, 2021 VOLUNTEERS!

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FEATURES

30
Does Your Telecommuting Policy Increase Your Risk of Workers’ Compensation Liability?
BY SHAWNA G. FRUIN AND FLYNN P. BURKE

34
Reach Your New Year’s Resolution Goals With Help From ProBonoWa.org
BY MICHAEL R. ADDAMS AND JACQUI MERRILL MARTIN

39
Want a Successful Mentoring Relationship? Focus on Building Trust
BY LISA Z. FAIN

42
Advocating for Clients in Jail
BY ETHAN FRENCHMAN

The Acknowledging Professional Excellence (APEX) Awards honor exemplary members of the legal community, including legal professionals, judges, and members of the public.

ESSENTIALS

7 Inbox
9 NWSidebar: There’s More on the Blog
24 Section Spotlight
48 On Board
51 Bar Notes
52 Need to Know
57 Discipline & Other Regulatory Notices
58 Announcements
59 Professionals
62 Classifieds
64 Beyond the Bar Number: Kathryn L. Tucker

COLUMNs

4 Editor’s Note
New Year, New Features
BY KIRSTEN ABEL

10 The Bar in Brief
Where Are We Headed in 2022 … and Beyond?
BY TERRA NEVITT

12 President’s Corner
Setting the Bar On Professionalism
BY JUDGE BRIAN TOLLEFSON (RET.)

15 Treasurer’s Report
Looking Back at Fiscal Year 21
BY BRYN A. PETERSON

16 Ethics & the Law
New Normal: Risk Management for ‘Hybrid’ Offices
BY MARK J. FUCILE

20 Write to Counsel
From Anecdata to Data on Writing a Winning Brief
BY DAVID J.S. ZIFF

ACKNOWLEDGING PROFESSIONAL EXCELLENCE AWARD

Winter 2021

The APEX Awards honor exemplary members of the legal community, including legal professionals, judges, and members of the public.
New Year, New Features

I have no personal New Year’s resolutions this year. I’ve learned from the 2020 list still taped to my refrigerator that it’s best to take things one day at a time. However, I did have year-end goals for the magazine. One of those goals, to launch a new website by the end of 2021, was accomplished last month. Another goal was to make the Bar News archive more robust. Starting this month, all issues back through 2006 are available online. You can search and download more than 15 years of content at www.wabarnews.org/archive.

In this issue, we have two timely articles on the topic of remote work—one on risk management for hybrid offices (page 16), and one on workers’ compensation and employer liability (page 30).

In addition, you can find the 2021 APEX Award winners on page 26. And on page 42, Ethan Frenchman, an attorney with Disability Rights Washington, writes about how defense attorneys can help clients advocate for their medical and mental health needs while they are incarcerated pretrial.

Also in this issue: a look at the newly revamped website that provides a centralized platform to seek out pro bono opportunities that align with your interests and availability, www.probonowa.org (page 34), the Animal Law Section Spotlight (page 20), and more.

Lastly, you may have noticed that the magazine paper feels a little lighter this month. You have probably also heard that global supply chain issues are affecting nearly every industry, including, it turns out, the publishing industry. As the costs of pulp and transportation have increased, the cost to print Bar News has increased slightly as well. In order to help offset part of that increase, we have opted to print on a lighter paper stock—without, we believe, any appreciable difference in the look and feel of the magazine.

Starting this month, all issues of Bar News back through 2006 are available online at www.wabarnews.org/archive.

Kirsten Abel is the editor of Washington State Bar News and can be reached at kirstena@wsba.org.
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We welcome letters to the editor on issues presented in the magazine. Email letters to wabarnews@wsba.org.

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

More Letters and Articles On Substantive Legal Issues

I look forward to reviewing Bar News each month. Typically I enjoy reading the excellent articles on the law submitted by our attorneys and skimming the letters to the editor and other articles to see what's happening with the Bar. This month

[October 2021] I was very disappointed to find no letters to the editor and only one article with any discussion of a substantive legal issue, “Ethics and the Law” (pp. 20-23). I hope this changes for future editions and that we see active solicitation on the part of the Bar News [staff] seeking articles on substantive legal issues for submission from our Bar colleagues.

Nancy Whitten
Sammamish

CORRECTION: In the November 2021 article entitled “WSBA Celebrates 50-Year Members: Reflections of the Only Woman,” the photo caption listing the names of the 1971 board members of the Washington State Trial Lawyers Association incorrectly listed one of the members as Jerry Bangs. We believe the correct name is Jerry Schumm. A corrected version can be found at https://wabarnews.org/2021/11/05/50-year-members-reflections-of-the-only-woman/.
YOU CAN’T WIN WITHOUT A GOOD ASSIST

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Associate, Seattle Office

“I strive to give others the voice they need to vindicate their harms and hold accountable those persons or entities that often skirt responsibility because of their size and power.”

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Associate, Tacoma Office

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Essential Tips for Renewing Your Law License in Washington

On any given day, the WSBA Service Center can generally answer calls on demand, in most cases providing answers to questions after a few minutes on the phone. But as the licensing deadline approaches, wait times increase as members rush to complete the requirements to renew their license. That is especially true this year as the WSBA will be reviewing more MCLE reported credits than usual. Last year, due [...]

nwsidebar.wsba.org

AG Ferguson: Let’s Address the Unmet Civil Legal Needs of Veterans and Service Members

As attorney general, I invite Washington’s legal community to consider how we all can support veterans and service members throughout the year. My office honors the service and sacrifices of those who have served in our armed forces by working to meet their civil legal needs through our Office of Military & Veterans Legal [...]

nwsidebar.wsba.org

COVID-19 Legal Need Checklist is the Latest Tool to Help Washingtonians in Need

In 2020, the Access to Justice (ATJ) Board established a COVID-19 Response Work Group to collaborate with other organizations in identifying and addressing community needs and systemic issues that arose or were exacerbated by the pandemic. The result is now available and being distributed [...]

nwsidebar.wsba.org

A LOOK BACK AT OUR TOP 5 MOST-READ POSTS OF 2021

1. Take Our Quiz: Which Type of Legal Volunteer Are You?
2. Statewide Electronic Filing is on the Way to Washington Courts
3. A Few Things Everyone Should Know About the WA Cares Fund
4. The Unsettled Policy Landscape of Drug Possession Laws in WA
5. What You Need to Know About the WA Nonprofit Corporation Act

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Happy New Year! As we welcome 2022, the WSBA is embarking on a journey, and I invite you to come along. Grab your bag. Let’s go! With the exception of a few carefree adventurers, I’m sure most of you would like to know where we are going … not to mention a few other key details: Do I need comfortable shoes? Fancy clothes? A passport? What’s the snack situation?

Most of us appreciate knowing the direction we are going. Purpose and planning, in fact, are downright critical in many situations. To quote Yogi Berra, “If you don’t know where you are going, you’ll end up someplace else.”

So where are we at the WSBA going in 2022 and beyond? I am excited to say we have a new roadmap for the journey ahead, formed after many months of planning. This roadmap takes the form of strategic goals that will set the direction and resources for the WSBA:

• **Goal 1:** To provide relevant and valuable resources to help all of its members achieve professional excellence and success, in service to their clients and the public, and to champion justice.
• **Goal 2:** To uphold and elevate the standard of honor, respect, and integrity among WSBA members in order to improve public confidence in the legal profession.
• **Goal 3:** To promote access to justice and improve public confidence, trust, and respect of members of the public in our legal system and Bar Association.
• **Goal 4:** To promote diversity, equity, and inclusion in the legal system and profession.
• **Goal 5:** To manage the business of the state Bar Association in a prudent, efficient, and cost-efficient manner.
• **Goal 6:** To foster an organizational environment and culture that demonstrate a commitment to staff and embody the organizational mission and stated values of the WSBA.

The WSBA Board of Governors approved these six goals upon the recommendation of the Long-Range Strategic Planning Council last spring. As part of that work, we reviewed strategic planning efforts from the past few decades, and we realized the organization’s strategic goals, at the highest level, remain pretty constant. My guess is that most of you will look at this list and think, “Meh, seems about right,” because the goals are not only constant but quite broad. Which means the critical work will be deciding how we implement and prioritize—how we operationalize—the strategic goals. That effort will also belong to the Long-Range Strategic Planning Council.

And here is where I want to invite you, once again, to come with us as we plot the course for the Bar’s future journey. Part of the Long-Range Strategic Planning Council’s work is to communicate with you, the members, and other stakeholders about the goals and potential initiatives we might undertake to further those goals. This will be part of our overall outreach work conducted by the Board as a whole as well as its Member Engagement Work Group. We hope to let you know where we’re headed, and give you the chance to influence that direction, or simply hop on the train and come along with us!

There are a number of ways we will reach out to you in the coming year. We have revamped our ongoing member engagement survey—working with a professional survey company to reach more members and safeguard confidentiality of responses—and we plan to incorporate several strategic goal-specific survey questions in the coming quarters. We will weave priority and resource conversations into annual meetings with stakeholders such as leaders of sections, county bars, specialty bars, law schools, and civic organizations. We will also continually provide updates via our website, Take Note email newsletter, and Bar News.

As in previous years, the Listening Tour will be an opportunity for you to engage in a meaningful and personal way with your WSBA president, local WSBA governors, and me as we travel across the state to hear from you.

Here’s a look at what happened last year on the Listening Tour. After a COVID-19-
caused hiatus in 2020, we were able to connect in person (masked up! safely distanced!) with WSBA members in Kitsap, Snohomish, Island, Skagit, Pacific, Mason, and Spokane counties between July and September. We also conducted a remote session for members in Asotin, Columbia, and Garfield counties.

Many of our conversations in 2021 related to the challenges of rural practice. Everyone agreed that recruiting and retaining legal professionals is a challenge for rural communities, particularly for public positions, which are often underfunded and low paying (especially for attorneys with substantial law school debt). Some members cited depressed local economies as a recruiting challenge; some talked about the challenge of having to hang out a shingle and maintain a broad set of practice areas without the support staff or resources available to new attorneys in a law-firm environment. But there are also benefits: flexibility and close relationships with judges and colleagues, for example. We are taking a slew of suggestions back to the WSBA’s Small Town and Rural Practice Committee (which was born out of previous Listening Tours) such as recognizing and acknowledging excellence in rural practice, higher compensation, help with student loans, having a supportive and energized local bar association, and addressing mental health challenges.

On the 2021 Listening Tour, we also talked quite a bit about Washington’s Admission and Practice Rule (APR) 6, which provides a pathway to licensure without attending law school. Our conversations touched on access to justice, and in some places we heard, “pro bono isn’t happening,” while in others we heard the opposite, that everyone gets taken care of one way or another in a small community. The future of the WSBA office is always a hot topic, and we talked about moving headquarters out of downtown Seattle (to Olympia? Satellite offices?) and, perhaps, even buying a building. We heard frustration about the Washington Supreme Court’s decision to grant diploma privilege and about the experience of being the subject of a random audit or a grievance. We did hear a number of appreciative comments as well, and topping the list is the Legal Lunchbox™, which is a monthly free CLE program that members can use to meet all of their required credits in a reporting period. We also heard appreciation for the insurance marketplace,† being able to volunteer remotely, practice management resources,‡ and the WSBA’s Practice Primer series.†

I cannot reiterate enough how meaningful and important these [Listening Tour] conversations are to WSBA leaders. Nothing takes the place of direct conversation and engagement.

NOTES

I cannot reiterate enough how meaningful and important these conversations are to WSBA leaders. Nothing takes the place of direct conversation and engagement. In 2022, and beyond, these Listening Tour stops will take on even more significance as we invite you to help map the WSBA’s future; we will be seeking your input on strategic priorities and initiatives that will set our near- and long-term direction.

I hope you will join us on this journey!

BLOGGERS WANTED!
Write for the WSBA’s award-winning blog — NWSidebar [nwsidebar.wsba.org].

Connect with the legal community!
For more information, contact blog@wsba.org.
President’s Corner

Setting the Bar On Professionalism

No doubt you’ve heard that, by nature, legal professionals are curious about almost everything. I admit that I am curious about almost everything, and of course that leads to seeking answers, which leads to more curiosity, more questions, and the need to seek more answers.

I am curious about what my legal colleagues think about professionalism in our field. We are “practicing law” in many ways and we have all accumulated ideas and practices that lead us to define what professionalism means in this field. How do you define professionalism in the law?

Did you know there are approximately 40,000 members of the WSBA? Do you believe that legal professionals help form the backbone of society through law and order? And do we hold ourselves accountable for doing so? Professionalism is but one component in helping the community respect and trust those in the legal field. Young and not-so-young legal professionals acquire different definitions of how the legal community represents itself in this manner, and I have a few thoughts on this subject as a not-so-young attorney.

Throughout my 45 years as a lawyer, superior court judge, and community volunteer, I have strived to reflect the high bar of professionalism set by those colleagues who have led the way and instinctively modeled the highest standards in this field. I am indebted to those attorneys and judges and trust that my efforts will likewise lead to others following in my footsteps.

As a trial court judge for many years, I observed many hundreds of attorneys and legal professionals ply their craft. I saw and heard outstanding lawyering and not-so-outstanding lawyering.

From my perspective, there are traits and practices that have led many in this field to model and uphold the bar set for professionalism. What I look for in evaluating the level of legal professionalism may differ from what you look for; however, there is probably a basic consensus on traits.

- **Honesty, ethics, civility.** These are intertwined and inseparable and speak for themselves.
- **Preparedness.** Parties, witnesses, jurors, courts, and the community in general are entitled to our best efforts.
- **Zealousness.** Not to be confused with its close relative, bullying. Competent legal professionals identify the line between the two before it gets crossed and proactively intervene should opposing counsel misconstrue where the line is. Passion does not need to invite bullying either.
- **Breaking it down.** Yes, sometimes legal professionals can get too arcane and clients, the courts, the community, and employers are left to grasp and, unfortunately, possibly misinterpret the advice or opinion proffered. Professionalism redirects the negative potential into a positive effort to be clear and to confirm the client’s understanding of the advice.

- **Competence.** The right legal professional for the right situation. Taking on matters within the legal professional’s skill set, training, and availability further enhance professionalism.

These are only a few traits I’ve identified and look for. What can or should be added to this list? What are your thoughts on what the WSBA can and should do to set the bar on professionalism? What are you doing to help the legal profession be a respected, integral part of society?

WSBA leadership and staff are curious and always interested in your help and your solutions. The WSBA will remain relevant and professional as its members continue to support its quest to move forward and to work together in harmony.

Every year the WSBA hands out professionalism awards at the APEX (“Acknowledging Professional Excellence) ceremony. The awards “honor exemplary members of the legal community, including legal professionals, judges, and members of the public.” Like last year, this year’s APEX awards ceremony will be virtual. I have the honor, as your president, to co-host the awards ceremony on Dec. 13. The awardees are featured on page 26 and videos highlighting each winner and their achievements are available at www.wsba.org/news-events/apex-awards. It is a wonderful event.

Yes, I too am curious. I invite WSBA members to flood my inbox at TollefsonBOG@outlook.com with your definitions and thoughts about “setting the bar” on legal professionalism.

Let’s continue the conversation on how we can all do better by working together. EN

---

What are your thoughts on what the WSBA can and should do to set the bar on professionalism?
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Focusing on strategy, oversight, and policy, Board members exhibit vision, leadership, diplomacy, and passion in pursuit of the WSBA's Mission.

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- District 9 Governor (currently held by Gov. Bryn Peterson)
- District 10 Governor (currently held by Gov. Tom McBride)
- Member At Large Governor (currently held by Gov. Hunter Abell)

The three-year term of office will run from September 23, 2022 through September 30, 2025.

ELIGIBILITY

Any active member may run for their own district. Any active member may run for the Member At Large position, representing lawyers whose membership has historically been underrepresented in governance. (See WSBA Bylaws Section VI for further details.)

BECOMING A CANDIDATE

Complete the application form (to be posted online by January 1, 2022) at www.wsba.org/elections

KEY DATES

| Application Submission Deadline | District Governor | February 15 |
| At Large Governor | April 15 |

| Voting | e-ballots sent: | votes are due: |
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Looking Back at Fiscal Year 21

It feels good to now have the final numbers for FY 21 and to be able to start looking forward to FY 22. Before moving forward to discuss FY 22, let’s look back at FY 21.

For FY 21, WSBA revenue was $23,691,045 and FY 21 WSBA expenses were $22,106,482.

The ending fund balances for FY 21 (Oct. 1, 2020 through Sept. 30, 2021) are as follows:

- **General Fund.** For FY 21, the WSBA General Fund balance ended at $7,076,440, or $1,548,206 over the FY 20 ending balance of $5,528,234.
- **Client Protection Fund.** For FY 21, the Client Protection Fund balance ended at $4,046,283, or $146,847 below the FY 20 ending balance of $4,193,130.
- **CLE Fund.** For FY 21, the CLE Fund balance ended at $635,784, or $166,500 above the FY 20 ending balance of $469,241.
- **Section Fund.** For FY 21, the Section Fund balance ended at $1,406,760, or $196,551 above the FY 20 ending balance of $1,210,209.

**LOOKING FORWARD TO FY 22**

In October we had our first Budget and Audit Committee meeting to look forward to the FY 23 budget process. Our Budget and Audit Committee meeting started with a discussion of what went well as to the FY 22 budget and what can potentially be done better as to the FY 23 budget. This is my third year on the Budget and Audit Committee, and I can assure you that we are always looking for ways to improve the WSBA budget process. The Budget and Audit Committee is committed to continuous improvement for the benefit of WSBA members.

In the spirit of continuous improvement, we had several governors volunteer their time on several exciting Budget and Audit Committee projects. I would like to thank Governor Francis Adewale for volunteering his time to work with WSBA CFO Jorge Perez to review and revise the WSBA fiscal policies. While our WSBA fiscal policies are currently in a good place, this project will further improve them for the benefit of the WSBA and its members.

I would also like to thank Governor Alec Stephens for volunteering his time to work with CFO Perez to look for ways to improve the budget process for FY 23. During the latter part of each year, the budgeting process becomes very time intensive for CFO Perez, his team, and the Budget and Audit Committee. While this is generally the way it works for organizations and businesses, it is great to be looking at this process with an eye for improvement. Governor Stephens and CFO Perez will review the budgeting process to determine if there is a way to tackle some of the budgeting process earlier in the year to hopefully decrease the workload on CFO Perez, his team, and the Budget and Audit Committee later in the year.

Last but not least, I would like to thank Governor Dan Clark and Governor Brett Purtzer for volunteering their time to work with CFO Perez to examine our current investment strategy and determine if there is a better way to invest our cash reserve. Governors Clark and Purtzer will also monitor and keep the Budget and Audit Committee updated on the efforts to sublease part of the WSBA office space in an effort to decrease our per-month lease rent amount. These two projects are very exciting to me because they give us the opportunity to grow our investments and cut our expenses, which would be a win for WSBA members and the organization!

The Budget and Audit Committee is already a huge time commitment for all of its members, so I am especially grateful to these governors for their willingness to spend even more of their time on these very important tasks.

In closing, please know that we continue to rigorously analyze how to operate as efficiently as possible while maintaining essential member supports and services, and also to look at all areas of the budget to increase revenue opportunities and improve overall efficient use of our license fee revenue and other revenue for the WSBA. It continues to be an honor to serve as WSBA treasurer. Please let me know if you have any comments or questions. Member feedback is always important to me and the Budget and Audit Committee.

The Budget and Audit Committee is committed to continuous improvement for the benefit of WSBA members.

---

**Treasurer’s Report**

**Bryn A. Peterson**
**WSBA Treasurer**

Peterson is the owner of Peterson Law, PLLC, which specializes in corporate law. He can be reached at bryn.peterson@brynpetersonlaw.com.
One of the most profound impacts of the pandemic on the legal profession has been on the way lawyers and their law firms work. When the COVID-19 pandemic enveloped the country, lawyers and law firms largely moved to remote work with most, if not all, lawyers and staff functioning outside their traditional “brick and mortar” offices. The Harvard Business Review article quoted above observes that what was once the province of technology visionaries became the practical reality for businesses large and small across the economy.

Now that some law firms are migrating back to their office space, trends—at least in the intermediate-term future—suggest something different than the pre-pandemic norm. As the opening quote notes, the emerging “new normal” appears to be the “hybrid” office—with some work from home and some work from a traditional office. Along with that, many firms are looking at the possibility of reducing their physical office footprint in light of continued remote work by subletting now-excess space to lawyers and nonlawyers alike.

In one sense, neither of these trends is new. Although traditional office space was just that—“traditional”—before the pandemic, technology made both “mobile lawyering” and “virtual” offices increasingly common. The WSBA, for example, issued an advisory opinion on “virtual” offices in 2016. Similarly, WSBA advisory opinions dating back to the 1980s discuss office-sharing arrangements with both lawyers and nonlawyers. With the hybrid model transitioning from a pandemic-born expedient to an institutionalized practice model, however, many firms are fundamentally rethinking where lawyers and staff will work going forward. In this column, we’ll focus on the attendant risk-management considerations for work both “outside” and “inside” traditional law firm office space.

Before we do, however, two caveats are warranted.

First, as firms assess their operations going forward, other substantive areas may come into play—ranging from employment law considerations for remote staff to commercial landlord-tenant law for firms re-evaluating their need for office space.

Second, because this is an evolving area, the topics discussed should not be regarded as static. For example, the hybrid model may alter both the way office space is configured and how lawyers and staff work in their office space. As firms gain experience with the hybrid model, new challenges may emerge in risk management and other potential concerns may recede. In short, firms need to institutionalize the flexibility they have demonstrated since the beginning of the pandemic.

“[E]mployees will increasingly be working in what we call the hybrid office—moving between a home work space and a traditional office building.”
— “Designing the Hybrid Office,” Harvard Business Review

New Normal: Risk Management for ‘Hybrid’ Offices

BY MARK J. FUCILE
OUTSIDE

When lawyers and staff are operating outside traditional office space, supervisory and confidentiality considerations are particularly heightened.

**Supervision.** We have both regulatory and civil duties to supervise law firm lawyers and staff. Firms discovered the challenge of remote supervision during the pandemic. The blended aspect of hybrid offices will not necessarily lessen that challenge.

Even when lawyers and staff were predominantly in traditional office settings, conflict checks were forgotten, engagement agreements were overlooked, and statutes of limitation were missed. The ABA’s periodic Profile of Legal Malpractice Claims was last updated just before the pandemic. From 2015 to 2019, administrative errors comprised nearly 20 percent of all malpractice claims nationally. The difficulty of systematically performing routine but critical tasks when everyone was in the same place suggests that firms will need to pay even closer attention to these tasks when lawyers and staff are working remotely, at least part of the time, on an ongoing basis. Although cloud-based software accessible from inside and outside offices is central in this regard, training lawyers and staff to both use the tools available and to speak up if, for example, a deadline is looming, is equally critical.

**Confidentiality.** Whether the accent is on privilege, work product, or RPC 1.6, confidentiality is one of our core duties regardless of location. Both the ABA and the WSBA provided excellent practical guidance before the pandemic on applying the duty of confidentiality to electronic communications, data transmission, and cloud-based storage. The pandemic reinforced these considerations on a very practical level as lawyers and staff adjusted to practicing from home.

The abrupt shift to remote work in early 2020 meant for many lawyers and law firm staff that kitchen tables suddenly became desks and closets became telephone booths. Longer term, firms moving to hybrid models need to assess how they support lawyers and staff to maintain both electronic and physical security when working from home. The former includes the technology necessary for secure communications and data transmission and the latter includes...
Ethics & the Law
CONTINUED >

Although the technological challenges of shared space can usually be addressed through good IT support, the human dimension largely involves continual training and reinforcement for lawyers and staff alike.

Similarly, printers should be placed where sensitive client materials are not visible to those not working for the lawyer or law firm.

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. He is the editor-in-chief of the WSBA Legal Ethics Deskbook and a co-editor of the WSBA Law of Lawyering in Washington and the OSB Ethical Oregon Lawyer. He can be reached at 503-224-4895 and mark@frlp.com.

INSIDE
Given the expense of office space, the move to hybrid work is, in many instances, causing firms to reconsider their overall need for space with fewer people in the office at the same time. For some firms, that change means reconfiguring existing space to accommodate more transient workers. In others, it means subletting newly excess space or moving their firms into a shared space. In some situations, the shared tenants are other lawyers or law firms. In others, they are nonlawyers.

Although combinations of co-tenants and corresponding risk management challenges vary, sharing space uniformly requires law firms to pay close attention to protecting client confidentiality. While older advisory opinions still provide useful insights, they are often painted against the backdrop of landline telephones and paper files. Although technology has evolved since the older office-sharing opinions were issued in the 1980s and 1990s, human behavior has not. Protecting confidentiality in shared space continues to have both technological and human dimensions.

For the technological dimension, the switch to mobile telephones and cloud-based email and files has changed the dynamics of protecting confidentiality in a shared space. The focus today is on ensuring that lawyers and law firms have their own secure electronic networks so that client-confidential materials are not accessible to others within their shared space.

For the human dimension, modern offices are often more open and use more glass internally than a generation ago. These features of modern office design put a premium on closing doors when conducting confidential client calls or meetings and being careful not to leave sensitive documents where they can be seen (whether on a computer screen or a conference table). Similarly, conversations about clients and their work should not be conducted in common areas—such as break rooms or reception areas— with others around. Those moving from an environment of space occupied by a single law firm to a space shared by nonfirm lawyers or others will need to be appropriately guarded so that the familiarity of seeing non-firm members every day does not lead to inadvertent disclosure of client confidential information in casual conversations.

Although technology has evolved since the older office-sharing opinions were issued in the 1980s and 1990s, human behavior has not.

NOTES
2. “Home” is a relative term. ABA Formal Opinion 495 (2020) addresses remote work on an extended basis from locations such as vacation homes in jurisdictions in which the lawyer may not be licensed. Because “hybrid” work typically envisions a regular presence at a firm’s “brick and mortar” office, this column is framed primarily from the perspective of lawyers who are splitting time between their primary residence and their firm’s office in the same jurisdiction.
4. “Mobile lawyering” is often used to describe lawyers who have traditional offices but use technology to practice in a wide variety of other venues ranging from airports to client facilities. See generally Joe Dysart, “The Mobile Lawyer,” ABA Journal, Apr. 2013, available at: www.abajournal.com/magazine/article/the_compleat_mobile_lawyer.
9. See RPCs 5.1(b) (supervision of lawyers), 5.3 (staff supervision); see also Ali v. American Seafoods Co., LLC, 2006 WL 1319449 (W.D. Wash. May 15, 2006) (unpublished) (disqualifying law firm based on conflicts of both lawyers and staff). For a discussion of outsourced services, see ABA Formal Opinions.


12. See RCW 5.60.060(2)(a).


14. RPC 16(c) reads: “A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.” See also RPCs 11, cmt. 8 (casting the use of technology as part of the duty of competence); 16, cmts. 18-19 (weaving together the duties of competence and confidentiality).

15. In the event of a breach, state and federal data security laws may also come into play. See generally ABA Formal Op. 483 (2018) (addressing lawyers’ obligations following a data breach); RCW 19.255.010 (data breach notification).


17. See generally WPI 174.04 (standard of care); RPCs 51, 5.3 (supervisory duties over lawyers and staff).


19. Other risk management issues from office-sharing include (but are not limited to) potential conflicts arising from being opposing counsel to another office-sharer and avoiding the implication that office-sharers are a firm. See generally WSBA Advisory Op. 1793 (1997) (conflicts), 1817 (1998) (conflicts), 1271 (firm names), 1304 (1989) (answering shared central telephone line with “law offices” greeting); see also RPC 71, cmt. 13 (avoiding implication that independent office-sharers are a firm).

Write to Counsel

From Anecdata to Data on Writing a Winning Brief

BY DAVID J.S. ZIFF

What is the underlying support for legal writing advice? Much of it, unfortunately, seems to be based on anecdata—a recommendation from a successful litigator, a conversation with a judge at a networking event, or perhaps a horror story from a senior partner. These are all good sources of wisdom, to be sure. I’ve gotten some great advice from conversations with judges and lawyers. But can’t we be a bit more scientific?

Among lawyers and, yes, even law professors, legal writing advice often suffers from a lack of rigor. Each brief, each mediation letter, each reply—these are all one-shot experiments that cannot be tested by the adjustment of variables. If a motion succeeds, then of course the writing must have been brilliant, the use of case law sophisticated, and the structure easy to follow. On the other hand, if a motion fails, well, perhaps the law just wasn’t supportive, or the judge just got it wrong. Who can say if the writing, the structure, or the presentation had a negative effect? It’s difficult to know whether to take writing advice from even the most successful attorneys. Are they successful because of some unique style quirk, or despite that quirk’s tendency to annoy judges?

With that general uncertainty in mind, I was excited to read a recent study from Brian Larson, a professor at Texas A&M University School of Law. In the study, Professor Larson set out to examine—rigorously and meticulously—how practicing lawyers and judges actually use case law to support their arguments in briefs and opinions. Sure, plenty of people offer advice on how to present arguments in legal briefs. But that advice is rarely backed up with hard data about how lawyers and judges write in the real world.

Professor Larson’s study produced some fascinating results that might influence your strategic writing decisions. But to understand those results, I need to tell you a bit about the study. Professor Larson was interested in examining how lawyers and judges use case law to support their written legal arguments. To do that, he started by categorizing different possible uses of case law. Here’s his list:

Providing an Example – Legal writers often reason by analogy to prior precedent. If an author uses the specific facts of a previous case to explain the workings of a legal rule, or to compare the precedent’s facts to her client’s facts, that use would fall under this category.

Offering a Policy Justification – Legal writers understand that broader policy considerations might influence a court’s decision. If a lawyer relies on a case to discuss the policies behind a rule, or if a judge explains that a certain policy supports an outcome, those uses would fall under this category.

Making a Generalization – A legal writer might explain a rule by describing what courts generally do, or routinely do, or traditionally do. For example, if an author uses a case to support her assertion that courts routinely enforce noncompetition

I’ve gotten some great advice from conversations with judges and lawyers. But can’t we be a bit more scientific?
attributing quotations. A quotation, however, will almost always be used in service of one of the four previously stated categories of use. But in any event, Professor Larson’s study also separately tracked the use of quotations.

Lastly, the study included a “catch-all” category, which covered the handful of uses that didn’t fit nicely into one of the four main categories. One catch-all use you’ve probably seen a few times: the parting shot! Lawyers love to include a witty quip or nice turn of phrase at the end of an argument section or in a brief’s conclusion. That kind of parting shot might not be a formal logical argument, but it certainly has some rhetorical appeal. Uses like that filled out the remaining 7 percent.

Now things get really interesting. With the categories set, Professor Larson was able to look at how (and how often) lawyers and judges employ these different kinds of arguments. His study was ingenious. First, he collected 199 different pieces of legal writing—55 court opinions and 144 accompanying briefs. To ensure some level of baseline commonality, he chose federal court cases involving copyright’s “fair use” defense. All the opinions and briefs were therefore addressing the same substantive issues. Then, with the help of some research assistants, Professor Larson broke the samples into “argument segments,” with each segment containing a single legal claim.

Armed with his categories of case law “uses,” Professor Larson was then able to examine how the lawyers and judges used restrictions that last less than one year, that use would likely fall under this category.

I can already hear your objections. There are infinite ways in which lawyers and judges use cases to support their arguments! It can’t possibly be true that these four categories of argument cover the field! Well, you’re right. But you’re probably not as right as you think. Professor Larson examined literally thousands of case references in briefs and opinions. Over 93 percent of those references fell into at least one of these categories. Of course, lawyers use case law for other purposes. One obvious use:

David J.S. Ziff is an associate teaching professor at the University of Washington School of Law. You can follow him on Twitter at @djsziff.

WRITE TO US

If you have a question about legal writing that you’d like to see addressed in a future “Write to Counsel” column by UW Law writing faculty, please submit it to wabarnews@wsba.org, with the subject line “Write to Counsel.”
case law to support the arguments in each individual segment. Not only that, he was also able to compare argument uses across different types of briefs and different types of legal writers. His findings have some useful and powerful insights for lawyers and judges alike. Without further delay, here you go:

As a baseline, the study found significant differences in how often the different categories of case uses are employed by legal writers. Perhaps not surprisingly, rule statements were the most common type of use. Legal writers used cases to support statements of a legal rule about twice as often as they used cases to advance analogies. And they used analogies about twice as often as they used cases to support policy arguments. So a hierarchy of uses emerged, at least with respect to frequency: rules over analogies, and analogies over policy arguments.

But from that baseline, the study revealed significant differences in how often different types of authors and different types of briefs employed the various case uses. For example, judges and lawyers both used rule-based arguments more than example-based arguments. But between the two groups, judges tended to use rule statements more than lawyers, who tended to use examples and analogies more than judges. Both types of writing were rule heavy, to be clear; judicial writing was just more rule heavy. As a lawyer, therefore, you might not want to mimic judicial writing’s paucity of examples and analogies, since that style does not reflect advocates’ greater use of those arguments.

Perhaps most importantly, Professor Larson found differences between winning and losing briefs. Across the board, winning briefs simply used more cases and offered more arguments. Does that mean you should pad your briefs with additional irrelevant case citations to increase your chances of winning? Probably not. The study didn’t prove causation. And it’s entirely possible, of course, that winning briefs use more cases simply because more case law exists to support a winning position. It’s not the losing lawyer’s fault that he’s stuck with less favorable precedent to work with.¹

But I don’t think the amount of case law tells the whole story. The winning briefs didn’t just use more cases to make more arguments; within those arguments, the winning briefs emphasized different kinds of arguments. Winning briefs really outpaced the losing briefs in three categories: the use of quotations, the use of examples and analogies, and the use of policy arguments.

Winning briefs really outpaced the losing briefs in three categories: the use of quotations, the use of examples and analogies, and the use of policy arguments.

Obviously, all of this should be taken with a grain of salt. Professor Larson’s study is but one look at a small set of federal district court copyright disputes. And though the study was sufficiently robust to show real differences, we can’t yet make any confident statements about causation.

But still, it’s wonderful to have real data on which to base some writing recommendations. Personally, despite all the cautionary notes, I would recommend making sure that your next brief effectively uses some examples and analogies, presents some policy arguments based in case law, and artfully employs some selected quotations. After all, it can’t hurt to at least look like a winning brief!

¹ Winning briefs really outpaced the losing briefs in three categories: the use of quotations, the use of examples and analogies, and the use of policy arguments.

NOTES
2. We do a lot of that here in “Write to Counsel!” It’s all good advice. You should check out the archives at https://www.law.uw.edu/academics/experiential-learning/writing/write-to-counsel.
CONGRATULATIONS TO
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LEILA AREFI-POUR

Q. What is the most valuable benefit members get from joining your Section that they can't get anywhere else?
The most valuable benefit for members is support and educational opportunities such as CLEs on animal law. Animal law is an area of law that touches every other area. For example, animals can become the center of issues arising under landlord/tenant law, criminal law, family law and divorce proceedings, and trusts and wills, just to name a few. With animal law becoming more prevalent, most attorneys will have an animal law case (or issue) come across their desk at some point. The Animal Law Section is here to support practitioners in their fight for animals.

Q. What is a recent Section accomplishment or current project that you are excited about?
Activities have been limited by COVID-19; however, the Animal Law Section hosted, in conjunction with the WSBA, a 2020 CLE on animals in transportation. The CLE covered animal-related cases that involved all modes of transportation (airplanes, maritime, rail, semi). At this CLE we also provided a legislative update that included the most relevant laws that practitioners may encounter, such as veterinary informed consent, outlawing breed-specific legislation, adoption of dogs and cats used for research purposes, and lethal removal of gray wolves. [The recorded version of this CLE is available for purchase at www.wsbaclerecording.org; enter 20803 in the search box.]

Q. What opportunities does your Section provide for members who are looking for a mentor or for somebody to mentor?
COVID-19 has affected the Section's ability to provide these opportunities; however, I intend to bring the project of restarting them to the forefront of the Animal Law Section during my term as chair.

Q. What advice do you have for building a successful practice in the area of law related to your Section and how does membership in your Section help do that?
Because animal law is an emerging area, it can be difficult for attorneys to find positions that are exclusively focused in this area. They do exist, and you should keep an eye out for them, but they are few and far between. Much of the time, attorneys incorporate animal law into their existing practice, by agreeing to take on an animal law case within their firm or taking animal law cases retained outside their firm. More and more firms are designating divisions in their firms to primarily focus on animal law. I would also advise a person looking to get into animal law to attend an animal law CLE and network. There are CLEs in different states and many of them are offered over Zoom due to COVID-19. The Animal Law Conference is a weekend-long conference sponsored by the Animal Legal Defense Fund (www.aldf.org) each year where people can really get an understanding of animal law. The conference also provides wonderful networking opportunities.

Q. In addition to membership in your Section, what are the best ways to stay up on the developing law in this practice area?
The best way to stay up on animal law is to keep track of proposed legislation at the federal and state levels.

Leila Arefi-Pour graduated in 2009 from the University of Louisiana at Lafayette with a degree in political science and a minor in criminal justice. She is also a 2018 graduate of Southern University Law Center (SULC) in Baton Rouge, Louisiana, and a 2019 graduate of Lewis & Clark Law School’s LL.M. in Animal Law Program. Arefi-Pour is currently an associate attorney at Vancouver Defenders in Vancouver, Washington, where she is a criminal defense attorney serving as a public defender. She also takes privately retained animal law cases. She currently serves as chair elect and secretary of the WSBA Animal Law Section and president of the Young Lawyers Section for the Clark County Bar Association.
SIDEBAR

Titles Available From the Lending Library Related to Animal Law and Other Topics

- **Careers in Animal Law**
  By Yolanda Eisenstein

- **The Essential Associate: Step Up, Stand Out, and Rise to the Top as a Young Lawyer**
  By Jay Harrington

- **The Simple Guide to Legal Innovation**
  By Lucy Endel Bassli

- **Microaggressions in Everyday Life**
  By Derald Wing Sue and Lisa Spanierman

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NMLS ID 2023310
The Acknowledging Professional Excellence (APEX) Awards honor exemplary members of the legal community, including legal professionals, judges, and members of the public.
LEGAL INNOVATION AWARD
This award recognizes legal professionals, law firms, courts, law schools, individuals, or organizations who demonstrate leadership in promoting innovation in the practice of law. Innovation may be defined as programs, processes, or technology that advance or streamline the future of the profession and accessibility/delivery of legal services.

Jacqueline G. Schafer

Schafer’s nominations centered around her groundbreaking work developing Clearbrief, a program that uses artificial intelligence (AI) to review citations in legal writing. Having served as an assistant attorney general in Washington and Alaska and as in-house counsel for the national child welfare nonprofit Casey Family Programs, she applies AI tools to improve the practice of law, particularly child welfare and foster care systems.

David A. Perez

Nominations for Perez, a partner at Perkins Coie LLP with a focus on intellectual property, centered on his pro bono work with the ACLU and Seattle University’s Korematsu Center to protect protestors during the 2020 racial justice movement. Their work resulted in a temporary restraining order against the use of chemical irritants and projectiles. Perez continued working on behalf of protestors after police violated the order, resulting in a stipulated injunction and finding of civil contempt against the city of Seattle. Perez said, “After witnessing repeated and blatant violations of protestors’ constitutional rights, we had to act.” A nominator wrote, “David has raised the stature of lawyers in and amongst the Bar and the entire community of Washington state. We all benefit from David’s pro bono work.”

JUSTICE CHARLES Z. SMITH EXCELLENCE IN DIVERSITY AWARD
Named in honor of Justice C. Z. Smith, the first African American to serve on the Washington Supreme Court, this award goes to a lawyer, law firm, or law-related group that has made a significant contribution to diversity in the legal profession.

James F. Williams

Williams is a managing partner at Perkins Coie LLP where he litigates complex business cases. His extensive pro bono work includes Wilbur v. City of Mt. Vernon, 989 F. Supp. 2d 1122 (W.D. Wash. 2013), which led to substantial reforms protecting the right to counsel in Washington. His leadership roles in community service organizations such as the Washington Leadership Institute, Treehouse, and the Metropolitan Seattle Urban League, as well as his everyday dedication and integrity, inspired the outpouring of nominations from his colleagues and friends.

NOTE: APEX Award winners are nominated by WSBA members and members of the public. Nominations are reviewed by the WSBA APEX Awards Committee (made up of members of the WSBA Board of Governors), which makes recommendations to the full Board of Governors. Nominations for the 2022 awards open in January. Questions can be emailed to barleaders@wsba.org.

ANGELO PETRUSS AWARD FOR LAWYERS IN GOVERNMENT SERVICE
Named in honor of Angelo R. Petruss, a senior assistant attorney general who passed away during his term of service on the WSBA Board of Governors, this award is given to a lawyer in government service who has made a significant contribution to the legal profession, the justice system, and the public.

Julian M. Bray
(Awarded posthumously)

Bray spent the majority of his career representing the Department of Social and Health Services and the Department of Children, Youth, and Families through the Washington Attorney General’s Office. He helped found the Pierce County chapter of Lawyers Helping Hungry Children and volunteered on the city of Tacoma’s Human Services Commission, as well as the WSBA’s Client Protection Board, Character and Fitness Board, and Disciplinary Board. Supporters noted he was a significant factor in the success of the Family Recovery Court in Pierce County and led the development of the first Baby Court in Washington. A supporter emphasized that he was “one of the most astute, erudite, influential, and congenial lawyers to have ever served in the Washington State Office of the Attorney General and as a member of the Tacoma-Pierce County Bar Association.”

AWARD OF MERIT
This award is the Bar’s highest honor and is given to an individual for a recent, singular achievement. The singular achievement may involve a display of exceptional courage in the face of adversity, thus bringing credit to the legal profession. It is awarded to individuals only—both legal professionals and members of the public.

David A. Perez

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**The 2021 APEX Awards**

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**PROFESSIONALISM AWARD**

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

**Lt. Col. Melanie J. Mann**

Lt. Col. Mann served as a Marine Corps Judge Advocate General (JAG) Officer in prosecution and defense roles for many years before assuming the role of military judge in 2020. She maintained momentum on her docket and was instrumental in keeping recruits’ basic training on schedule despite coronavirus restrictions. Her work also opened the door for the first transgender Marine recruits and the integration of women into combat roles. Prosecution and defense groups across the Marine Corps employ training and certification programs she developed.

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**LIFETIME SERVICE AWARD**

This is a special award given for a lifetime of service to the legal community and the public.

**William H. Gates II**

(Awarded posthumously)

Gates was an unforgettable role model, mentor, and friend whose work touched countless lives. He left an indelible impression through his practice, his advocacy for tax fairness and diversity in the legal profession, and his service to many nonprofit, philanthropic, and civic entities, including terms as president of the Seattle-King County Bar Association (now the King County Bar Association) and the WSBA.

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**OUTSTANDING JUDGE AWARD**

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

**Chief Justice Gerry L. Alexander (Ret.)**

Washington Supreme Court Chief Justice Alexander’s nomination described how he personifies what the chief should be: smart, hardworking, humble, having a keen understanding of the law and stare decisis while also adapting to changing times, maintaining the peace among his fellow justices, and a dedication to public outreach.

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**NORM MALEN LEADERSHIP AWARD**

This award is presented in partnership with the Access to Justice Board in honor of the late King County Prosecutor Norm Maleng’s legacy as a leader. He was an innovative and optimistic leader committed to justice and access to justice in both civil and criminal settings. Within the profession, his leadership was characterized by his love of the law and commitment to diversity and mentorship. This award recognizes those who embody these qualities.

**Edmund R. Witter**

Witter serves the Housing Justice Project as the senior managing attorney. His nominators emphasized his commitment to racial justice and equity and his advocacy for improved housing legislation, and stressed that he “embodies commitment to access to civil legal aid, advocacy for marginalized communities, and a willingness to change the material conditions preventing tenants from fully exercising their rights.”
PRO BONO AND PUBLIC SERVICE AWARDS

These awards are presented to an individual, a lawyer, a legal professional, law firm, or other legal entity for outstanding cumulative efforts in providing pro bono services or for giving back in meaningful ways to the public, the community, or the legal profession. Nominations are made in two categories: (1) for an individual, or solo or small firm practitioner; (2) for a multi-person law firm or organization.

GROUP

Virtual Help, a collaboration between Perkins Coie LLP, Microsoft, and Legal Hope

Virtual Help responded to domestic abuse survivors’ urgent need for access to courts following the early coronavirus restrictions. The groups collaborated to create an innovative program facilitating remote access to courts and pro bono counsel.

INDIVIDUAL

Master Chief Petty Officer Sally A. Webster

Master Chief Petty Officer Webster took the unusual step of volunteering for the Navy Reserve five years after starting with the legal department at Microsoft, where she is now a senior attorney. She went on to serve tours in Iraq and Afghanistan. Thanks to her dedication and acumen, she achieved the highest positions possible for an enlisted reservist, command master chief of the Navy Reserve Law Program and the senior enlisted advisor to the deputy judge advocate general for Reserve Affairs and Operations. She has also volunteered with organizations helping unaccompanied immigrant children and Microsoft’s military veteran’s employee network. Her service, integrity, and mentorship left a mark on colleagues and friends in and outside the service.

SALLY P. SAVAGE LEADERSHIP IN PHILANTHROPY AWARD

Sally Savage led the Washington State Bar Foundation’s renaissance and was a catalyst for its refocused mission to sustain the WSBA’s efforts to advance justice and diversity. Her clarity, expertise, and vision helped establish a path for enduring support of a strong bar association that provides statewide leadership on matters of profound importance to the profession and the citizenry. Savage’s spirit of generosity and leadership continue to inspire all who recognize the transformative potential of philanthropy. Philanthropy means “love of humanity” and focuses on private initiatives for the public good, focusing on quality of life. Savage emulated this spirit of philanthropy in her life, and it is in her memory that the Bar Foundation continues to honor donors, volunteers, and friends of the Washington State Bar Foundation who embody her spirit.

OUTSTANDING YOUNG LAWYER AWARD

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

Paul Heer

Heer is an associate in Foster Garvey PC’s investment management group who distinguished himself in only a few years of practice. His dedication to pro bono service goes far beyond the norm and includes a successful clemency petition unanimously supported by the state Clemency & Pardons Board. Many advocacy groups take advantage of Heer’s advice and mentorship and use his pro bono work as a template in civil rights litigation and training for the next generation of advocates.

Karen W. Murray

Murray’s supporters highlighted this distinguished social justice advocate’s years of service as a public defender and mentor. Supporters particularly emphasized her enthusiasm for the King County Bar Association’s Dr. Martin Luther King Jr. Luncheon Committee.

For more information and to view the entire 2021 awards presentation ceremony as well as the award winners’ videos, visit www.wsba.org/about-wsba/apex-awards.
Does your telecommuting policy increase your risk of workers’ compensation liability?

By Shawna G. Fruin and Flynn P. Burke
When COVID-19 emerged as a public health crisis, it became imperative to shift an unprecedented portion of the global workforce to remote employment. This abrupt sea change, in addition to countless other upheavals to daily life, left employers scrambling to keep businesses afloat. Many all at once needed to provide digital devices, secure access to applications, increased bandwidth, and more. Many more were forced to reimagine employee functions on the fly. The number of workers affected by that shift is staggering; according to Forbes, around 5 percent of employees worked remotely before the pandemic; that figure is now at least 20 percent of the greater workforce, and is reasonably expected to increase over time.¹

As employers rose to the challenge of accommodating remote work, telecommuting policies followed—contracts were drawn between employer and employee, outlining guidelines, standards, and expectations for working beyond the confines of centralized space. Common sense suggests such policies are a sensible step to ward off conflict and establish norms and customs to address unfamiliar issues, such as identifying which employees are eligible to work from home, time reporting requirements, overtime hours, breaks, health and safety, technology agreements, supplies, tech support, and security concerns. Experience shows those policies are all too frequently silent on a key concern: The risk of liability for employee injuries or illnesses occurring in their remote workspaces.

Under the Industrial Insurance Act, employers are responsible for injuries or illnesses that occur “in the course of employment.”² Yet it is not easy to spell out where or when an employee is acting “in the course of employment,” especially when comparing remote workers to those who perform their duties in an office or at a jobsite. If an employer implements a telecommuting policy that fails to take heed of workers’ compensation principles, the employer is doing so at the risk of inadvertently increasing the circumstances in which it could be held responsible for an industrial injury or illness claim.

**WHAT IS ‘THE COURSE OF EMPLOYMENT’?**

“Acting in the course of employment” means that the employee is acting at the employer’s direction or in the furtherance of the employer’s business.³ This definition—somewhat unique to Washington as compared to other states—can encompass endeavors that fall well outside the performance of normal or anticipated employment duties. For example, injuries that occur while attending to most personal comforts—noshing a snack, stepping out for a smoke—are firmly within the “course of employment” if the law specifically defines a remote worker’s “course of employment”; however, there is no precise regulation or statute on the matter, and past court and administrative decisions provide similarly slender instruction. That said, a handful of examples show how even well-intentioned employer policies may unintentionally create liability for workers’ compensation claims.

In Department of Labor and Industries v. Johnson, Charles Johnson was sent home from work for disciplinary reasons and told not to perform his usual work functions.⁶ Then, during typical work hours, Johnson severed three of his fingers using a power saw for a personal project. Johnson pursued a workers’ compensation claim, contending that he was following the employer’s directive—staying at home, and not performing his usual work functions—so, in his view, the injury occurred in “the course of employment.” The employer countered that it never told Johnson to engage in personal projects, much less with power tools, and noted that such projects did not further the employer’s business. The claim was variously allowed and denied at different stages, but ultimately the Washington Court of Appeals weighed in, concluding that Johnson was not “acting in the course of employment” at the time of injury because the personal project was neither required by the employment contract nor specifically performed at the employer’s direction.

**Tip:** This fact pattern shows that decision-makers will focus narrowly on the worker’s specific activities when deciding if an injury is “in the course of employment.”

In re: Christine Haywood is a case that made its way through administrative hearings at the Board of Industrial Insurance Appeals,⁷ Haywood regularly worked at home on Fridays, and occasionally in the mornings on other days before traveling to

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³ This definition—somewhat unique to Washington as compared to other states—can encompass endeavors that fall well outside the performance of normal or anticipated employment duties. For example, injuries that occur while attending to most personal comforts—noshing a snack, stepping out for a smoke—are firmly within the “course of employment” if the law specifically defines a remote worker’s “course of employment.” However, there is no precise regulation or statute on the matter, and past court and administrative decisions provide similarly slender instruction. That said, a handful of examples show how even well-intentioned employer policies may unintentionally create liability for workers’ compensation claims.

⁴ By contrast, Washington law draws a line at the employer’s parking lot, where injuries are not compensable despite presumably occurring in the course of furthering employment—i.e., showing up for work.⁵ Outside of a few settled circumstances, whether an employee is

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an office. On a Monday morning, Haywood worked for about 30 minutes at home (at her discretion) to prepare for a meeting at the office, then took her materials from home, drove to the office, and slipped and fell in the employer’s parking lot. Haywood pursued a workers’ compensation claim, contending that remote workers should be deemed “acting in the course of employment” in the same manner as traveling employees—that is, with nearly continuous coverage. But in a non-significant decision (meaning the Board did not find that the decision was of substantial importance), the Board disagreed. It concluded that telecommuting employees are not akin to “traveling” employees under the law, as traveling employees often have greater risks in the course of travel and less control over their location, destination, and/or activities. The Board also noted that Haywood’s remote worksite was probably limited to her home desk and telephone.

**Tip:** This fact pattern shows that a remote worker’s jobsite probably enjoys less than continuous coverage, and that the parking lot exception can still apply to a remote worker’s claim.

*In re: Leeann Starovasnik* is another case that made its way through administrative hearings, before reaching the Superior Court. Starovasnik exclusively worked from home, handling client calls over the phone. The employer allowed her to take breaks if she logged off her work computer and made clear that she was unavailable. The employer’s training manuals also encouraged healthful activities during breaks, such as walking, stretching, and taking trips around the block for exercise. On one such trip around the block while walking her dog, Starovasnik was injured. She pursued a workers’ compensation claim, contending that she was “acting in the course of employment” and attending to her personal comfort. The employer countered that her walk was a significant deviation from her duties. The Board agreed with the employer, finding Starovasnik was not “acting in the course of employment.” But a superior court judge disagreed, allowing the claim because “[Starovasnik] was near her home office at the time of the fall and was performing an activity that was reasonable and encouraged by her employer.”

**Tip:** This fact pattern shows that encouraging specific break-time activities in a telecommuting policy may bring those activities into the course of employment. Hence, a well-intentioned policy that encourages personal comforts and the like might inadvertently increase the chances that the employer is responsible for an associated injury or illness.
her home, could fit Starovasnik’s “course of employment.” Hence, it might be best to omit any suggestion of how remote employees spend their time during a break.

Third, consider specifically delineating work hours, enforcing compliance, and documenting when your remote employee is on the clock. While it is possible that one could be deemed “in the course of employment” outside those hours, a clear bifurcation of what the employer considers work and non-work time should help decision-makers assess whether an incident is covered by workers’ compensation.

The facts of the cases described above highlight how well-intentioned telecommuting policies that lose sight of workers’ compensation principles might inadvertently expand an employer’s liabilities. Consider having a workers’ compensation attorney review your new or revised proposed telecommuting policy to help steer clear of unintended consequences and exposures.

NOTES
2. RCW 51.32.010.
3. RCW 51.08.013.
4. See e.g., In re Janise Dial, BIIA Dec., 01 17217 (2003) (injury during a smoke break is within the course of employment); In re Philip Carstens, Jr., BIIA Dec., 89 0723 (1990) (injury eating candy from a receptionist’s desk is in the course of employment); Knight v. Dept. of Lab. & Indus., 181 Wn. App. 788, 798, 321 P.3d 1275, 1280 (2014) (drinking alcohol in moderation “may be considered a personal comfort,” but drinking to the point of intoxication is outside of the scope of employment).
5. RCW 51.08.013(1).
8. WAC 296-12-195.
Reach Your New Year’s Resolution Goals With Help From ProBonoWA.org

BY MICHAEL R. ADDAMS AND JACQUI MERRILL MARTIN

Even in non-pandemic times, New Year’s resolutions are notoriously hard to keep. According to some studies, as many as 88 percent of them fail. ¹ Research has shown that human willpower is weak, especially when the brain is overtaxed by stress and external stimuli. ²

Attorneys—with lives full of stress and external stimuli—are not immune to this weakness. Despite what our critics and our biggest fans (happy former clients) both may suggest, attorneys are people, too. We have our aspirations, and we have our limits. We can easily take on too much and push ourselves too far. Whether it is because we love our work, are vying to make partner, or are trying to hit our minimum expected billables for the year, we can make it hard to achieve our self-improvement goals.

So, what can we do if we want to actually achieve our goals and accomplish our New Year’s resolutions in 2022? Suggestions include making a resolution with a friend for accountability, planning a re-

ProBonoWA.org makes it easier than ever to keep your resolutions and get involved in pro bono opportunities and community-driven efforts.
the centralized platform to seek out organizations that align with your interests and availability. Many of these fantastic legal service organizations now offer remote opportunities for volunteer legal professionals, making it easier to volunteer all across Washington state.

Have you ever considered trying your hand at a different practice area, but hesitated because you lack experience? Pro bono service is a great way to learn and gain mentorship from organizational leaders who are experts in their fields. Many QLSPs and other organizations listed on www.ProBonoWa.org offer training, resources, and other support to those who wish to volunteer in a subject matter outside of their practice area. Beyond expanding your base of knowledge, you can network with other legal professionals who are also committed to serving others who lack access to justice.

According to a 2015 study by Washington’s Office of Civil Legal Aid, 18 percent of Washington residents live at or below 125 percent of the federal poverty level, and 70 percent of low-income residents experience at least one civil legal problem per year. The need for pro bono attorneys is great, particularly in rural areas where access to justice is often more restricted and resources are more limited. Many of these needs are being addressed by QLSPs and other organizations on www.ProBonoWa.org.

With more than 100 statewide organizations registered on the site, you can filter your search by practice area, clientele, and location to find the perfect match. Each organization’s profile includes pertinent information, such as the organization’s mission, whether your time is eligible for CLE credit, whether training is available, and who to contact for more information. On the site, you can simply click a link to contact an organization directly, or you can copy the organization’s listed contact email and write a personalized message to share more about yourself and how you would like to help.

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**Michael R. Addams** is the co-chair of the WSBA Pro Bono and Public Service Committee. He is currently the director of the Support Enforcement Program at the Washington Association of Prosecuting Attorneys. He has practiced in Washington since graduating from Gonzaga University in 2014 with a dual J.D./M.B.A. Addams is also an online adjunct instructor for BYU-Idaho and Eastern Washington University and serves in the Washington Air National Guard. He can be reached at mraddams@wapa-sep.org.

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Reach Your New Year’s Resolution Goals With Help From ProBonoWa.org

These organizations are grateful for your interest. The more information you are able to share in your initial contact, the better.

Pro Bono Washington also features a calendar of upcoming events. The calendar is a great way to find pro bono opportunities and trainings that fit your busy schedule. You can also find a library of resources and an FAQ page that addresses common pro bono-related questions, like whether you can engage in pro bono after retiring (spoiler alert: the answer is yes).

If you are committed to making a resolution this year, consider visiting www.ProBonoWa.org and reaching out to an organization to take just one pro bono case. That one case will make a difference in the life of a fellow Washingtonian, and it will help you on your journey to make and meet a meaningful and realistic goal in 2022.

This article was made possible by volunteer contributions from the WSBA Pro Bono & Public Service Committee (PBPS), whose mission is to serve WSBA members by communicating opportunities and eliminating barriers to providing pro bono services to communities that experience poverty and injustice. The PBPS is always looking for dedicated team members seeking to close the access to justice gap. If you are interested in getting involved with the PBPS, contact Saleena Salango at saleenas@wsba.org.

NOTES

1. www.wsj.com/articles/SB10001424052748703478704574612052322122442
2. www.wsj.com/articles/SB10001424052748703478704574612052322122442
Invest in Equity & Justice

GIFTS TO THE Washington State Bar Foundation support the Washington State Bar Association’s Pro Bono & Public Service, and Diversity, Equity & Inclusion programs. Initiatives like the Moderate Means Program and the Powerful Communities Project champion justice by helping ensure access to legal services for people throughout Washington.

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Want a Successful Mentoring Relationship? Focus on Building Trust

BY LISA Z. FAIN

Mentoring can be a great tool for lawyers to increase job satisfaction, accelerate learning, and develop new skills. It is an effective way for law firms and companies to create inclusive work environments, attract and retain talent, and increase productivity. To fully realize these benefits, mentoring relationships and mentoring initiatives must take care to build trust.

At its core, trust is the belief that someone or something is safe, honest, and reliable. It is unsurprising that mentoring relationships are more effective when they are built on trust. But trust can be hard to create in formal mentoring programs without an understanding of the components of trust and the behaviors necessary to build it.

There are three kinds of trust that are critical to effective mentoring, and each takes time and attention to build. Each is essential to building high-performing mentoring relationships that last.

**Self-trust**

“With self-trust, you’re positioned to become the best possible version of yourself. Without it, you’re stuck in status quo, repeating patterns, reliving worn-out scenarios and missing golden opportunities to take your personal and professional relationships to the next level.”

The foundation of a trusting mentoring relationship is self-trust. Self-trust is how mentor and mentee prepare for their relationship. Each must be willing to look inward and be willing to show up fully to the mentoring relationship. They must believe that they have the capacity to learn and grow from one another.

**Markers of Self-Trust**

Mentees must let go of the idea that they have to show up as a blank slate for their mentor and follow their mentor’s direction. They must approach the mentorship relationship with self-awareness about their limitations, demonstrating curiosity, letting go of any judgments they have made about their current challenges, and adopting a growth mindset. That is, they must trust themselves enough to believe that they can let go of existing limitations and become the person they need to be in order to achieve their own goals. As Reina and Reina note, “Trusting yourself gives you a starting point to face challenges.”

Mentoring is a reciprocal learning relationship in which mentor and mentee co-create the terms of their relationship by setting agreements about how they will work together. This requires mentees to trust that they know how they learn best and that their preferences for the working relationship are as valid and important as their mentor’s. It requires mentors to become aware of how they might need to develop their mentoring skills and to let go of the notion that they must have all the answers for their mentee.

Self-trust requires both mentor and mentee to have confidence that if they are vulnerable and share their challenges with their mentoring partner, it will strengthen the relationship and the mentoring outcome.
**Want a Successful Mentoring Relationship? Focus on Building Trust**

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**How to Foster Self-Trust**

Here are three ways mentors and mentees can build self-trust:

1. **Set aside time for self-reflection prior to engaging in mentoring.** Self-trust begins with self-awareness. Take a few moments to think about what you are bringing to the mentoring relationship and to articulate your own expectations and assumptions.

2. **Co-create agreements that meet both people’s learning needs and priorities.** Discuss these with your mentoring partner and take care to form guidelines for your relationship that meet both of your preferences.

3. **Get comfortable being uncomfortable.** Mentors, this means admitting when you don’t know the answers and sharing your own challenges with your mentee. Mentees, this means being willing to take risks and try new things.

**INTERPERSONAL TRUST**

The next kind of trust is interpersonal trust, which is the trust that mentor and mentee develop in each other. Interpersonal trust allows mentoring partners to engage with one another in an environment of psychological safety, where each can share openly and show up authentically without fear of judgement.

**Markers of Interpersonal Trust**

Interpersonal trust is marked by a shared intent to focus on the developmental needs of the mentee, an openness to feedback, and an assumption of positive intent. Trustworthiness comes from one’s behavior, not one’s intent, so it is critical to demonstrate the behaviors that catalyze trust.

Professor Roger Mayer and his colleagues at the University of Notre Dame and Purdue University identified three factors of perceived trustworthiness: ability (possessing the skills, competencies, and characteristics necessary for success), benevolence (wanting to do good to and for the other), and integrity (adherence to principles, values, and agreements that the other finds acceptable).³ Here’s how to demonstrate trustworthy behavior in each of those categories:

**How to Foster Interpersonal Trust**

1. **Behaviors that demonstrate ability.** Mentors can demonstrate their ability to be trustworthy by exercising sound judgment and by asking questions of the mentee so they can come to their own conclusions, rather than telling the mentee what to do. Mentees can demonstrate the ability to be trustworthy by stepping out of their comfort zone, being willing to take risks, being curious, and showing up ready to learn.

2. **Behaviors that demonstrate benevolence.** Demonstrate benevolence by prioritizing mentoring, limiting distractions during mentoring, and showing up for mentoring meetings prepared. Check in frequently on the relationship—show a willingness to improve your mentoring relationship by adjusting the way you conduct your meetings if necessary. Be candid about your observations and your opinions. Mentors, extend your network to your mentees. Mentees, share feedback and progress with your mentors.

3. **Behaviors that demonstrate integrity.** Integrity requires each mentoring partner’s fidelity to principles, values, and agreements that the other finds acceptable. To demonstrate integrity, mentoring partners should adequately prepare for mentoring, keep their agreements to each other, protect confidentiality, and stay connected and accountable to one another.

**INSTITUTIONAL TRUST**

The final level of trust essential for successful mentoring is institutional trust. Too often, organizations miss the importance of creating trust beyond the mentoring pairs. When there is institutional trust, individuals have trust in the efficacy of the mentoring program and trust in the organization to protect and value mentoring.

**Markers of Institutional Trust**

Without trust in the mentoring program, participants are less likely to maintain engagement in mentoring or to believe it will yield measurable results. This becomes a self-fulfilling prophecy. Some markers of trust in a mentoring program are: training mentors and mentees, equipping mentor-managers with skills and resources for supporting pairs, providing resources for mentoring pairs, and reinforcing learning throughout the mentoring period by sharing milestones or best practices.

When program participants do not trust that an organization values its mentoring initiatives, they doubt that opportunities will be available or that the organization values the development of its people. They will be less likely to volunteer to participate in mentoring. Some markers of institutional trust in the organization’s commitment to mentoring are: opportunities to become a mentor and find a mentor, dedication of financial and human resources to creating effective mentoring initiatives, and a demonstrated understanding of the alignment of mentoring with organizational strategy and business outcomes.

**How to Foster Institutional Trust in a Mentoring Program**

Here are three ways that organizations can demonstrate trustworthiness in their mentoring programs:

1. Provide training and resources for men-

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How to Foster Institutional Trust in an Organization's Commitment to Mentoring

Three ways to demonstrate organizational trustworthiness are:

1. Leadership participation in and endorsement of mentoring. Leaders can and should be mentors. At the least, leaders should discuss the importance of mentoring and encourage team members to find a mentor and mentor others.

2. Alignment with organizational objectives. When mentoring initiatives are aligned with other leadership development initiatives like retention; culture change; and diversity, equity, and inclusion, they are more likely to be successful.

3. Create accountabilities around mentoring. Set an expectation for new and experienced lawyers to participate in mentoring. Reinforce this expectation in performance reviews and company-wide communications, and recognize mentoring as you would other positive contributions.

Remember that building trust takes time. With time, intention, and attention across each level of trust, your mentoring initiatives will be strengthened and result in better outcomes.

NOTES

1. Trust and Betrayal in the Workplace, 2nd ed., Dennis and Michelle Reina, (Berrett-Koehler, 2015)

2. Id.

Advocating for Clients in Jail

BY ETHAN FRENCHMAN

The goals of a zealous criminal defense are well known: to get one’s client out of jail and achieve the best possible outcome for the case. Attorneys have honed the skills to achieve these goals—creative arguments, effective cross-examination, motions practice, and communicating to a court or jury that one’s client is more than what may have occurred on one of the worst days of their life.

However, the past year has brought into even greater focus that these goals and the traditional tools of courtroom lawyering used to achieve them are insufficient to address the many problems our clients face when they are incarcerated pretrial.

Since 2016, Disability Rights Washington has monitored nearly all of our state’s 58 city, county, and regional jails. We have found that people in jail are commonly placed in solitary confinement, denied adequate medical and mental health care, and have limited ability to communicate with people outside while awaiting trial.²

The reach of these harms is staggering. The average total daily population of all of Washington’s 58 jails is greater than 12,000 people.³ Because jail stays typically last for a period of months or weeks, this large number hides an even darker reality: According to one estimate, no fewer than 98,000 people are booked into Washington jails each year.⁴

As those of us who have practiced in Washington’s criminal courts know all too well, people in jail are typically there be-
As those of us who have practiced in Washington’s criminal courts know all too well, people in jail are typically there because they are too poor to pay bail. They disproportionately identify as a racial minority, and they are more likely to be in need of medical care, social services, or other assistance. The U.S. Department of Justice has estimated that approximately 40 percent of people in jail self-identify as having at least one disability. People in jail are also commonly sick and living with serious underlying medical conditions, and have mental health needs. When they arrive in jail, they have often gone without treatment for a substantial period of time.

Unfortunately, jails and the staff that run them have little incentive, on their own, to care for people in custody. Strapped county budgets and the federal Medicaid inmate exclusion policy mean that there is little money available for care. Notwithstanding state and federal laws that require jails to provide necessary medical treatment and accommodations, DRW has found through its monitoring that jails in Washington, like jails across the country, commonly fail to provide such care. And because Washington has no standards or effective oversight bodies to make jails accountable, incarcerated people often have no place to turn for help.

Given this hard reality, criminal defense attorneys have a critical role to play in helping their clients receive better treatment in jail during the pendency of their criminal case by educating them on how they can advocate for themselves and, in some cases, stepping in to advocate for their clients with jail staff and administrators. Doing so may also help a client be released from jail, if the jail cannot meet their needs, and may improve case outcomes by facilitating the client’s participation in their criminal case and furthering the attorney-client relationship.

**EDUCATE AND ENCOURAGE SELF-ADVOCACY**

Most jails in Washington operate complicated internal administrative systems for people in custody to make requests and file complaints about their treatment. These systems are often daunting and inaccessible to people with disabilities. People in jail may also be afraid that speaking up could result in retaliation or make them a target for harassment or violence from other people in custody or from staff. Attorneys can educate and encourage their clients on how they can advocate for themselves in jail. A lawyer who is well-versed in a jail’s administrative processes can provide tailored advice to such clients.

The simplest advice clients in jail may need to hear is encouragement to speak up and raise an issue with staff. Depending on the facility and the nature of the problem, an informal request to an officer on the individual’s unit, or medical staff during pill line (where individuals wait in line to receive their medications) or a visit to a clinic, may be enough to resolve the client’s issue. Because such requests are not documented, however, they cannot be used to substantiate subsequent allegations of mistreatment. On the other hand, and for the same reason, such informal requests create less risk of retaliation.

Clients can also be encouraged to submit a “kite.” A kite is a fast, formal method for incarcerated people to make written requests. They are also used to share information and ask questions. While some jails have single kites, other jails—for example, King County Correctional Facility—use different kites in a complex array of colors to ensure that the individual’s concern is directed to the appropriate staff.

If a kite does not resolve the issue, an incarcerated person can typically also submit a formal grievance. A grievance is a written complaint about one’s treatment, conditions in the jail, or staff actions. Grievances are often reviewed by more senior staff or leadership. A client who is interested in writing a grievance should be advised to complain about only a single issue. To the best of their ability they should prepare a short, concise statement that identifies the problem they are having, the steps they have taken to resolve the
issue, any witnesses or necessary information, and a proposed remedy.

For example, if a client reports that they are not receiving their psychiatric medication, an attorney can encourage the client to use the kite system to report to jail health staff their diagnosis, the contact information for their provider or pharmacy (if any), any prior prescriptions, their symptoms, and, if they have never received medication before, why they think medication may be beneficial. If this kite is ignored or results in an inadequate response, the attorney can encourage the client to write a grievance describing when they wrote their kite, what information they included in their kite, why the response was inadequate, and the remedy sought (such as psychiatric medication).

Some jails also operate an administrative appeals process through which an incarcerated person can appeal the jail’s response to a formal grievance. Where they exist, appeals are typically reviewed by senior jail leadership under strict timeframes. As with grievances, people in jail should be encouraged to appeal grievance responses with which they disagree, explaining the specific problem with the response and their proposed solution.

Exhausting a jail’s administrative remedies, including grievances and appeals, is typically a prerequisite for filing a lawsuit against a jail regarding a person’s conditions or treatment. Failure to exhaust an available administrative remedy is grounds for dismissal under the federal Prison Litigation Reform Act. 42 U.S.C. §1997e(a)). Clients and attorneys should also keep in mind that not all issues—for example, matters beyond the control of the jail, issues affecting other people, and issues for which there is a separate appeals process—can be raised via the jail grievance process.

**WHEN ATTORNEYS SHOULD CONTACT JAILS**

Some clients face emergent and potentially life-threatening issues in jail. Others may not have access to a jail administrative process because they are in solitary confine-
ment, are in the middle of an acute psychiatric crisis, or are unable to use the process for other disability-related reasons. For still others, the jail may simply be refusing to solve a client's problem after the person has exhausted the jail's administrative process. For such people, the defense attorney is in the best position to reach out to the jail and advocate for the client's needs.

There are several steps that defense attorneys can take to effectively advocate for their client in jail. Sometimes a problem can be resolved with a simple telephone call with jail leadership or medical staff. An attorney may express concerns based on the client's report of their treatment or conditions and propose a solution or remedy. While discussing the issue over the phone, an attorney should request the contact information, including email address, of the person to whom they are speaking and promptly follow up with an email documenting the conversation. Even if the jail refuses to take further action, such an email could prove to be a valuable record as proof that the jail was notified of a concern.

Attorneys can also perform short, simple investigations into their client's conditions at the jail. This typically involves nothing more than having a client sign a release of information for the jail to share medical and custodial records with the attorney. Jail medical records must be provided under the Uniform Health Care Information Act (RCW 70.48), and custodial records must be provided under the Public Records Act (RCW 70.02), and custodial records with the attorney. Jail records can be provided under the Public Records Act (RCW 70.48) and promptly follow up with an email documenting the conversation. Even if the jail refuses to take further action, such an email could prove to be a valuable record as proof that the jail was notified of a concern.

There are several steps that defense attorneys can take to effectively advocate for their client in jail. Sometimes a problem can be resolved with a simple telephone call with jail leadership or medical staff. An attorney may express concerns based on the client's report of their treatment or conditions and propose a solution or remedy. While discussing the issue over the phone, an attorney should request the contact information, including email address, of the person to whom they are speaking and promptly follow up with an email documenting the conversation. Even if the jail refuses to take further action, such an email could prove to be a valuable record as proof that the jail was notified of a concern.

ISSUES FACING PEOPLE WITH DISABILITIES IN JAIL

Under Title II of the Americans with Disabilities Act (ADA), “no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.” 42 U.S.C. § 12132. Jails are subject to the ADA. Therefore, jails must not exclude people with disabilities from participation in jail programs, services, and activities. Pa. Dep’t of Corr. v. Yeskey, 524 U.S. 206 (1998). That includes the ability to safely use hygiene services such as toilets and showers, to engage in exercise, and to use the mail, administrative kite and grievance program, and phones. Jails must also provide people with disabilities accommodations to ensure that they can participate in jail programs such as educational classes, religious services, and work assignments on the same basis as other people. See Pierce v. County of Orange, 526 F.3d 1190, 1214 (9th Cir. 2008) (citing Yeskey, 524 U.S. at 209-10 ); 28 C.F.R. § 35.152.

Disability Rights Washington has found that many jails across the state fall short of these ADA requirements.11 While jail is difficult for everyone, it is particularly challenging for people with disabilities. Jails often fail to provide people with disabilities even basic accommodations to ensure that they can properly communicate their needs to jail staff. Such people may require additional assistance from their defense attorney to receive necessary accommodations.

For example, jails should provide individuals with assistance in writing and reading mail, kites, grievances, and law library materials.

Jails should also provide accommodations to people who are deaf or hard of hearing. Some jails offer Video Relay Service, which is a video-enabled translation service for people who use American Sign Language to communicate. Jails must also provide hearing aids and assistive listening devices as necessary. Such tools are critical for people to communicate not only with defense counsel, but jail staff, medical providers, and the court.

Similarly, individuals with intellectual disabilities that impact their cognitive functioning and skills may be unable to use phones or jail kite and grievance systems. For such individuals, it is crucial that defense attorneys communicate with jails on their client's behalf to explain their needs and advocate for them to receive appropriate accommodations, such as assistance in using phones and administrative processes.

While jail is difficult for everyone, it is particularly challenging for people with disabilities.

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CONTINUED >
Advocating for Clients in Jail CONTINUED >

UNIQUE PROBLEMS FOR TRANSGENDER PEOPLE IN JAIL

Transgender people face many of the same challenges as other people in jail, but often face additional and serious risks of harm due to prejudice or ignorance. Studies have shown that transgender people in correctional settings are at extraordinarily high risk for sexual abuse, assault, and self-harm.12

Due to these risks, the federal Prison Rape Elimination Act and its implementing regulations require that transgender people be housed in correctional facilities, including jails, according to the results of an individualized assessment of the person’s safety that includes input from the person.13 Jails violate federal law if they mechanically house transgender people according to their sex assigned at birth without assessment of their individual safety or medical needs.

Many transgender people experience gender dysphoria, which is distress caused by a discrepancy between a person’s gender identity and their sex assigned at birth. In 2019, the Ninth Circuit made clear that correctional facilities must provide medically necessary care for gender dysphoria steps to have the client’s doctor or pharmacy contact the jail and inform the jail of its legal obligations to provide gender-affirming care.

Finally, it is important for transgender people in jail to be assigned the proper name and gender marker. The person’s incarcerated name and gender marker will be used not only to identify the person in the jail, but in state prison if they are transferred. Defense attorneys are in a good position to assist transgender clients by providing documents to a jail of a person’s legal name change order from a county auditor’s office and government identification with their current gender marker. In addition, defense attorneys can take steps to have the criminal case caption amended so that the client’s case name reflects their current legal name. Steps like these can ensure that transgender clients are able to live with dignity and without the fear of having their transgender identity needlessly disclosed due to inaccurate and out-of-date jail and court paperwork that will follow the client for the rest of their life.

CONCLUSION

Investing the relatively small amount of time necessary to pursue the steps discussed in this article could have enormous benefits, both for the client and for the attorney-client relationship. For many clients, resolving an emergent medical or mental health issue can be lifesaving. For others, finding a solution to such issues, or a disability accommodation, is necessary to their participation in their own defense. Clients may need their attorney’s help to access treatment for an acute mental illness or to receive their court paperwork in an accessible format so they can get down to the work of assisting their attorney. Even documenting that a jail has failed to meet a client’s needs could result in an effective bail modification argument and the client’s release from pretrial detention. Advocating for a client’s treatment in jail will also build trust and strengthen the attorney-client relationship, improving the quality of communication and case outcomes. I have found that clients know that an attorney who fights for them with the jail will fight for them in their case, regardless of the outcome.

11. Disability Rights Washington (DRW) is a private, nonprofit advocacy organization that is federally mandated to provide protection and advocacy services to individuals with disabilities in Washington. DRW’s AVID Program focuses on improving the conditions of incarcerated people with disabilities in our state’s jails and prisons.

Clients know that an attorney who fights for them with the jail will fight for them in their case, regardless of the outcome.

in Edmo v. Corizon, Inc., 935 F.3d 757 (9th Cir. 2019). Many transgender people in the community are receiving feminizing or masculinizing hormone replacement therapy (HRT), which is a medically necessary intervention for gender dysphoria. Even brief interruptions to HRT can cause patients serious physical and mental health consequences. If a defense attorney knows that a transgender client is not receiving their HRT prescription, they should take

NOTES

1. Disability Rights Washington (DRW) is a private, nonprofit advocacy organization that is federally mandated to provide protection and advocacy services to individuals with disabilities in Washington. DRW’s AVID Program focuses on improving the conditions of incarcerated people with disabilities in our state’s jails and prisons.
2. www.disabilityrights.org/reports/cruel-not-unusual/.
4. Id.
9. The Social Security Act (42 U.S. Code § 1396d(a) (A)) prohibits the use of federal Medicaid funds from being used to pay for services for people incarcerated in jails and prisons, even if they are eligible for or enrolled in Medicaid during their incarceration.
11. E.g., www.disabilityrights.org/reports/wasted-time/.
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On Board
NEWS FROM THE BOARD OF GOVERNORS & THE WSBA

NOV. 4-5, 2021

A Summary of the Board of Governors Meeting

The WSBA Board of Governors determines the Bar’s general policies and approves its annual budget.

TOP MEETING TAKEAWAYS

1 Bar structure. In light of federal litigation regarding integrated bars, the Washington Supreme Court has asked the Board of Governors to develop a process to analyze and make a recommendation about the WSBA’s structure; the Board made a commitment to develop this process during a special meeting that will be held sometime before Dec. 22. Most importantly, the Board stated its commitment to transparency and opportunities for robust member engagement.

2 Proposed changes to RPC 1.15 (Safeguarding Property). The Legal Foundation of Washington (LFW), which distributes IOLTA funds to legal aid organizations, has recommended a change to the Rules of Professional Conduct so that unidentified property in a lawyer’s trust account is required to be remitted to the LFW rather than (as the rules currently provide) being transferred to the Department of Revenue as abandoned property under the Uniform Unclaimed Property Act. At the request of the Board, the Committee on Professional Ethics finalized and presented draft amendments to Rules of Professional Conduct 1.15A and 1.15B to implement such a change. The Board voted to support the recommended amendments (as well as a companion amendment to the Rules for Enforcement of Lawyer Conduct suggested by the WSBA’s chief disciplinary counsel), which the LFW will now submit to the Washington Supreme Court for consideration.

3 2022 legislative priorities and WSBA-sponsored bills. Planning for the coming legislative session, the Board approved the WSBA’s overall priorities: Monitoring and taking appropriate action on legislative proposals related to the practice of law and administration of justice; supporting legislative proposals approved by the Board under GR 12 constraints; and supporting legislative proposals initiated by WSBA Sections and approved by the Board. Per the last priority, the Board approved two bills put forth by the Business Law Section: Proposed changes to the Washington Business Corporation Act related to record dates and mergers and share exchanges; and proposed revisions to the Washington Limited Liability Company Act regarding logistics and definitions.

4 Bylaw changes proposed by the Senior Lawyers Section. After much discussion, the Board amended the WSBA bylaws to allow each section the option of permitting inactive/honorary members to join a section as a voting member and to serve as a voting member of a section executive committee.

OTHER BUSINESS
The Board also:
• Participated in annual anti-harassment and email security training.
• Passed a Board and Officers Roles and Responsibilities document to clarify WSBA governance. (See page 272 of the November 2021 meeting materials.)
• Supported the Council on Public Defense’s state budget request and its comments regarding the newly proposed GR 41 and amendments to CR 39. (See page 357 of the November 2021 meeting materials.)
• Received the Annual Report of the Washington State Bar Foundation. Highlights from 2021 include continuing the Powerful Communities Project, enhancing the Moderate Means Program to support families impacted by COVID-19, and administering funds for a WSBA Elder Law Section law student internship with Northwest Justice Project.
• Heard a report from the MCLE Board, including a recap of its work and plans for implementing the new ethics requirement it successfully recommended to the Supreme Court last year.

MORE ONLINE
The agenda, materials, and video recording from this Board of Governors meeting (held in Ruston and virtually), as well as past meetings, are online here: www.wsba.org/about-wsba/who-we-are/board-of-governors.
CMG Law congratulates
Tyler Goldberg-Hoss for serving as Co-Editor of the recently released second edition WSAJ’s Medical Negligence Deskbook.

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Clark County
BAR ASSOCIATION

Jesse Jacobs, of NW Injury Law Center in Vancouver, has been elected president of the Clark County Bar Association (CCBA). His term runs September 2021-2022. Jacobs focuses his career on advocating for injured plaintiffs. He is an active EAGLE member of the Washington State Association for Justice and a Guardians of Civil Justice member with the Oregon Trial Lawyers Association. Jacobs obtained his J.D. at Seattle University School of Law. He also holds a B.A. in business administration with a focus on international business from Washington State University. Jacobs was recently awarded the Service to the CCBA Award for his work prior to becoming treasurer. Also active with the Multnomah Bar Association (MBA), Jacobs has previously served as chair for the MBA Young Lawyers Membership Committee. Jacobs can be reached at NW Injury Law Center, 514 W 9th St, Vancouver, WA 98660; jesse@nwinjurylawcenter.com; 360-695-1624; and www.nwinjurylawcenter.com.

MORE ONLINE > Get involved—find out how to contact your county bar at www.wsba.org/connect-serve/other-bars/county-bar-associations.

GET PUBLISHED!

We Are Looking for a Few Good Writers

See your name in lights (well, in ink, anyway) in Washington State Bar News! If you have an article of interest to Washington lawyers or have been meaning to write one, see page 7 for article submission guidelines. Bar News relies almost entirely on the generous contribution of articles from WSBA members.

Questions? Contact wabarnews@wsba.org.
2022 LICENSE RENEWAL & SECTIONS INFORMATION

License Renewal
Renew your license, certify MCLE compliance, and join sections online. License renewal must be completed by Feb. 1, 2022, and includes paying the annual license fee and any mandatory assessments, certifying MCLE compliance, completing the trust account declaration, and disclosing professional liability insurance or financial responsibility. A 30 percent late-payment fee will apply if the annual license fee remains unpaid after that date.

Certify MCLE Compliance
If you are in the extended 2018-2021 or 2019-2021 reporting period, then you are due to report CLE credits and certify MCLE compliance. The deadline for completing credits is Dec. 31, 2021. The certification must be completed online or be postmarked or delivered to the WSBA by Feb. 1, 2022. Visit www.wsba.org/MCLE to learn more.

Voluntary Demographic Information
Please update your information at www/licensing.wsba.org or contact the Service Center to request a paper form. This information assists the WSBA in understanding the demographic makeup of our licensed legal professionals.

Join a Section or Renew Your Membership
The Section Membership Year is Jan. 1-Dec. 31. Visit www.wsba.org/legal-community/sections/sections to learn more.

License Fee Payment Plan Option Available
If you are experiencing financial challenges, you may contact us about our payment plan option available to all licensed legal professionals. Payments may be made in up to five installments with the balance required to be paid in full by Feb. 1, 2022. A license fee hardship exemption is available for active licensed legal professionals who qualify. Visit www.wsba.org/licensing to learn more.

Pro Bono Status
If you are considering going inactive, pro bono status (formerly known as emeritus pro bono status) is a great alternative that lets you provide pro bono services through a qualified legal services provider. Starting with the 2021 licensing year, the license fee will be waived for pro bono status members who completed at least 30 hours of pro bono service with a qualified legal services provider in the prior year. Visit www.wsba.org/probono to learn more.

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

Important Dates
- **Dec. 31, 2021**: Licensed legal professionals in the extended 2018-2021 and 2019-2021 reporting period must complete required MCLE credits.

THE BAR BUZZ

Your Voice Matters
The WSBA is teaming up with the National Business Research Institute (NBRI) to begin an ongoing member survey. Each quarter, a random selection of members will receive an invitation to participate; please be on the lookout for an email from WSBA@nbriresearch.com and respond if you are selected—your feedback will help WSBA leaders prioritize member services and resources and shape strategic goals. NBRI will report all results anonymously.

For more information and survey results (when available), visit www.wsba.org/survey.

WSBA NEWS

Goldmark Award Luncheon
The Legal Foundation of Washington’s (LFW) 36th Annual Goldmark Award Luncheon will be a virtual gathering on Feb. 22, 2022, from noon to 1 p.m. Please save the date and join LFW in honoring Annie Lee, executive director and co-founder of TeamChild, with the Charles A. Goldmark Distinguished Service Award. All proceeds support civil legal aid for families and youth experiencing poverty in Washington. Register at https://legalfoundation.org.

2022 ABA Awards
Washington Supreme Court Chief Justice Steven González and Justice Helen Whitener will be honored with awards during the American Bar Association’s Midyear Meeting on Feb. 9-14, 2022, in Seattle. Chief Justice González will receive the ABA’s Spirit of Excellence Award and Justice Whitener will receive the ABA’s Stonewall Award. Both awards will be presented at ceremonies on Feb. 12, 2022. For more information, visit www.americanbar.org/groups/departments_offices/meetings_travel_dept/midyear-meeting/.

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

Opportunities to Comment on Proposed Court Rule Amendments

The WSBA encourages members to actively monitor and provide feedback when the Washington Supreme Court is considering amendments to its rules. Keep track of opportunities to comment at www.wsba.org/for-legal-professionals/rules-feedback, or visit the court’s website at www.courts.wa.gov/court_rules/?fa=court_rules.proposed.

WSBA Board Feedback

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

Why join a section?

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

Who can join a section?

Any active WSBA member.

What are the benefits?

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

Is there a section that meets my interests?

With 29 practice sections, you’ll find at least one that aligns with your practice area and/or interests.

What about law students?

Law students can join any section for $18.18.

What about new attorneys?

 Newly admitted attorneys can join one section for free during their first year.

Questions? Contact sections@wsba.org.

H ave Something Newsworthy to Share?

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

Volunteer with the Lawyer Discipline System

Learn more about volunteering as an adjunct disciplinary counsel (ADC). ADCs assist as needed in carrying out the functions of the lawyer discipline system pursuant to Rule 2.9 of the Rules for Enforcement of Lawyer Conduct. An ADC must have been an active lawyer or judicial member of the WSBA for at least seven years at the time of appointment. Appointment is for a five-year term. Visit www.wsba.org/adc-panel or contact rachela@wsba.org to learn more.

Custodians Needed

The WSBA is seeking interested lawyers as potential volunteer custodians of files and records to protect clients’ interests. Visit www.wsba.org/connectserve/volunteer-opportunities/act-as-custodian, or contact Darlene Neumann: darlenen@wsba.org, 206-733-5923, 800-945-9722, ext. 5923.

Volunteers Needed as Attorney Advocates

Unique opportunity to assist families or individuals in crisis by serving as a volunteer attorney advocate on the first-ever national advocacy hotline. Work from home or office at times you choose with hotline calls routed there. Resolution is typically achieved in under an hour. The nonprofit Help Now! Advocacy has assisted at no fee over 8,700 clients, mostly in Oregon, over the past 17 years. The organization is expanding its unique services to a national scope through the hotline. Contact LMKahn@HelpNowAdvocacy.org for more information.

Check Out DEI Resource Library

The DEI Resource Library is where WSBA members can learn more about diversity, equity, and inclusion concepts. There are compiled resource lists, books, and articles on the criminal legal system, identity and intersectionality, for a five-year term. Visit www.wsba.org/adc-panel or contact rachela@wsba.org to learn more.

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org/pma. You can also schedule a free phone consultation with a WSBA practice-management advisor. Visit www.wsba.org/consult to get started.

Lending Library
The WSBA Lending Library is open to members for both in-person and online checkouts. We have made a few changes to be aware of. For more information, visit www.wsba.org/library or email lendinglibrary@wsba.org.

Special Discount on WSBA Career Center Through March 2022
Nonprofit, government, and small-firm employers can post job openings on the WSBA Career Center, https://jobs.wsba.org, at 50 percent of standard rates. This special discount, offered to prevent pricing from becoming a barrier as the legal community continues to navigate the effects of the COVID-19 crisis, has been extended through March 31, 2022. Contact Mike Credit at 727-494-6565 Ext 3332 or michael.credit@communitybrands.com for more information.

WSBA MEMBER WELLNESS
Telehealth is Here!
The Member Wellness Program is now offering hi-def, HIPAA-protected video consultations using the telehealth portal Doxy.me. Visit www.wsba.org/for-legal-professionals/member-support/wellness and click “Book Your Initial Consultation” to schedule time with our licensed providers.

Judges Need Help Too
The Judicial Assistance and Services Program (JASP) provides confidential support for judges, or those who are concerned about a judge. Contact Susanna Kanther, Psy.D., at 415-572-3803. Visit www.wsba.org/for-legal-professionals/member-support/wellness/judicial-assistance-service-program.

The ‘Unbar’ Alcoholics Anonymous Group
The Washington Unbar Alcoholics Anonymous group for legal professionals has been meeting weekly for almost 30 years. The group meets Wednesdays, 12:15–1:30 p.m., and Sundays, 7–8 p.m. Currently, the group meets online via Zoom, and attorneys from all over Washington participate. For more information and Zoom credentials contact unbarwa@gmail.com.

WSBA COMMUNITY NETWORKING
Sign Up for Low Bono
The Moderate Means Program connects moderate income clients with family, housing, consumer law, and unemployment cases to legal professionals who offer reduced fees. Family law lawyers and LLLTs are especially needed due to a backlog of cases stemming from the COVID-19 pandemic. Find out more at www.wsba.org/connect-serve/volunteer-opportunities/mmp or email publicservice@wsba.org.

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

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

ETICS
Ethics Line
Members facing ethical dilemmas can talk with WSBA professional responsibility counsel for informal guidance. Learn more at www.wsba.org/for-legal-professionals/ethics/ethics-line or call the Ethics Line at 206-727-8284.

WSBA Advisory Opinions
WSBA advisory opinions are available online at www.wsba.org/for-legal-professionals/ethics/about-advisory-opinions. For assistance, call the Ethics Line at 206-727-8284.

QUICK REFERENCE
Dec. 2021 Usury
The usury rate for December 2021 is 12.00%. The auction yield of the Nov. 1, 2021 auction of the six-month Treasury Bill was 0.066%. The interest rate required by RCW 45.56.105(3) (a) and 45.56.115 for December 2021 is 2.066%. The interest rate required by RCW 45.56.105(3)(b) and 45.56.111 for December 2021 is 5.25%.
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**Suspended**

**Patricia A. Toy** (WSBA No. 20178, admitted 1990) of Tacoma, was suspended for one year, effective 10/15/2021, by order of the Washington Supreme Court. Toy’s conduct violated the following Rules of Professional Conduct: 1.15A (Safeguarding Property), 1.15B (Required Trust Account Records).

In relation to her handling of her trust account and disputed funds, Toy stipulated to suspension for: 1) failing to maintain a complete and current check register and client ledgers for the trust account; 2) failing to perform bank statement and client ledger reconciliations for the trust account; 3) failing to promptly pay or deliver funds that clients and third persons were entitled to receive; 4) retaining earned fees in the trust account; and 5) failing to take reasonable action to resolve the dispute over ownership of disputed funds in the trust account.

Henry Cruz acted as disciplinary counsel. Kenneth Scott Kagan represented Respondent. Timothy J. O’Connell was the hearing officer. Anthony Angelo Russo was the settlement hearing officer. The online version of Washington State Bar News contains links to the following documents: Order Approving Stipulation to Suspension; Stipulation to Suspension; and Washington Supreme Court Order.

**Reprimanded**

**John Gibson** (WSBA No. 19407, admitted 1990) of Seattle, was reprimanded, effective 10/01/2021, by order of the Chief Hearing Officer. Gibson’s conduct violated the following Rules of Professional Conduct: 8.4(i) (Disregard of Rule of Law).

In relation to his recent convictions for DUI, brandishing a weapon, and malicious mischief/domestic violence, and a pending criminal proceeding, Gibson stipulated to reprimand for repeatedly violating the criminal law and the terms of probation.

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

**Interim Suspension**

**Jeffrey Howard Sadler** (WSBA No. 27136, admitted 1997) of Tacoma, is suspended from the practice of law in the state of Washington pending the outcome of disciplinary proceedings, effective 10/29/2021, by order of the Washington Supreme Court. This is not a disciplinary sanction.
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is pleased to announce

Norma Linda Ureña

joined the firm in October 2020. Norma Linda, is fluent in Spanish and a regular traveler to Latin America with a client base of nearly 80% Hispanophone clients, has always served members of under represented communities. She will continue to focus her practice on matters in Family Law, including but not limited to:

- Divorce/Dissolution of Marriage
- Legal Separation
- Adoption
- Domestic Violence
- Child Support
- Child Custody

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**FREEDOM OF SPEECH**

(See, e.g.,):

- Ground Zero v. United States Navy, 860 F.3d 1244 (9th Cir. 2017)
- City of Seattle v. Menotti, 409 F.3d 1113 (9th Cir. 2005)
  Fordyce v. Seattle, 55 F.3d 436 (9th Cir. 1995)

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**IRIS TAX RESOLUTION**

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**IRS TAX RESOLUTION**

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Kathryn L. Tucker

BAR NUMBER: 15881

Kathryn L. Tucker is special counsel at Emerge Law Group, where she co-chairs the Psychedelic Practice Group. Tucker previously served as executive director of the End of Life Liberty Project, which she founded during her tenure as executive director of the Disability Rights Legal Center, the nation’s oldest disability rights advocacy organization. She is also a founding board member of the Psychedelic Bar Association. Previously, Tucker served two decades as director of Advocacy and Legal Affairs for Compassion & Choices, and prior to that she practiced law with Perkins Coie. She has held faculty appointments at Loyola Law School, University of Washington School of Law, Seattle University School of Law, and Lewis & Clark Law School.

What is the most interesting case you have handled in your career so far and why? *Glucksberg v. State of Washington.* Brought on behalf of terminally ill patients and physicians who provide their care, this case sought recognition that the choice by a mentally competent terminally ill patient for a more peaceful death via ingestion of medication to precipitate a peaceful death (“death with dignity” or “aid in dying”) was a protected privacy and/or liberty interest under the 14th Amendment to the U.S. Constitution. We won on summary judgment in the district court and before the Ninth Circuit sitting en banc. On cert. review, the U.S. Supreme Court refrained from recognizing a federal constitutional right but carefully reserved the possibility it would do so in the future. It did recognize the right of states to enact death with dignity laws and it did recognize a federal constitutional right for a dying patient to receive as much pain medication as necessary to obtain relief, even if that advanced the time of death. The case is widely recognized as having brought much needed and long overdue attention to the need to improve end-of-life care, and it galvanized efforts nationwide to enact statutes permitting aid in dying.

How do you define success as a lawyer? Creating a career where I feel able to be of service in a domain I consider critically important, enjoying the process, and interacting with clients and colleagues. Having the privilege of working with brilliant colleagues, who constantly inspire me to rise to their level.

What is your best piece of advice for someone who’s just entered law school? Take charge of your career; seek out work meaningful to you. Don’t wait for, or expect, someone else to create the position you want. Conceptualize what you want and work hard to manifest your vision. Never forget to always enjoy the journey: Get outside; spend time in nature; do things that scare you. If you have kids, never be too busy for them. Let them see your love of your work, and enjoy every precious moment you have with them.

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